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Spheres of Migration: Political, Economic and Universal Imperatives in Israel's Migration Regime

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Abstract

This article seeks to describe the piecemeal process of creation of what may, arguably, be a new immigration regime in Israel. In order to do so, we focus on three distinct waves of non-Jewish entry to Israel. The first is the day-labor entry of Palestinian workers from the Occupied Palestinian Territories (OPT) since 1967; the second is the entry of migrant workers from various countries, primarily since 1993; and the third is the entry of asylum-seekers, primarily from Africa, since 2007. Each of these waves was carved out by the state as a distinct *sphere of migration*, a narrow exception to Israel's general Jewish Settler Regime, which is based on a different *functional imperative*. The entry of Palestinians is justified primarily by a *political* imperative – the political relationship between Israel and the Palestinians under occupation. The entry of migrant workers is, first and foremost, seen as the result of *economic* imperatives – a way to supply cheap labor to cater to the needs of the domestic labor market and fulfill the economic needs of the state. The entry of asylum-seekers (and their rights upon entry) rests primarily on a *universal humanitarian* imperative led by the state's moral and convention-based responsibility toward those who are in dire need, and particularly in need of a safe territorial haven.

Keywords

Israel; immigration; Jewish Settler Regime; Palestinians; migrant workers; asylum seekers; refugees

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Introduction

Israel's migration regime used to be rather simple. Its declared goals were to support and accommodate the migration and settlement of Jews in Israel. It, therefore, gave primacy to ethno-national criteria in allocating full membership in the polity.[1] At the center of this migration regime was The Law of Return-1950, which grants citizenship to all Jews on the basis of Israel's designation as the homeland of the Jewish people.[2] In Christian Joppke's typology of immigration regimes,[3] the Israeli regime could be categorized as a Jewish "Settlers Regime" (JSR) – one that seeks to attract new members through Jewish immigration only.[4] The idea of Israel as the land of the Jews was the political cornerstone and moral justification of the Israeli state since its establishment in 1948. The original aspiration was to have an economy and society that sustains itself solely by relying on the immigration and settlement of Jews from around the globe, with no need for non-Jewish immigration.[5]

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1) Gershon Shafir and Yoav Peled, "Citizenship and Stratification in an Ethnic Democracy," *Ethnic and Racial Studies* 21 (1998): 408.

2) Law of Return (1950). The Law of Return was amended in 1970 to permit the migration of some family members of Jews – children, grandchildren, spouses, as well as spouses of children and grandchildren of Jews – even if they themselves are not Jewish (Section 4A). This section was of particular importance in the 1990s during the mass migration to Israel of Jews (and their families) from the former Soviet Union, in which between 20%-40% of migrants were not Jewish themselves. See. Yinon Cohen, "From A Country of Refuge to a Country of Choice: Changing Trends in Migration to Israel," *Israeli Sociology* 4 (2002): 39 [Hebrew]; Ruth Gavison, *The Law of Return at Sixty Years: History, Ideology and Justification* (Jerusalem: Metzilah Center, 2010). This type of migration lies outside the scope of this article, which focuses on immigration of non-Jewish (and unrelated to Jews) individuals that migrate to Israel outside the scope of the Law of Return.

3) Christian Joppke, *Immigration and the Nation-State* (Oxford: Oxford University Press, 1999), 8.

4) Zeev Rosenhek, "Migration Regimes, Intra-State Conflicts, and the Politics of Exclusion and Inclusion: Migrant Workers in the Israeli Welfare State," *Social Problems* 47 (2000): 53-4.

5) This view excluded the Palestinian citizens of Israel, who were viewed as outsiders to the Israeli body politic and economy and were governed by military rule until 1967. Yoav Peled,

Today, after several waves of non-Jewish migration to Israel, it is difficult to paint the Israeli migration regime in such simple, broad strokes. In the past couple of decades, Israel's JSR has gone through an intense transformation. From a baseline of minimal rights and obligations towards non-Jews who enter Israel outside the framework of the Law of Return,[6] it has changed in piecemeal fashion, evolving towards a somewhat more inclusive regime.

Some scholars have pointed out that the current challenges to Israel's JSR can be attributed to the fact that Israel never established a planned immigration regime.[7] The aim of this article is to show that, while it is true that many of the developments in the Israeli immigration regime were not carefully thought out in advance, path-dependent patterns, justifications, and logics keep emerging, cumulating in what can possibly be designated as an emerging post-JSR in contemporary Israel.

Attempts to identify the logic in Israel's immigration laws and emerging regime – reactive and incremental as it may be – tend to rely predominantly either on the exclusionary logic of nationalism[8] or on the interests of

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"Ethnic Democracy and the Legal Construction of Citizenship: Arab Citizens of the Jewish State," *The American Political Science Review* 86, no. 2 (1992): 432.

6) Exceptional instances of non-Jewish migration that are aligned with the logic of Return (e.g., people who helped Jews during the holocaust) are situated at the margins of the discussion.

7) See e.g. Gilad Natan, *Migrant Workers and Victims of Trafficking: Governmental Policy and the Operation of the Immigration Authority* (Jerusalem: Knesset Research and Information Center, 2009) [Hebrew] ["Israel is the only western democracy without an immigration policy"]; Gilad Natan, *Non-Israelis in Israel* (*Foreigners, Foreign Workers, Refugees, Infiltrators and Asylum Seekers*) – *A Situation Report 2010-2011* (Jerusalem: Knesset Research and Information Center, 2011) [Hebrew]. In 2005, the government established a committee in order to formulate Israel's immigration regime. The committee released an interim report in 2006, but the report was neither adopted nor discussed by the government. See State of Israel, The Advisory Committee for Assessing Immigration Policy for Israel, *Interim Report* , February 7, 2006. Recently, several attempts (outside the formal state channels) have been made to structure a comprehensive immigration law. See, for example: Israel Democracy Institute, *Proposal for Immigration Law*, September 1, 2011, http://www.idi.org.il/BreakingNews/ Pages/336 .aspx [Hebrew] (accessed 30 August 2012); Ruth Gavison et al., *Dealing With Global Migration: A Blueprint for Israeli Immigration Law* (Jeruslaem: Metzilah, 2009), http://www.metzilah .org.il/?p=357 [Hebrew] (accessed 30 August 2012). This proposal was adopted into a privately proposed bill which is currently pending in the Knesset (P/2637/18, October 11, 2010).

8) Gershon Shafir and Yoav Peled, *Being Israeli: The Dynamics of Multiple Citizenship* (Cambridge: Cambridge University Press, 2002).

capital in wealth accumulation.[9] Those emphasizing nationalism frame developments and controversies about migration in the context of the state's attempt to assert its sovereignty in general, and its Zionist nature in particular. Those emphasizing capital interests posit that economic imperatives are the leading explanatory variable. This article argues that neither nationalism nor economic interests alone can explain the development of Israel's emerging immigration regime. Rather, we adopt a framework that relies on an analysis of the interplay between different functional imperatives to understand it.[10]

This article seeks to describe the piecemeal process of creation of what may, arguably, be a new immigration regime in Israel. In order to do so, we focus on three distinct waves of non-Jewish entry to Israel. The first is the day-labor entry of Palestinian workers from the Occupied Palestinian Territories (OPT) since 1967;[11] the second is the entry of migrant workers from various countries, primarily since 1993; and the third is the entry of asylum-seekers, primarily from Africa, since 2007. Each of these waves was carved out by the state as a distinct *sphere of migration*, a narrow exception to Israel's general JSR, which is based on a different *functional imperative*. The entry of Palestinians is justified primarily by a *political* imperative – the political relationship between Israel and the Palestinians under occupation. The entry of migrant workers is, first and foremost, seen as the result of *economic* imperatives – a way to supply cheap labor to cater to the needs of the domestic labor market and fulfill the economic needs of the state.

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9) Adriana Kemp and Rebeca Raijman, *Migrants and Workers: The Political Economy of Labor Migration in Israel* (Jerusalem and Tel Aviv: The Van Leer Jerusalem Institute and Hakibbutz Hameuchad Publishing House, 2008) [Hebrew].

10) Christina Boswell, "Theorizing Migration Policy: Is There a Third Way?," *International Migration Review* 41 (March 2007): 75–100.

11) For the purposes of this article, we bracket the question of the Palestinian right of return and only touch briefly on the question of Palestinian refugees as well as the question of family unification policies (on the topic, see, generally, Yoav Peled, "The Palestinian Refugees and the Right of Return – Theoretical Perspectives," *Theoretical Inquiries in Law* 5 (2004): 317). The right of return is still at the core of political negotiations between the Palestinian Authority and Israel, but has not been translated into an actual practice of migration. Neither Israel nor the Palestinians crossing the borders to perform daily construction work view this crossing of borders as fulfilling the right of return. We therefore believe that the issue of the Palestinian right of return, while of great political significance to the past, present, and future of Israel and Palestine, needs be treated separately from the study of actual current migration practices in Israel.

At the outset we should note that the term "political" is used to narrowly connote the relationship between the state of Israel and other political entities, may they be a state, territory, nation or 'people'. In this relationship the state asserts its sovereignty and holds communities and states as its 'Other'. By contrast, the economic imperative encompasses any calculus of self-regarding interests – may they be interests in expanding profit or in advancing other values. Hence the thematic borderline between the political and the economic is thin. They can be distinguished because the economic imperative is vertical (state-individuals), while the political here is horizontal (state-state).

In addition to the political and economic imperatives, the entry of asylum-seekers (and their rights upon entry) rests primarily on a *universal humanitarian* imperative led by the state's moral and convention-based responsibility toward those who are in dire need, and particularly in need of a safe territorial haven. Again, the state's compliance with international moral and humanitarian considerations can overlap with political and economic concerns, but the universal imperative is used here as an indication of compliance with the ever-growing set of supranational norms and values.

Traditionally, the three spheres of migration have been seen as narrow and confined departures from Israel's JSR, since the laws that developed in each sphere continued the rejection of non-Jewish migrants as prospective members of the society. The inclusion of each of these waves has been performed on a temporary and partial basis, which opens practically no legal routes for naturalization or permanent residency.

Although each sphere is attached to a dominant imperative, the process of constructing Israel's post-JSR has hardly been based on a neat linkage between a sphere of migration and a single imperative. This article shows that the development of the post-JSR is based on the interplay between the different functional imperatives and on the strategic use of the imperatives by different actors. While the state is ultimately responsible for writing the rules and devising the institutions that implement them, the process of change is better understood against the backdrop of constant manipulation and contestation among the imperatives, within the state, whereby different branches and agents display different preferences and hold on to different interests, and between the state and civil society.

Drawing on a neo-institutionalist approach, which looks at the role of interest groups in shaping a regime that distributes the benefits of

migration between competing groups,[12] the article tracks the utilization of the functional imperatives by different stakeholders, as well as their interaction. The analysis demonstrates that imperatives belonging to one sphere often 'infiltrate' other spheres, and, in fact, all three spheres are governed by a combination of all three functional imperatives – political, economic, and universal. Moreover, the integration of chronological, thematic, and institutional analyses accommodates an understanding of incremental path-dependent transformation.[13] We claim that fundamental junctions in this process of regime transformation are characterized by attempts to contest the appropriateness of the imperatives in each sphere and offer a new amalgam of imperatives. Such incidents of contestation are indicative of a controversy over the nature of Israel's immigration regime and its raison d'être. Hence, to understand the political economy of Israel's changing immigration regime, it is important to map and understand the rhetorical use of its "separate spheres ideology" – the insistence on a separation between spheres of migration and their imperatives – and the challenges posed to this ideology by the infiltration of imperatives from one sphere into another.

The first section of the article briefly presents the evolution of Israel's post-JSR, with a focus on the three main spheres of non-Jewish entrants: Palestinian workers, migrant workers, and asylum-seekers. The second section illustrates the terrains in which state and civil society dispute the imperatives in each sphere, through studies of several incidents of contestation. These incidents are not always seminal cases in terms of precedence, or even of public visibility. However, we believe that identifying them is a useful way to discern patterns and understand the logic animating what seems to be the unstructured, unplanned development of Israel's post-JSR.

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12) See Kemp and Rijman, *Migrants and Workers* (see note 9), and Boswell, "Theorizing Migration Policy" (see note 10).

13) On the study of incremental path-determined change, see Wolfgang Streeck and Kathleen Thelen, "Institutional Change in Advanced Political Economies," in *Beyond Continuity: Institutional Change in Advanced Political Economies*, eds. Wolfgang Streeck and Kathleen Thelen (Oxford: Oxford University Press, 2005), 1-40; Paul Pierson, *Politics in Time: History, Institutions and Social Analysis* (Oxford: Oxford University Press, 2004).

1. Spheres of Migration

Citizenship is often conceived as the ticket to inclusion within a community. It therefore delineates the insiders-outsiders divide.[14] The Israeli notion of citizenship, based on the JSR, is no exception. The exclusive migration of Jews was legally established in The Law of Return and known as *aliyah* (literally meaning 'ascent', colloquially signifying the migration of Jews to Israel); it was intractably linked with the bundle of rights associated with citizenship – including both economic and political rights. At times, immigrants were also accorded extra privileges not offered to veteran Israeli citizens, such as compensatory programs in the social security system, to redress the absence of rights that were contingent on long-term savings.[15] Those who did not qualify for *aliyah* were not admitted on lesser conditions, but simply denied entry altogether. Consequently, under the JSR, the legal regulation of immigration of non-Jews in Israel was underdeveloped, almost nonexistent.[16] The most fundamental question for immigration law under the JSR was the question of religious affiliation with the Jewish people. Admittedly, this question stirred some intense debates and important judicial cases,[17] but these have more to do with the relationship between state and religion than with issues within the domain of immigration law.

While Israel's JSR remains an important part of the national ethos to this day, in reality, it turned out to be unsustainable. Israel's economy could not (or would not) rely only on the proverbial "Jewish Labor" (*Avodah Ivrit*) that animated the Zionist vision of the state,[18] and Israel could not keep its

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14) William James Booth, "Foreigner: Insiders, Outsiders and the Ethics of Membership," *Review of Politics* 59 (1997): 259; Judith Shklar, *American Citizenship: The Quest for Inclusion* (Cambridge, MA: Harvard University Press, 1991).

15) For discussion of the benefits in the social security program and the costs of aliyah, see Johnny Gal and Roni Barzuri, "Immigration and Social Welfare in Israel," The Taub Center for Social Policy Studies in Israel (2007) [Hebrew], http://taubcenter.org.il/tauborgilwp/wp-content/uploads/H2007_Immigration_Social_Security.pdf (accessed 30 August 2012).

16) Na'ama Carmi, *Immigration and the Law of Return – Immigration Rights and Their Limits* (Tel Aviv: Tel Aviv University Press, 2003).

17) For example, HCJ 58/68 *Shalit v. Minister of Interior* (1969) PD 23(2) 477; HCJ 3648/97 *Stamka v. The Minister of the Interior* (1999) PD 53(2) 728. For extensive analysis of this body of law, see Gavison, *The Law of Return*, (see note 2).

18) The notion of Jewish work, or, more properly translated, Hebrew work (emphasizing the transition from the religious Jew in the Diaspora to the constructivist pioneer in the new land) – was fundamental to the ethos of the pre-statehood period. See, for example, David Ben-Gurion. *Avodah Ivrit*, (Tel-Aviv: Hisatdrut Vaad-Hapoel Publications, 1932).

borders sealed in an era of globalization when national boundaries are becoming increasingly permeable. Three major waves of non-Jewish migration reflect this shift: the Palestinian day-laborers from the Occupied Territories (beginning in 1967); migrant workers (beginning in 1993); and asylum-seekers (beginning in 2007). In addition, other categories of non-Jewish presence have challenged Israel's JSR, such as victims of trafficking and those entitled to Palestinian family unification.

This section focuses on the three major "spheres of migration" that have challenged Israel's JSR, leading to the development of a post-JSR. Each sphere encompasses a distinct wave of migration, the functional imperatives that animated the state's response to each, and the legal regime that developed in consequence.

a. Palestinian Day Laborers

The first significant wave of non-Jewish entrants to Israel consisted of Palestinian workers who entered Israel after the 1967 Occupation. Their entry was not formally planned or foreseen by the State of Israel.[19] The policy that Israel adopted with regard to Palestinian workers was shaped primarily by debates centered on the political imperative. The common understanding of the situation was that the presence of Palestinian day-laborers in Israel is a result of the physical proximity between Israel and the OPT and the difficulty of sealing off the OPT completely.[20] Their presence was seen by the authorities, first and foremost, as posing a security threat and, therefore, something to be controlled and regulated by the military, promoting military objectives, rather than by a civilian agency. Despite the dominance of the political imperative, it was clear already early on that other imperatives – economic and humanitarian – were intertwined with and inseparable from the political.

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19) Guy Mundlak, "Power Breaking or Power Entrenching Law? The Regulation of Palestinian Workers in Israel" *Comp. Lab. L. & Pol'y J.* 20 (1999): 569.

20) Only in 2002 did Israel start sealing the border with the OPT by constructing a separation barrier. The controversy over the separation barrier was legally addressed by the Supreme Court in HCJ 7957/04 *Zaharan Yunis Muhammad Mara'abe and others v. The Prime-Minister of Israel and others* (2005) 60(2) 477. While this was not the first case discussing the separation barrier, its importance lies in the polemics it develops with the ICJ's position, which found that the barrier violates international law. See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 43 ILM 1009 (2004)* (International Court of Justice, July 9, 2004).

Between 1967 and 1970, political parties of both the left and right and major economic actors in Israel deliberated over the appropriate legal regime that should apply to Palestinian day workers.[21] On the one hand, some supported erecting clear borders and preventing entry. That was the argument made by both the political left, which wanted to make the separation between Israel and the Occupied Territories visible, and by the political right, which wanted to deny economic privileges to an enemy population. On the other hand, there were those who favored greater control over the Palestinian workers and the Israeli labor market, by issuing permits to Palestinians to enter Israel for work. This was an argument made by parties on the left, that claimed Israel had a moral responsibility for the OPT's economy, and by parties on the right, who hoped that economic gains to the Israeli economy would guarantee silent acquiescence to the state of occupation. In the economic sphere, the employers' associations and the state-qua-employer sought to admit Palestinian workers to weaken the power of the major trade union (the Israeli Federation of Trade Unions – hereon: *the Histadrut*). The Histadrut objected, but was willing to admit the workers as long as they received the same wages and benefits as Israeli workers, to prevent the undercutting of wages. In 1970, a compromise was reached and formalized in an executive decision, admitting Palestinian workers on the basis of "economic equality".[22] In addition, a special agency was established in the OPT, which was responsible for administering work permits and wages. All the workers' wages were to be paid by employers to the agency, which, in turn, was supposed to remit the money to the workers. This was intended to ensure that the workers receive the wages and benefits they are entitled to, as well as to facilitate state control over the identity of workers and employers.

To achieve the objective of 'economic equality', the executive decision of 1970 imposed an equalization levy on employers of Palestinian workers. National Insurance payments for Israeli workers are set at a level of approximately 12% of their wage (paid jointly by the employer and the employee). Palestinian workers from the OPT are not considered Israeli residents and are, therefore, denied most of the benefits of National

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21) The analysis of interests described here is based on Michael Shalev, *Labor and the Political Economy in Israel* (Oxford: Oxford University Press, 1992); Louis Lev Grinberg, *The Histadrut Above All* (Jerusalem: Nevo, 1993): 162-205 [Hebrew].

22) The Ministers' Committee on Security Number 1/B, from October 8, 1970.

Insurance.[23] For the three benefits they are entitled to, they pay a much smaller sum. The equalization levy was imposed to make up for the difference. However, upon collection, the levy was not remitted to the individual workers, rather, was intended to cover the improvement of the social welfare system in the OPT. Accordingly, the money collected by the Israeli agency was supposed to be transferred to projects in the OPT for the welfare of all OPT residents. Until 1994, Israel was responsible for administering the use of the money in the OPT, and, after the 1994 Gaza and Jericho peace agreement, the administration of the money was handed over to the Palestinian Authority.[24]

Despite the security dimensions and political overtones of Israeli policy towards Palestinian workers, between 1970 and 1993, it was equally based on the general economic interest of the Israeli labor market, as well as on the implications of Palestinians' work for the Palestinian economy and the sustainability of the state of occupation.[25]

The balance between the weight assigned to the economic and political imperatives in this sphere fluctuated over time. During the first Palestinian uprising (*intifiadah*), day-workers continued to enter Israel despite the perceived security risk they posed. Economic reliance on Palestinian workers became the dominant factor governing their entry. However, when the peace process commenced in 1993, the state decided to decrease its reliance on Palestinian workers and open its gates to migrant workers, thus securing a different source of labor to cater to the economy's needs.[26] Once economic considerations had been relocated to a different sphere of migration, the political imperative regained a dominant position. Terminating the work of Palestinian workers was strongly connected with a position that sought political separation, as well as a means of imposing pressure in

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23) Most National Insurance benefits require a status of residency (which is less than citizenship, but requires a more stable demonstration of domicile than mere presence) as a condition of eligibility, except three: workmen's compensation, insurance for situations of employers' bankruptcy, and birth grants to women giving birth in an Israeli hospital (distinguished from maternity benefits).

24) *Law Implementing Agreement on Gaza and Jericho Areas* (*Legislative Amendments*) (*Economic Arrangements and Miscellaneous Provisions*) (1994), Section 20. For a more detailed analysis of the equalization levy and its significance, see Part 2a.

25) Mundlak, "Power Breaking", (see note 19); Emanuel Farjoun, "Palestinian Workers in Israel: A Reserve Army of Labor," *Forbidden Agendas* (1984): 107.

26) David Bartram, "Foreign Workers in Israel: History and Theory," *The International Migration Review* 32, no.2 (1998): 303.

the peace talks.[27] Ever since, the political imperative has distinguished the sphere of Palestinian day-workers from that of migrant workers.

In the report of an official committee on the future of non-Israeli workers in the Israeli labor market (the 'Eckstein Report'), the political considerations with regard to Palestinian workers can be identified.[28] These include, inter alia, the need to devise a mechanism that will leave the security forces involved in determining the quotas and the administration of individual permits, as well as the explicit linkage between Palestinian work and the Israeli/Palestinian political process. Most recently, the political imperative became evident again when Israel withheld the taxes it collects for the Palestinian authority, including the money collected from the equalization levy, following the Palestinians' attempt to obtain recognition in the UN and its affiliate organization, UNESCO.[29] While the Ecsktein committee generally clustered all non-Israeli workers (except asylum-seekers) together in its discussion on the economic effects of 'foreign' work in Israel, the security and political considerations continue to single out the Palestinian workers from all others.

b. Migrant Workers

The influx of migrant workers from around the globe into Israel since the early 1990s marks the second major opening of the gates to non-*aliyah*, or non-Jewish, entry.[30] The legal status of migrant workers in Israel was originally premised on the status established for Palestinian day-workers. The status of migrant workers differed considerably from the legal status of the

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27) Leila Farsakh, "Palestinian Labor Flows to the Israeli Economy: A Finished Story?," *Journal of Palestine Studies* 32, no.1 (2002): 13. The economic implications are discussed in Sami H. Miaari and Robert M. Sauer, "The Labor Market Costs of Conflict: Closures, Foreign Workers and Palestinian Employment and Earnings," *Review of Economics of the Household* 9, no. 1 (2011): 129.

28) Zvi Eckstein, *Report by the Inter-Ministerial Committee for the Formulation on Labour Migration Policy* (Jerusalem: Bank of Israel and Ministry of Industry, Trade and Labour, 2007) [Hebrew].

29) On the reliance of the Palestinian economy on Israeli tax collections, see Arie Arnon et al., *The Palestinian Economy: Between Imposed Integration and Voluntary Separation* (Leidn: Brill, 1997).

30) David Bartram, "Foreign Workers in Israel", (see note 26); Kemp and Raijman, *Migrants and Workers*, (see note 9); Y. Kondor, *Foreign Workers in Israel* (Jerusalem: The National Institute for Social Security Research Administration, 1997).

large wave of immigrants from the former Soviet Union who entered Israel at the same period of time, on the basis of the Law of Return.[31] The baseline established for migrant workers included the formal equality of rights in the sphere of labor and employment law that emerges from the economic raison d'être for their presence in Israel. Moreover, like the Palestinian workers, and in line with the rationale of Israel's JSR, their inclusion was seen as temporary, partial, and conditional. They were excluded from most branches of national social security schemes, thus preventing access to social citizenship. Yet, due to the absence of the political imperative that animated the legal regime in relation to Palestinians, the institutions governing Palestinian day-workers were not extended to migrant workers. There was no institutionalized mechanism to ensure the receipt of wages and benefits and no equalization levy was introduced.

The implementation of the status established for Palestinian day-workers in relation to migrant workers resulted in a mismatch between the characteristics of the Palestinians' and the migrant workers' presence. The Palestinian entry, strongly marked by political concerns, was structured for daily workers who commuted back and forth. They were deliberately removed from the social life in Israel for political reasons. They were admitted solely for work and were deemed to be represented at the political level by the Palestinian leadership (as demonstrated by the equalization levy). The migrant workers were similarly admitted solely for the purpose of work, but they received visas for several years.[32] They have a residential presence in Israel, accentuating the absence of social rights. Moreover, they come from numerous countries and their entry was, for the most part, removed from political affiliations. Hence, the lack of political representation is also more poignant.

The entry of the migrant workers was also different from that of Palestinian workers and asylum-seekers (as well as other categories, such as victims of trafficking and those eligible for family unification), in that it was initiated purposively by the state. However, despite the active role of the

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31) Guy Mundlak, "Litigating Citizenship Beyond the Law of Return," in *Transnational Migration to Israel in Global Comparative Context*, ed. Sarah S. Willen (Lanham MD: Lexington, 2007).

32) *The Entry into Israel Law, 1952*, Amendment No. 11 (2003), s. 3A, which currently grants a visa for five years for migrant workers, with exceptional provisions for longer duration of stay for care-workers.

state in opening the gates to migrant workers, no systemic attention was devoted to the long-term implications of their lives in Israel. It was economic haste, motivated by the need to undo the dependence of the Israeli economy on Palestinian labor, which brought about the opening of the gates to migrant workers.[33] The lessons learned from guest-worker programs around the world in the past were not carefully studied. In particular, the admission of migrant workers was based on the assumption that the state can guarantee the temporary nature of their stay in Israel and control exit and entry at the borders. The mismatch between the baseline of the first wave of Palestinian workers and the reality of the second wave of migrant workers soon became evident.

The initial guest-worker regime – regulating migrant workers' entrance, life in, and exit from Israel – that formed the legal content of this sphere of migration was seemingly narrow in scope. The Law of Foreign Workers – 1991, which was enacted shortly before, and foresaw, the mass entry of migrant workers, was, first and foremost, concerned with the problem of avoiding undocumented ('illegal') work and securing the state's control over the presence of migrant workers.[34] The Law of Foreign Workers regulated the entry and stay of guest workers from around the globe, as well as that of Palestinian day workers, all clustered together under the category of "foreign workers". The law was initially confined to sanctions against employers who employ undocumented workers or who allow Palestinian workers to stay overnight in Israel. In addition, the economic imperative underlying the new guest-workers' legal regime dictated a 'hands-on' approach towards the determination of quotas of guest-worker visas, flexibly adjusting the supply of workers to the Israeli market's demands. The goal was to ensure a high level of control over the migrant workers' population and flexible adjustment of quotas to demand, and to prevent the creation of migrant communities.[35] These are the paradigmatic premises underlying the economics of guest-worker programs around the world,

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33) Kemp and Raijman, *Migrants and Workers*, (see note 9), at 80-94.

34) Foreign Workers Law (1991).

35) Sharon Asiskovitch, "The Political Economy of Labor Migration to Israel and the Migration Policy During the 1990s," *Labor, Society and Law* 10 (2004): 79 [Hebrew]; Guy Mundlak and Hila Shamir, "Between Intimacy and Alienage: The Legal Construction of Domestic and Care Work in the Welfare State," in *Migration and Domestic Work: a European Perspective on a Global Theme*, ed. Helma Lutz (London: Ashgate, 2007), 161.

namely temporality, sensitivity to local labor market demands, and the commoditization of work.[36]

Under the Israeli regime, quotas for migrant workers are determined at the labor sector level and set to fit the needs of employers. Research suggests that the quotas are heavily influenced by pressures imposed by economic interest groups, mostly employers' associations (the 'end users', or the 'demand side') as well as employment mediators (contractors and employment agencies).[37] The former seek to increase the availability of migrant workers, due to both the structural shortage of labor supply,[38] as well as the persistent search for ways to reduce labor costs.[39] The employment agencies have an additional interest. They seek to ensure a high level of circulation, given the high sums of money paid by migrant workers in their home countries in return for a work permit and visa, a large share of which finds its way to Israel in undocumented (and unlawful) ways.[40] Together, these economic, rent-seeking interests lead to increased visa quotas.

At the same time, there are countervailing forces attempting to curtail the entrance of migrant workers. Various political parties, particularly the ultra-Orthodox parties, have been voicing concerns about the increasing non-Jewish presence in Israel, calling for a reduction of quotas.[41]

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36) Stephen Castles, "Guestworkers in Europe: A Resurrection?," *International Migration Review* 40 (2006): 741.

37) Kemp and Raijman, *Migrants and Workers*, (see note 9); Asiskovitch, "The Political Economy of Labor Migration", (see note 35).

38) The nature of the shortage is contested. Employers argue that Israeli workers no longer agree to work in difficult jobs. By contrast, NGOs argue that the problem is misframed. Workers are not willing to take these jobs at the low level of pay and benefits that are given to non-Israeli workers. See, for example, WAC (Workers Advice Center), *Reclaiming Jobs in Agriculture* (2005), http://www.wac-maan.org.il/en/article__64/wac_reclaiming_jobs_in_agriculture (accessed 30 August 2012).

39) Despite formal equality in the application of labor and employment protections, migrant workers' labor is cheap due to their lower wages and the possibility of avoiding their statutory rights against the backdrop of the state's lax enforcement. Adriana Kemp, "Reforming Policies on Foreign Workers in Israel," *OECD Social, Employment and Migration Working Papers* 103 (2010).

40) *Ibid.*, at 18; Gilad Natan, "Dealing with the Illegal Fees charged by Intermediaries from Foreign Workers," *The Knesset's Research Center* (January 25, 2011) [Hebrew]; Gilad Natan, "Status, Recruitment and Employment of Foreign Workers," *The Knesset's Research Center* (December 26, 2006) [Hebrew].

41) See, for example, in the political platform of SHAS (Sephardi Torah Guardians), the biggest Ultraorthodox political party in Israel, calling for a "Significant reduction of foreign

In addition, key state bureaucrats have been voicing domestic economic concerns. The Bank of Israel and the Ministry of Finance, for example, argue that the presence of low-waged migrant workers pushes down the wages for Israeli unskilled workers, resulting in growing unemployment among the low-skilled workforce and leading to a substitution effect.[42] For all of these reasons, the governmental committee on foreign workers (the Eckstein Committee), in 2007, recommended significantly decreasing the level of migrant workers' employment and gradually abolishing the dependence on migrant workers in Israel, with an exception for the care-work sector.[43]

Due to concerns about the rapidly growing numbers of migrant workers – both documented and undocumented – in 2002, the Israeli government adopted a "closed skies" policy.[44] The policy, promoted by the Ministry of Finance, sought to stop the arrival of new migrant workers and to re-assign or "re-document" undocumented workers, in tandem with efforts to increase Israeli work in these sectors. This decision was anchored mostly in protectionist economic arguments and was part of a reform aimed at increasing the level of employment of welfare recipients through welfare-to-work policies.[45] For several years, the closed skies policy succeeded in reducing the numbers of migrant workers in Israel, but, in 2007, the numbers rose again to their previous levels. Throughout this period, due to pressures from the construction and agriculture sectors, the skies

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workers' numbers, a "closed skies" policy, and defending the rights of those with permits." Available at http://www.shasnet.org.il/Front/NewsNet/reports.asp?reportId =126976 [Hebrew] (accessed 30 August 2012).

42) There is some controversy over this claim. While some argue that migrant workers indeed substitute for Israeli workers (see the Eckstein Committee Report, see note 28, 81), others suggest that this is not true across the board and that there are notable differences between sectors (see Kemp, *supra* note 39, p.14). For example, the entry of care-workers induced job creation, while in construction there is evidence of a substitution effect.

43) On the reasons for the exceptional approach to migrant care-work, see: Hila Shamir, "The State of Care: Rethinking the Distributive Effects of Familial Care Policies in Liberal Welfare States," *American Journal of Comparative Law* 58 (2010): 953.

44) See Kemp and Raijman, *Migrants and Workers*, (see note 9), 7, 28. In 2002, the number of foreign workers reached a peak of 11% of the total labor force and 13.8% of the labor force in the private sector, approximately 60% of them without permits.

45) On the welfare reform during the years 2002-2005, see Avraham Doron, "The Shaping of Israel's Welfare Policy 2000-2005," in *Shaping Israel's Social Policy*, eds. Uri Aviram, John Gal, and Yosef Katan (Jeruslaem: Taub Center, 2007), 33-57 [Hebrew].

were again and again "opened", the quotas enlarged, making Israel one of the industrialized economies most heavily dependent on migrant labor.[46]

In addition to the economic push and pull forces that determine the quotas, further measures were introduced to monitor and prevent undocumented work. Besides border control procedures, the major control factor that was devised was the *'binding arrangement'*, tying a worker's visa and work permit to a particular employer.[47] The implication was that, once a worker's employment for a designated employer was terminated for whatever reason, the worker would lose her visa and, therefore, be required to leave the country. The binding system increased the limitations on workers' market mobility and, therefore, simultaneously served, on the one hand, the protectionist economic interest that dictated the need to control migrant workers, and, on the other hand, rent-seeking economic interests by weakening workers' bargaining power and increasing their dependency on employers. The binding policy was challenged by NGOs in the Supreme Court, which, in 2006, found the policy to be unconstitutional because it violated the rights to liberty, dignity, and autonomy and the derived right to freely accept a job and resign at will.[48]

Other measures that were adopted to obstruct the unwarranted long-term presence of migrant workers included restrictions on family life, most notably the limitation on the length of the permit in the event of pregnancy, the requirement to remove the newborn from the country several weeks after birth, and the prohibition on the simultaneous stay of two

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46) See Kemp and Raijman, *Migrants and Workers*, (see note 9).

47) This provision was enacted in 2002 by authorization of Article 6(2) of the Entry into Israel Law 1952. For the legislative background, see Michal Tabibian, "The Binding Arrangement in Israel and other Possibilities," *Knesset Research and Information Center*, June 8, 2004 [Hebrew].

48) HCJ 4542/02, *Kav La'Oved et al. v. The State of Israel* (March 20, 2006), translated into English in the *Oxford Reports on International Law in Domestic Courts*, ILDC 382 (IL2006). The binding system was replaced by a system that binds the workers to a sector rather than an employer. Israel Government Portal, *Guide to the Employment Of Migrant Workers: Care Workers*, http://www.gov.il/FirstGov/ TopNav/Situations/SPopulationsGuides/ SHiringForeignWorkers/SFWDifferentJobs/ (accessed 30 August 2012). See, also, Kemp and Raijman, *Migrants and Workers*, (see note 9); The Hotline for Migrant Workers, The Workers Hotline, *Freedom Inc. - Binding Migrant Workers to Manpower Corporations in Israel* (2007), http://www.hotline.org.il/english/pdf/Corporations_Report_072507_Eng.pdf (accessed 30 August 2012).

family members on guest worker visas in Israel.[49] More generally, following lawsuits that challenged the exclusion of workers from various social security benefits, an explicit provision was enacted, holding that, regardless of the duration of stay, migrant workers categorically cannot be considered 'residents'.[50] The significant implication of this provision was the hermetic denial of most social security benefits to migrant workers. Hence, the economic imperative dictates a legal regime that has exclusionary and oppressive effects. At the same time, it also prescribes the sphere's protective components. For example, attempts to improve the enforcement of migrant worker' rights have been primarily intended to deny wage undercutting and its negative implications for Israeli workers. Similarly, measures expanding workers' rights that were added to the Foreign Workers Law in 1999 were justified on the basis of the negative externalities caused by migrant workers' irregular and substandard living conditions in Israel.[51] As a result, the rights to housing and to healthcare were imposed on employers so as to avoid imposing their costs on the state.

c. Asylum-Seekers

The third wave of non-Jewish migrants that challenged Israel's JSR consisted of asylum-seekers. The status of asylum-seekers generally, and refugees in particular, has always been a controversial issue in the Israeli immigration regime because of the Palestinian demand for recognition as refugees and of their Right of Return. From the outset, Israel denied any connection between arrangements for (non-Palestinian) asylum-seekers and the issue of Palestinian refugees. This difference was asserted at both

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49) Migrant workers can enter the country on a guest worker visa only if they do not have a close family member (spouse, parent or child) who is also a guest worker in Israel. Similarly, if two migrant workers get married in Israel, one of them is required to leave the country, and, if a woman gives birth to a child, she must leave the country with the newborn within 12 weeks of the birth, and can return to Israel for the remaining period of her visa only if she comes back alone.

On the legal contestation of these practices, see the discussion in Part 2b below.

50) Tel Aviv Labor Court case 1427/02 *Beth Torres – National Insurance Institute* (May, 2004). For a discussion of the case, see Mundlak and Shamir, "Between Intimacy and Alienage", (see note 35).

51) Government Bill 2824 (October 25, 1999), 104-105.

the political and legal level.[52] In international law, article 1D of the 1951 Refugee Convention excludes persons who receive assistance from other UN bodies from the scope of the Convention. Its main implication is the intentional exclusion of Palestinians from the Convention, since those who were displaced due to the 1946-1948 Arab-Israeli conflict fall under the mandate of the U.N. Relief and Works Agency for Refugees in the Near East (UNRWA).[53] Tracing the categories of Israel's developing immigration regime, we will focus on non-Palestinian asylum-seekers.[54]

The large wave of asylum-seekers from Africa to Israel began circa 2007, in the wake of the armed conflict and humanitarian crisis in Sudan and Eritrea.[55] Asylum-seekers reach Israel after what is often a long, difficult, and dangerous journey across the Sinai desert. Many of those who enter Israel through the desert pay large sums to Bedouin smugglers to help them get to the border. During their journey, they are vulnerable and may fall victim to violence, rape, starvation, and organ harvesting.[56] Upon reaching the Egyptian-Israeli border, the danger may increase due to frequent shootings by the Egyptian border patrol.[57]

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52) Lex Takkenberg, *Status of Palestinian Refugees in International Law* (Oxford: Clarendon Press, 1998), 90.

53) Article D of the Convention Relating to the Status of Refugees (July 28, 1951). According to UNRWA's definition, "Palestine refugees are people whose normal place of residence was Palestine between June 1946 and May 1948, who lost both their homes and means of livelihood as a result of the 1948 Arab-Israeli conflict." See http://www.unrwa.org/etemplate.php?id=86 (accessed 30 August 2012).

54) These distinctions are not always clear, as there have been attempts to claim asylum on behalf of Palestinians, but not as part of the argument on the Right of Return. Such, for example, is the claim of gay Palestinians who seek refuge in Israel. Michael Kagan and Anat Ben-Dor, *Nowhere to Run: Gay Palestinian Asylum Seekers in Israel* (Tel-Aviv: Tel Aviv University Faculty of Law, 2008), http://www.law.tau.ac.il/Heb/_Uploads/dbsAttachedFiles/NowheretoRun.pdf (accessed 30 August 2012).

55) Adrianna Kemp and Tali Kritzman, "Between State and Civil Society: The Formation of a Refugee Regime in Israel," in *Law, Society and Culture – Empowerment on Trial 55*, eds. Mimi Aijsensdadt and Guy Mundlak (Tel-Aviv: Nevo, 2008), 65 [Hebrew].

56) Such practices are documented in EveryOne Group, *A Report-Complaint against the Smuggling of Migrants in the Sinai* (*Egypt*) (January 2012), www.everyonegroup.com/EveryOne/MainPage/Entries/2012/1/4_A_report-complaint_against_the_smuggling_of_migrantsin_the_Sinai_(Egypt).html (accessed 30 August 2012); HotLine for Migrant Workers, *The Dead of the Wilderness – Testimonies from the Sinai Desert* (2010), http://www.hotline.org.il/english/pdf/Testimonies_from_sinay_122010.pdf (accessed 30 August 2012).

57) See Human Rights Watch, *Sinai Perils: Risks to Migrants, Refugees, and Asylum Seekers in Egypt and Israel* (2008): 34. There were at least 60 documented deadly shootings of unarmed

This wave of migration shares a fundamental characteristic with the first wave of Palestinian day-workers in that the entrance of both groups was not the outcome of premeditated state policy. As a result, until 2007, when people started crossing the border between Egypt and Israel in large numbers, Israel did not develop an official process for designating refugees. The third wave also shares a basic premise with the second wave, in that the asylum-seekers come from countries with which Israel has no shared borders, even no political relations, and certainly no particular responsibility for. Consequently, the third wave is neither characterized as an outcome of a political imperative like the first, nor as a result of an economic imperative like the second.

The legal regime that developed around asylum-seekers was, first and foremost, explained as stemming from universal, humanitarian values. The State of Israel, which bears in its collective consciousness the heritage of difficulties faced by Jewish refugees during and after the Holocaust, was among the countries that actively pursued the writing of the Refugees Convention and among the first to sign it.[58] Despite this heritage, however, the humanitarian-based aspects of Israel's asylum regime were developed only slowly and reluctantly.

Until 2007, the number of asylum-seekers reaching Israel was relatively small. Except for episodic instances, such as the state-initiated asylum that was granted to a group of Vietnamese boat people in 1977 and 1979, Israel mostly did not grant refugee status, nor was it asked to, due to the few asylum-seekers in its territory.[59] Absent any need to systematically review petitions by asylum-seekers, the state did not institutionalize the process. Therefore, when the wave of African asylum-seekers began entering Israel, the process of refugee status determination (RSD) was underdeveloped,

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individuals by the Egyptian border patrol between 2007 and 2010: Yonatan Paz, *Ordered Disorder: African Asylum Seekers in Israel and Discursive Challenges to an Emerging Refugee Regime*, UNHCR, Research Paper 205 (2011), http://www.unhcr.org/4d7a26ba9. html (accessed 30 August 2012).

58) Israel was the fifth state to become a party to the Convention. See UNCHR, States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, http://www .unhcr.org/ protect/PROTECTION/3b73b0d63.pdf. On Israel's role in drafting the convention, see Andreas Zimmermann, *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol - A Commentary*, Oxford Commentaries on International Law (Oxford: Oxford University Press, 2011), 37-74.

59) Anat Ben-Dor and Rami Adut, *The State of Israel – A Safe Haven?* (Tel Aviv: Buchman Faculty of Law, Tel Aviv University, 2003).

long, and cumbersome. While there were only a few hundred applications for refugee status pending in 2003, since 2007, the number of asylum-seekers has increased to several thousand each year.[60] The more asylum-seekers entering Israel, the more the state's failure to develop an asylum regime became evident.[61]

The growing number of entrants seeking asylum led to several changes. First, it was necessary to improve the process of questioning asylum-seekers and processing their applications. Indeed, until 2009, the UNHCR handled all cases of refugee status determination (RSD) in Israel. As the volume of RSDs grew and the challenge to the JSR became evident, Israel gradually removed the UNHCR from the process and developed its own policies and bureaucracies for this purpose.[62] Second, it was necessary to consider the purpose and length of entrants' stay, distinguishing between those who should be judged on the basis of the economic imperative (migrant workers) versus a humanitarian imperative (asylum-seekers). These changes were introduced slowly, in piecemeal fashion, and mostly in response to challenges and petitions to the courts by civil society organizations representing asylum-seekers.[63]

The major challenge to the state, as mentioned above, was to correct the underdeveloped RSD process. In response to petitions by NGOs representing asylum-seekers, Israel established and developed a somewhat greater procedural fairness in RSD: allowing legal representation in hearings, providing applicants with protocols of the proceedings and allowing for their recording, setting time limits for the process, and formalizing its review.[64] However, better procedural safeguards aggravate the problem of expediency, particularly in the context of an exponentially surging number of

60) Yonatan Paz, *Ordered Disorder*, (see note 57).

61) Anat Ben-Dor and Rami Adut, *A Safe Haven*, (see note 59).

62) Population Immigration and Border Authority, Ministry of Interior, State of Israel, *Procedure Relating to Asylum Seekers in Israel* (January 2, 2011) [Hebrew], http://www.piba.gov.il/Regulations/Procedure%20for%20Handling%20Political%20Asylum%20Seekers%20in%20Israel-he.pdf (accessed 30 August 2012).

63) Adrianna Kemp and Tali Kritzman, "Between State and Civil Society", (see note 55).

64) *Ibid*. For examples on litigation regarding the RSD process, see Supreme Court HCJ 8993/09 *The African Refugee Development Center vs. The Ministry of Interior* (Nov. 3, 2010); Administrative Petition (Jerusalem) 22336-04-10 *Abdul vs. the Supervisor of Freedom of Information Law* (October 21, 2010); Administrative Petition (Center) 5462-05-11 *Win Pa Pa Shwe vs. the Ministry of Interior* (October 5, 2011); Supreme Court - Administrative Appeal 8675/11 *Mespen Mezmor Tedessa vs. RSD Unit and others* (May 14, 2012).

entrants. The state addressed this problem by exempting a large group of asylum-seekers from the process altogether, granting asylum-seekers from certain countries (such as Liberia, Côte d'Ivoire, Eritrea, and Sudan) a "temporary group protection" outside of the RSD process. This, in fact, became the dominant method for asylum-seekers to legally stay in Israel, since only a small number of individual asylum requests are approved.[65] Such temporary group protection is not mentioned in the Refugee Convention, but it is comparable to the European Community Directive that has recognized a version of such protection in cases of a mass influx of refugees.[66] Although the temporary group protection is separate from RSD procedures, it is administered according to the universal humanitarian imperative. However, the permit does not entail examination of individual petitions and is temporary in nature. Similarly, while staying under the protection of a group permit, members of the group are not deported, but they do not receive any social rights, are not allowed to work, and cannot begin an RSD process.[67]

The second primary challenge in this sphere of migration – distinguishing between asylum-seekers and undocumented migrants – was met with a governmental approach that categorized most of those entering Israel through the Egyptian border as mere 'infiltrators' and therefore a security threat, or as voluntary economic migrants and therefore an economic threat, rather than 'authentic' asylum-seekers forced into the country due to political circumstances.[68] Israel was, in fact, experiencing for the first

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65) Information regarding the number of refugee statuses granted was published only after the court ruling in Administrative Petition (Jerusalem) 348-10 *The African Refugee Development Center vs. The Ministry of Interior advisory sub-committee regarding asylum applications et al.* (May 1, 2011). Between January 2008 and May 2011, Israel granted refugee status to only nine individuals out of thousands of applicants. In 2009, 812 asylum applications were submitted and only 2 individuals were granted refugee status (0.24% recognition ratio). In 2010, of 3366 applications, only 6 were granted (0.17%).

66) Council Directive 2001/55/EC of July 20, 2001 on Minimum Standards for Giving Temporary Protection in the Event of Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts between Member States in Receiving such Persons and Bearing the Consequences Thereof (OJ L 212, August 7, 2001): 12.

67) Procedure Relating to Asylum Seekers in Israel, (see note 62).

68) See, for example, the statement of the Head of Foreigners Office, The Population, Immigration and Border Control Bureau, Mr. Yossi Edelstein, delivered to the Knesset's Committee for Examining Foreign Workers' Problems, Protocol no. 65, October 31, 2011 [Hebrew], http://knesset.gov.il/protocols/data/rtf/zarim/2011-10-31-01.rtf (accessed 30 August 2012).

time the 'asylum-migration nexus': the blurring of the lines between economic migration and humanitarian displacement.[69] While the humanitarian imperative remains the guiding principle in the sphere of asylum-seekers, that sphere has been identified as applying to only a small number of individuals, while the rest have been re-categorized to other spheres of migration as economic migrants or as infiltrators who pose a security threat.

The categorization of entrants through the border with Egypt as infiltrators posing a security, demographic, or economic threat has had significant legal and policy consequences. One reaction was the enhancement of border policing as well as the legislative provisions against cross-border infiltration. While legislation prohibiting infiltration has existed since 1950, after 2008, the legislature attempted to revise the law and make its penal sanctions more stringent, culminating in a 2011 reform.[70] Particular measures that were adopted, such as what is called 'hot return' (returning 'infiltrators' at the border), stood in tension with the principles of asylum (most notably, the principle of non-refoulement).[71] The physical strengthening of the border was also pursued vigorously, constructing a separation barrier along the border with Egypt,[72] a large detention facility for 'infiltrators' which is designed to hold up to 10,000 detainees.[73]

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69) Stephen Castles, "The Migration-Asylum Nexus and Regional Approaches," in *New Regionalism and Asylum Seekers: Challenges Ahead*, ed. Susan Kneebone and Felicity Rawlings-Sanaei, (Oxford: Berghahn Books, 2007), 25-6. For a discussion of the difficulty in distinguishing between the two in Egypt, see Chantal Thomas, "Migrant Domestic Workers in Egypt," *American Journal of Comparative Law* 58, no. 4 (2010): 987, 998, 1003-5.

70) The Prevention of Infiltration Law (Offences and Jurisdiction) (1954). Amendment No. 3 (January 9, 2012), Legislation 2332 (2012), 199.

71) The state declared in Court that it has ceased the practice of "hot return" due to the recent political developments in Egypt. See HCJ 7302/07 *Hotline for Migrant Workers et al. vs. The Secretary of Defense* (July 7, 2011). It is noteworthy that the Court did not establish an opinion on merits with regard to the legality of "hot return" policies, noting that judicial review is not necessary as long as the policy is no longer practiced.

72) Executive Decision no. 1506 on Constructing a Barrier on the Western Border (March 14, 2010).

73) Executive Decision no. 2507 on Construction of a Detention Facility for Infiltrators through the Egyptian Border (November 28, 2010); The Law for the Prevention of Infiltration, Amendment no. 3 2012 (passed January 10, 2012). The latter amendment defines as an infiltrator anyone who does not enter Israel through a formal border crossing point, and does not distinguish between asylum-seekers and other border crossers. The law further allows for three years of detention in the newly established facility, unlike the 60 days' detention stipulated in the Entry to Israel Law.

The economic threat was addressed by attempts to deny asylum-seekers access to the labor market. Asylum-seekers that did not enjoy the temporary group protection were either held in detention or allowed to reside in the country during the process, but denied the right to work.[74] Despite the long wait for their status determination, and the lack of material resources and paths to gainful income during the wait, the state further denied asylum-seekers any rights to social security benefits. Without legal access to either the labor market or social rights, it was inevitable that asylum-seekers would join the undocumented workforce in their search for livelihood. As in the case of the binding policy's effects on migrant workers, the denial of social rights to asylum-seekers had the perverse effect of increasing undocumented work. Asylum-seekers, waiting for long periods of time for a decision on their application, also moved into residential neighborhoods that were, by then, mostly occupied by migrant workers and where accommodations are relatively cheap. Despite the government's intention to treat the groups as belonging to separate spheres and governed by distinct functional imperatives, in reality, the populations became mixed, with undocumented migrant workers and asylum-seekers living in the same neighborhoods and working in some of the same labor sectors. As a result, the boundaries between the categories of asylum-seekers and migrant workers became blurred.[75]

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In broad brushstrokes, these are the three major spheres of migration that have challenged Israel's JSR. Along the way, other categories, most notably victims of trafficking and claimants of permanent residency for reasons of family unification, have had a similar effect on the regime and engaged distinct spheres. The general principle guiding the Ministry of Interior is that the different categories are distinct and exclusive. Accordingly, a 'foreigner' should decide her preferred status track (victim of trafficking or asylum-seeker, family reunification, or migrant worker, etc.). A claimant cannot ask

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74) Yuval Livnat, "Refugees, Employers and 'Practical Solutions' in the High court of Justice: Following HCJ 6312/10 Kav La'Oved v. The State of Israel," *Mishpatim Online* 3 (2011): 23.

75) Assimilation was not wholesale due to ethnic and racial differences. While most documented and undocumented migrant workers in Israel are from Southeast Asia and, to a lesser extent, Eastern Europe, the asylum-seeking population is from Africa and is, therefore, easily distinguishable by physical appearance.

for recognition in two different tracks at once. Moreover, if the claimant fails in her preferred track and tries again using another track, e.g., an asylum-seeker who then asks to be recognized as a victim of trafficking, that is seen as suspicious strategic behavior and significantly reduces her already limited chances of being granted rights. The spheres of migration are therefore viewed as separate, their objectives as distinct. Individual attempts to cross the spheres' boundaries are presumed to be indicative of insincere motives.

2. Israel's Changing Migration Regime – Within and Between Spheres of Migration

The three waves of migration caused an incremental restructuring of the immigration regime in Israel. The process of restructuring is the product of ongoing interaction between various state branches and civil society stakeholders (including NGOs, market actors, and organizations that represent economic as well as community interests). Regime transformation has been catalyzed by two main types of arguments: those internal to the logic of each sphere's dominant imperative, and those external to it, which challenge the dominant imperative in each sphere. "Internal" arguments are made within the confines of the dominant imperative of the particular sphere of migration. For example, as part of an attempt to push for a less restrictive policy in relation to the employment of migrant workers, arguments regarding the effect of migrant work on the labor supply of Israeli workers may contest the assertion that migrant workers are a cause of local unemployment. Such arguments accept the economic imperative's dominance in the sphere of migrant work, operating within the logic it prescribes. Similarly, attempts to push for extending rights to Palestinian day workers that draw on the political obligation of Israel towards the Palestinians due to years of occupation, or attempts to push for the extension of rights to asylum-seekers because of Israel's particular history and the humanitarian obligations under the Refugee Convention, are internal to the political and universal imperatives that animate each sphere, respectively. Internal critiques within the spheres of migration are strategically important and can be highly effective in bringing about regime transformation. However, the deeper transformative moments are those in which arguments external to the logic of the sphere's main imperative contest its logic. Contestation by external imperatives and attempts to sidestep the

dominant imperative within the sphere altogether are pivotal to the incremental design of Israel's post-JSR. In this section, we illustrate such incidents of contestation in an attempt to provide tools for conceptualizing and considering future options in the development of various trajectories that affect the assumptions underlying the JSR.

Arguably, the three functional imperatives at the basis of the different spheres of migration push and pull the regime in different directions. Paradigmatically, the economic and political imperatives shape the exclusionary and restrictive aspects of the immigration regime, and the universal-humanitarian imperative informs its more inclusive and generous characteristics. Accordingly, a broad-stroke account of the patterns of interaction among different stakeholders might run as follows: state actors use the political and economic functional imperatives to justify policies that either exclude "foreigners" from the Israeli body politic altogether or severely limit their rights in an attempt to sustain Israel's JSR. At the same time, civil society organizations use humanitarian arguments to push for a universal and more inclusive regime. However, the case studies below suggest that, beneath this neatly drawn picture, lies a much more nuanced conceptual framework. The imperatives turn out to be multifaceted, each prompting contradictory trends that can be and are exploited by all stakeholders for differing purposes.

In this section, we attempt to understand the multifaceted use of functional imperatives by stakeholders, their interests in transgressing the dominant imperative animating each sphere of migration, and the outcomes of such interactions. The discussion is divided into three parts. In the first part, we observe the interaction between the two seemingly exclusionary imperatives – the political and the economic. The case studies demonstrate that these are not mere rhetorical alternatives, but, rather, the use of each imperative may translate into different types of policies, and their different modes of operation induce stakeholders to attempt sphere transgression. In the second part, we observe the interaction of claims based on the universal imperative with claims based on the political and economic imperatives. Drawing on examples concerning the right to family, we highlight the impact of universal arguments, made outside the sphere of asylum-seekers, on the shaping of migrant workers' and Palestinians' respective spheres of migration. The case studies suggest that claims based on the universal imperative are not uniform, and that they operate differently when they confront the political or economic imperatives dominant in the different spheres. Finally, we draw on the most dynamic sphere of migration in Israel

today, that of asylum-seekers, to identify the ongoing struggle over the dominant imperative.

a. Between Political and Economic Imperatives

The political and economic imperatives in immigration policy have much in common: both may primarily serve the sovereign interest in border protection and economic control over the interests of non-citizens who enter the country. The prescriptions of political economy actually suggest that any attempt to separate the political from the economic process is misguided.[76] We accept the linkage wholesale. Notwithstanding, we make here a more focused claim about the distinction between the two, limited to our discussion of immigration policy. Here we find that, while the considerations voiced through the political and economic imperatives in different spheres of migration at times merge and intertwine, they do not fully overlap and do have distinguishing characteristics.

The economic imperative in Israel's post-JSR is Janus-faced. In its rent-seeking formulation, mostly advocated by representatives of economic interests, it can be used to justify a more inclusive immigration regime and the expansion of the post-JSR, serving the need and desire of Israeli employers for cheap labor. In its protectionist formulation, most often advocated by state actors and labor unions, it, traditionally, has been used to secure control over the labor supply in an attempt to prevent the substitution of Israeli workers by migrant workers. These two formulations of the economic imperative powerfully animate the sphere of migrant workers and the dynamics of the "closed" then "open" skies detailed above. They also affect the development of other spheres, as was demonstrated by the coupling of the entrance of Palestinian day workers to Israel with the imposition of an equalization levy, and the formal denial to asylum-seekers of the right to work.

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76) On the political economics of migration, see, generally, Gary P. Friedman, "Migration and the Political Economy of the Welfare State," *ANNALS AAPSS* 485 (1986): 51; Christian Joppke, "Why Liberal States Accept Unwanted Immigration," *World Politics* 50 (1998): 266; Jeannette Money, "No Vacancy: The Political Geography of Immigration Control in Advanced Industrial Countries," *International Organization* 51 (1997): 685; Giovanni Facchini and Anna Maria Mayda, "The Political Economy of Immigration Policy," Human Development Research Paper 2009/3 (UNDP, 2009).

The political imperative in Israel's post-JSR has universal-generic and regional-contextual elements. The former are characterized by the principle of Westphalian sovereignty, that is – the political imperative serves the state's interest in solidifying its power-to-exclude and control at the borders. This component appears as a commonly asserted legal principle in myriad court opinions, leading to a narrow scope of judicial review over immigration matters.[77] The idiosyncratic Zionist and Jewish nature of the Israeli regime and Israel's position in the Middle East demonstrate the latter. The Zionist manifestation of the political imperative is traditionally used as an argument for an exclusive JSR. Both aspects are usually demonstrated in decisions regarding the entry of individuals. However they are most evident in Israel's attempt to assert, display and practice its sovereignty with regard to others nations, communities and states. Due to the Palestinian-Israeli conflict and its direct relationship to Israel's sovereignty and Jewish-Zionist identity, the political imperative is strongest in the sphere of Palestinian migration. However, it is asserted to restrict all waves of migration: it serves the argument that Israel must seal its borders to asylum-seekers from enemy states, and justifies restrictions on the settlement and naturalization of families of migrant workers due to what is considered the "demographic" threat of diluting Israel's Jewish majority. Like the economic imperative it can also be used inclusively, for example – when Israel asserts its sovereignty and voluntarily enters labor migration agreements with other states.

The interplay between the political and economic imperatives is best demonstrated in the context of migrant workers. In this section, we emphasize the gradual 'politicization' of the migrant workers' traditionally economic sphere. However, to understand the difference between the competing imperatives, it is necessary to commence with their appearance in the sphere of Palestinian day-workers. In the final section, we also identify the appearance of the very same interplay between the two imperatives in the traditionally humanitarian sphere of asylum-seekers.

In Israel's migration regime, the political imperative is most dominant and explicit in the Palestinian context. As explained in the previous section, it accounts for the 1970 executive decision regulating the work of Palestinians from the OPT in Israel, as well as for the 1993 decision to replace

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77) This principle is often repeated in the case law. See, for example, HCJ 2629/03 *Svetlana Ivshein and others v. The Minister of Interior* (September 28, 2008); HCJ 4542/02.

Palestinian workers with migrant workers. While economic and political motives were almost inseparable in shaping the sphere of Palestinian day workers until 1993, the considerations regarding the entry of Palestinians have become predominantly shaped by political forces ever since migrant workers replaced Palestinian workers in supplying the demand for cheap labor in the Israeli labor market.

The dominant position of the political imperative was evident in a legal controversy over the nature of the equalization levy.[78] In a case that was initiated in 1996 by the workers' rights NGO Kav La'Oved, the organization petitioned on behalf of Palestinian workers, arguing against the remittance of the equalization levy to the Palestinian authority rather than individual workers.[79] The NGO pursued two lines of argument, first in the language of the political imperative and, alternatively, in the language of the economic imperative.

In the political argumentation, which is customary in this sphere, Kav La'Oved argued that, even if the equalization levy funds are being paid for a legitimate collective welfare objective, the money is not being transferred to its proper use. Alternatively, the NGO advanced an argument based on the economic imperative, utilizing it to contest the political imperative itself and to undermine the logic animating the sphere. In this second line of argument, Kav La'Oved contended that the admission of individual workers to Israel is economic in nature and cannot be relocated to the political sphere. That is, the issue is not the political relationship between the Israeli state and the Palestinian people *as a group* (and later the Palestinian Authority); rather, what the admission of individual permit holders requires is that each worker be considered in the context of the economic transaction and contractual obligation that is forged by her entry to the state and to the labor market.

The state argued that the equalization levy, much like taxes collected, does not create individual entitlements, and that the state could therefore collect the levy from individual workers (and their employers) and use them to promote the welfare of the Palestinian people in the OPT. Hence, the equalization levy was part of a horizontal relationship between the

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78) See notes 21 and 24, and accompanying text.

79) 16/94 (Jeruslaem District Court) *Hussein Abed Elhafad Abed Algani Masri and Others v. The State of Israel* (May 16, 1995). An appeal to the Supreme Court was dismissed on March 1, 1999.

Israeli state and the Palestinian entity and not merely an economic measure to avoid the undercutting of wages and maximize the wealth of some workers (Israeli and Palestinian alike). The NGO's attempt to present an individualistic economic argument was unsuccessful: the court rejected the petition and accepted the state's position, viewing the levy as a kind of public tariff imposed on Palestinians who want to work in Israel, and justifying its collection from individual workers for collective welfare purposes in the OPT.[80]

The strength of the political imperative was demonstrated most recently when Israel refused to remit taxes that were collected by Israel on behalf of the Palestinian Authority, including the money collected through the equalization levy, in response to the Palestinian attempt to pursue full membership in the United Nations. The political nature of the levy makes it perfectly suited for the sphere of inter-state politics. Israel released the tax money, according to officials of the Prime Minister's Office, only when it appeared that the "Palestinians have suspended their unilateral move".[81] Israel's position would have been more difficult to sustain if the equalization levy were relegated to the economic sphere and intractably linked to the individuals who actually perform the work when seen as their property or contractual right.

The controversy over the equalization levy demonstrates the discursive strength of the political imperative in the sphere of Palestinian day workers, post 1993, and the difficulty of "smuggling" in what are perceived as exogenous economic imperatives to inform policymaking in this sphere. By contrast, the dominant imperative of the migrant workers' sphere was economic from the outset. Israel established a guest-worker visa regime, partly to replace Palestinian workers after the border closure that followed the Madrid peace conference. These new migrant workers would come from various countries, following the paths of globalization and the trends of south to north migration, independently of the political relationships between Israel and their countries of origin. In this way, the state forged a

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80) For a detailed discussion of the case, see Mundlak, "Power Breaking", (see note 19).

81) Karib Laub, "Israel: Palestinians' Money to Be Released," *Huff Post World*, November 30, 2011 http://www.huffingtonpost.com/2011/11/30/israel-palestinians-money_n_1120169.html (accessed 30 August 2012). The Palestinian response was also framed in political terms, as demonstrated by the Palestinian Foreign Minister Riad Malki, who said that, "It [withholding of the money] should be described as state piracy by Israel against the Palestinian people." *Ibid*.

sort of "reserve army of labor",[82] whereby workers from around the world can temporarily migrate to work in Israel and be easily substituted, after a short period of time, by others, with no Israeli political obligation towards their countries of origin. This global labor reserve is simpler to govern and regulate than Palestinian workers, and even more convenient to manage than the traditional reserve of domestic (citizen) low-skilled workers who hold some political power as a group vis-à-vis the state of Israel.

Attempts by NGOs to impact the sphere of migrant work in Israel have often been framed on the basis of the universal imperative, as will be demonstrated in the following section. However, some of the most effective claims towards a more inclusive regime have been those that resonated with the prevailing economic imperative. For example, the successful challenge against the binding policy in 2006 was advocated in terms of universal and constitutional human rights.[83] Insufficient emphasis, however, was placed on the proper balance between economic interests and human rights because it was clear already to policymakers at the time that the binding policy had failed, even when measured in economic terms.[84] Instead of preventing undocumented presence in Israel, the restrictive binding system incentivized migrant workers to violate the terms of their visas and become undocumented, allowing them greater market mobility, the ability to bargain for higher wages, and greater control over their working conditions.[85] Consequently, despite differences in emphases, there were some striking similarities between the position voiced by NGOs representing migrant workers and that of the public economic regulatory agencies, such as the Central Bank of Israel. We surmise that the strength of the

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82) Karl Marx, *Capital*, vol. 1, chapter 25: The General Law of Capitalist Accumulation, at s. 4: Different Forms of the Relative Surplus Population - The General Law of Capitalistic Accumulation, http://www.marxists.org/archive/marx/works/1867-c1/ch25.htm#S4.

83) HCJ 4542/02, *Kav La'Oved et al.*, (see note 48).

84) Yoram Ida, "The Factors Affecting the Changeover of Foreign Workers to Unlawful Employment, State of Israel, Ministry of Industry," *Trade and Employment, Planning, Research and Economics Administration* (2004) [Hebrew]; Tabibian, "The Binding Arrangement in Israel", (see note 47).

85) The phenomenon of moving from documented to undocumented stay in the receiving country is common in guest-worker visa programs that use the binding system. A similar situation exists in the U.S. with regard to Mexican Bracero workers . See Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2005), 7-146.

constitutional challenge to the binding policy was successful precisely because it also made economic sense.[86]

The economic imperative gave NGOs a mechanism with which to frame universal moral claims for the promotion of migrant workers' rights, i.e. arguments palatable to state actors who are guided by the economic imperative. However, at times, the economic reasoning also accentuated differences. The malleability of both state and civil society arguments in this context can be demonstrated by the case of the Turkish construction workers (hereinafter: the *Yilmazlar case*),[87] in which NGOs made an effort to defend the dominant economic imperative in light of the state's attempt to politicize the sphere of migrant workers, using the same type of economic arguments put forward by NGOs in regard to the equalization levy.

Following the Supreme Court's important decision holding the binding arrangement unconstitutional, a peculiar case appeared on the court's docket, again brought before it by the NGO Kav La'Oved. The (state-owned) Israeli Military Industry had concluded a contract with the Turkish government to refurbish 180 tanks. In exchange, Israel committed to purchase services from Turkey, and an additional agreement had been signed with a Turkish-owned, Israeli-registered construction company allowing it to bring 800 Turkish workers to Israel to work in construction. The regular rules pertaining to migrant workers were replaced by an inter-state contractual arrangement, which included the binding of the workers to the Turkish-owned company. The Supreme Court decided that this did not violate the court's previous opinion declaring the binding arrangement unconstitutional because the facts of the case were idiosyncratic.[88] The court noted the security and economic interests the state had in the agreements it had signed. Moreover, the Justices noted that, unlike other migrant workers, the Turkish workers were not required to pay high sums of money

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86) See paragraphs 50-2 in the opinion of Justice Levy in HCJ 4542/02, (see note 48). This hypothesis is further confirmed by the government's later attempts to reinstate a more lenient binding policy, to protect Israeli economic interests. In 2011, the Law of Entry to Israel was amended to limit care-workers' labor market mobility. The amendment permits the passage of regulation that limits the number of employer changes a care-worker can request during their visa period, as well as regulation that creates "geographical binding", which limits employer changes to employers within a certain geographical area. At the time of writing this article, the regulation had not been introduced.

87) HCJ 10843/04 *Hotline for Migrant Workers vs. The Government of Israel* (September 19, 2007).

88) *Ibid.,* at para. 17 of Justice Rivlin's opinion.

to middlemen in Turkey in order to obtain a work permit and visa. They also highlighted the Turkish government's involvement in their working conditions, which was stipulated in the contract between the two governments. Both of these elements were seen as adequate safeguards of the workers' rights.[89] Hence, in the Yilmazlar case, the state deviated from the economic imperative that traditionally shapes the sphere of migrant workers' migration, and framed its argument within the context of the political imperative (the Israel-Turkey relationship). The NGO attempted, but failed, to reposition the Turkish workers' employment through the prism of their individual rights and the economic logic of the sphere. The arrangement with Yilmazlar was terminated in 2011, following the rising tension between Israel and turkey over the sail of the Turkish Marmara ship to the Gaza area, and Turkey's pro-Palestinian position. The workers were sent back home, indicating how strongly embedded was their position in regional politics.[90]

The Yilmazlar decision expanded the political imperative at the expense of the economic imperative, sidestepping the protective laws that emerged following the Supreme Court's decision on the binding arrangement. Such an outcome is most likely to come at the expense of protecting migrant workers' rights. To rely on sending countries to secure their citizens' workers' rights upon migration, as Turkey was supposed to do in this case, may lead, in some cases, to severe workers' rights violations. However, the Yilmazlar case remains an isolated case, given the state's general interest in depoliticizing the sphere of labor migration and keeping economic considerations apart from political commitments.

In the Yilmazlar case, the state argued through the prism of the political imperative, while an NGO relied on an economic imperative; more commonly, however, the arguments are reversed. Human rights organizations attempt to link components in the sphere of migrant work to the political level, for example with regard to the problem of the grossly high fees that are charged in sending countries by individuals and agencies that facilitate

89) The dissenting opinion by Justice Levy expressed willingness to view the agreement through the universalist, human rights-based argument offered by the petitioners, and held that the political factors do not affect the basic holding that deems the binding of workers to their employer unconstitutional.

90) Rotem Sela, "Yilmezlar Lost its Contract and the Workers Lost their Employment" *NRG NEWS* October 24, 2011, http://www.nrg.co.il/online/16/ART2/298/140.html (accessed 30 August 2012).

workers' migration and work in Israel.[91] The industry of middlemen is ridden with corruption, both in sending countries and on the Israeli side, where a large share of the workers' fees unlawfully 'find their way' to Israeli agencies.[92] Israeli law has capped the allowed fees,[93] but Israel's enforcement agencies can do little to intervene in these practices in the sending countries, and have done little about them in Israel either.[94] In this context, NGOs have pressured the state to transform what has traditionally been seen as an economic, individualized, problem into a political inter-state problem.

For instance, political engagement with the regulation of migrant work was sought by an NGO in the case of Nepal, a sending country of care workers. Kav La'Oved advocated halting the migration of Nepalese workers to Israel, arguing that, in the absence of a Nepalese embassy and consular services in Israel, Nepalese workers are exceptionally vulnerable to exploitation by employers. Their vulnerability results from the fact that they cannot rely on the assistance and support of an embassy or consulate, as many migrant workers from other countries do, and, more specifically, if a worker's passport is (illegally) confiscated by an employer, they cannot have it reissued in Israel. The NGO's argument received further support from a report filed by one of the Israeli consulate's employees in Nepal highlighting the extent of the abusive practices and exorbitant fees charged from the Nepalese workers in the process of recruitment to work in Israel. The pressures to change policies in relation to Nepal succeeded, and Israel stopped issuing guest-worker visas to Nepalese applicants.[95] Migration was renewed when a Nepalese consulate opened in Israel. Israel's response in this case deviated from the traditional individual-economic view of migrant workers' presence in Israel.

A more robust experiment aimed at dealing with the excessive sums migrant workers pay in order to work in Israel is the current effort to

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91) Rebeca Raijman and Nonna Kushnirovich, *Labor Migration Recruitment Practices in Israel*, Ruppin Academic Center, The Institute for Immigration and Social Integration Working Paper Series no. 13, March 2012), 8-9.

92) Gilad Natan,"Dealing with the Illegal Fees charged by Intermediaries from Foreign Workers," *The Knesset's Research Center* (January 25, 2011) [Hebrew].

93) The Employment Service Bylaws (Payments by Job-Seekers for Placements) (2006). The regulations limit fees to a total sum of 3,401.68 NIS (approx. $900 US).

94) See Natan,"Dealing with the Illegal Fees", (see note 91).

95) Kav La'Oved 's Annual Report (2007), http://www.kavlaoved.org.il/media-view.asp?id=1773 (accessed 30 August 2012).

conclude a trilateral agreement between Israel, Thailand, and the IOM.[96] This initiative has been in the making for several years, and, despite significant attempts by interest groups on both sides to thwart the agreement, it was signed in May 2011 and implemented in June 2012.[97] According to the agreement, the IOM will be involved in the recruitment process in Thailand, making sure workers are not taken advantage of, mainly by fixing the fees for the processing of the work permit, visa, and travel arrangements. Despite governmental decisions on the issue, the process did not begin before Kav La'Oved petitioned the court to demand its implementation.[98] As a result of this initiative, the sphere of migration is changing to formally incorporate political considerations. More recently, the Israeli government decided to pursue bilateral agreements with other sending countries of migrant workers.[99] For example, in the coming years only migrant workers from countries that have signed a bilateral agreement with Israel will receive guest-worker visas to work in the construction sector.[100] Implementing this governmental decision, Israel signed the first bilateral agreement with Bulgaria, in an attempt to eliminate the excessive recruitment fees paid by workers.[101] Consequently, it is expected that, in the near future,

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96) See Government Decision No. 4024, July 31, 2005, and Government Decision No. 3996, August 24, 2008, both referring to establishing cooperation with the IOM in an attempt to reduce the recruitment fees in sending countries. The actual implementation of this agreement began in June 2012.

97) Population, Immigration and Borders Authority Press Release: For the First Time, 22 Thai Agricultural Migrant workers Landed in Israel as Part of Bilateral Agreements (June 28, 2012) http://www.piba.gov.il/SpokesmanshipMessagess/Pages/280612.aspx [Hebrew] (accessed 30 August 2012).

98) HCJ Petition 2405/06 *Kav La'Oved vs. The Unit for Foreign Workers, Ministry of Industry, Commerce and Employment and others* (petition filed March 13, 2006). The case is still pending before the court.

99) Government decision 4024, 31 July, 2005; Government Decision No. 3996, Aug. 24, 2008; Government Decision No. 1274, Jan. 24, 2010.

100) Government Decision No. 3453, July 10, 2011.

101) See Population, Immigration and Borders Authority Press Release, End to the Labor Shortage in the Construction Sector: Hundreds of Skilled Construction Workers from Bulgaria will Reach Israel Following a New Agreement between the Countries (December 1, 2011), http://piba.gov.il/ spokesmanshipmessagess/pages/27865.aspx (accessed 30 August 2012). According to the press release, the agreement is aimed at reducing excessive recruitment fees by, among other measures, selecting workers through a randomized process from a large pool of applicants. The random process is expected to decrease corruption and prevent human trafficking. The agreement was signed on December 21, 2011.

Chinese migrant workers, who have dominated the construction sector, will be replaced by Bulgarians.

Relying on a political imperative in the economic sphere of migrant work is not intrinsically positive or negative, nor is it one-sided or unidirectional. What distinguishes the Turkish example from the Nepalese, Thai, and Bulgarian examples is the relationship between the political and the economic one. In the Turkish example, the political imperative trumped the economic nature of migration, sustaining the problems associated with the 'binding arrangement', namely the suppression of the workers' market power. In the other examples, by contrast, the move to the political imperative was for the purpose of strengthening individual economic power by political means.[102] The individualized nature of the economic imperative highlights the democratic deficit that is associated with cross-border migration, whereby the migrants themselves are unable to affect the rules that govern migration.[103] As opposed to the political basis of the Palestinians' entry to Israel, labor migration to date has been an individualized matter. The absence of any political obligation between Israel and the sending countries accentuated migrant workers' vulnerability. Workers' vulnerability and circularity was also exploited by various middlemen and manpower agencies to their economic advantage. The creation of obligations to protect workers from exploitation by middlemen in the emerging bilateral framework may prove to be one possible way to overcome, or at least ameliorate, this situation.

Finally, it is noteworthy that the process of transgressing the dominant economic imperative is incremental and path-dependent. But, once transgression takes place, it creates a new repertoire of possibilities and institutions that can later be used for other purposes. There is a possibility, as the process progresses, that the sphere of labor migration will depart from its historical baseline as purely economic. And there may be considerable

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102) The three examples are different in terms of global justice. The Nepalese example sacrificed, at least temporarily, the opportunities for Nepalese workers themselves and denied their entry to Israel altogether. The Bulgarian example demonstrates the potential for closing the gates to workers of one country (China), while opening them to those of another (Bulgaria). Only in the Thai example was an attempt made to maintain the current source of labor supply and improve their working conditions and earnings without risking their employment opportunities in Israel.

103) Seyla Benhabib, *Rights of Others: Aliens, Residents and Citizens* (Cambridge: Cambridge University Press, 2006), 10-20.

difference between a regime that is based on a political commitment to opening the gates to individualized and 'denationalized' workers, and a sphere in which workers enter under the umbrella of bilateral agreements.[104]

b. Between Humanitarian Imperatives and Political and Economic Ones

Arguably, distinguishing between the political and economic imperatives and fleshing out the nuances between the two is peripheral in relation to the main controversy at the heart of all immigration regimes – the tension between the universal humanitarian imperative, which pushes for political and social inclusion, and the state's protectionist (economic and political) interests in exclusion. However, through sustaining a tri-fold view of the imperatives, variations can be depicted in the way universal arguments are being framed, and spheres of migration take shape and are transformed.

To demonstrate the operation of universal-humanitarian claims in spheres that are predominantly construed around political or economic imperatives, we focus on the right to family.[105] The right to family has to do with both the political and the economic imperatives. With regard to the political, it is a right that forces the recognition of individual needs, which are argued to be universal and inalienable, and stands in direct contradiction to Israel's JSR. It is, therefore, in tension with the limitations the state imposes on all migrant workers or residents of the Occupied Territories, *as a group*, in an attempt to guarantee the temporary nature of their stay in Israel or exclude them from Israel altogether, in order to ensure the Jewish nature of the state. With regard to the economic, recognizing the right to a family is 'de-commodifying' since it highlights the worker's agency and

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104) Though, note that such bilateral agreements do not necessarily entail a significant improvement for migrant workers' rights. See, e.g., Jennifer Gordon, "People are Not Bananas: How Immigration Differs from Trade," *Northwestern University Law Review* 104 (2010): 1109, 1128-30.

105) The international sources of the right to family are numerous. Among the most prominent are: Universal Declaration of Human Rights (1948), Article 16; International Covenant on Economic, Social and Cultural Rights (1966), Article 10; International Covenant on Civil and Political Rights (1966), Article 23; International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (1990), Articles 4, 44, 45, 50; Convention Relating to the Status of Refugees (1951), Article 12; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979), Articles 9, 16; Convention on the Rights of the Child (1989), Articles 9, 10, 20, 21, 22.

social needs, and requires the state to view her as more than just a worker. Recognizing a worker's right to family may undermine one of the economic rationales for employing migrant workers, because migrant workers are often understood to be economically productive exactly due to the fact that they are 'de-familialized',[106] – that is, they are dislocated from their communities and families and do not need to balance their market role with family commitments.

Perhaps the most successful use of the humanitarian imperative in the sphere of migrant workers' migration in Israel was in the case of amnesty for children of migrant workers who were born and raised in Israel. We begin this section with that case, and then juxtapose it with two others: first, the successful challenge to a policy that limited the rights of migrant workers to give birth in Israel and continue their work,[107] and, second, the denial of the universal right to family in cases of family unification between Israeli citizens and spouses from the OPT.[108] The trilogy of right-to-family cases exemplify both successful and failed attempts to draw on the universal imperative in challenging spheres of migration dominated by economic and political imperatives.

Until 1993, the right to family was recognized mostly for Jews under the auspices of the Right of Return.[109] The post-JSR family challenge became prominent after the opening of the gates to migrant workers in 1993. Despite the assumption underlying guest-worker programs – namely, that the sole

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106) Hila Shamir, "What's the border got to do with it: How Immigration Regimes Affect Familial Care Provision," *J. of Gender, Soc. Pol. & L.* 29 (2011): 601.

107) See, generally, The 14th Knesset, Protocol of the Knesset Committee for Foreign Workers Protocol (November 3, 2004), http://www.knesset.gov.il/protocols/data/html/zarim/2004-11-03.html [Hebrew], discussing the problems associated with Israel's immigration policy regarding foreign workers who become pregnant and have children while residing in the country. See, also, Hanny Ben-Israel and Oded Feller, *No State for Love* (2006), http://www.acri.org.il/pdf/RighttoFamily.pdf (accessed 30 August 2012).

108) Although family unification (with non-Jewish partners) is not one of the post-JSR spheres we discuss in depth, it is a highly contested arena of regulation and adjudication. Since the mid-1990s, there has been significant regulatory activity that draws on the humanitarian-universal imperative, but also challenges the political imperative, particularly in the Palestinian context. See note 142.

109) JSR family unification cases were mostly considered under, and partially responded to, a broad definition of relationship to Judaism. See Michael Korinaldi, "The Law of Return: Law and Practice," *Kiryat Hamishpat* 1 (2001): 155 [Hebrew]; Ruth Gavison, *The State of Israel as a Jewish and Democratic State* (Jerusalem: Van Leer Institute, 1999): 58, 60-1, 86.

purpose for which people are admitted is to fulfill an economic mission – the length of stay and human nature conspire to lead to the creation of families.[110] The creation of migrant worker families and communities presented a significant challenge to the state's immigration policy, because it destabilized the reliance on the economic imperative underlying this sphere and drew in the political (in this case, mostly demographic) and universal-humanitarian imperatives. To prevent the 'contamination' of the economic logic, the Authority for Population Immigration and Borders issued guidelines clarifying that migrant workers are not allowed to have families in Israel. According to the guidelines, a migrant worker that gives birth cannot stay in Israel *with* her child, and members of the same family (children, parents, or siblings) cannot work in Israel at the same time.[111]

Since 1996, deportations have been the main tool used by the Israeli government at the national level against the settlement of migrant workers.[112] In 2002, an Immigration Authority (IA) was established[113] and launched a campaign against the employment of undocumented workers, increased enforcement with respect to employers of migrant workers, and, most significantly, carried out a sweeping wave of deportations.[114]

During that period, media coverage of families with children broken apart led to significant public criticism of the government's policy and to legal attempts by NGOs to challenge Israel's policy towards families,

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110) Data from the U.S. and Europe suggest that this tends to be the case. See Martin Baldwin-Edwards and Martin A. Schain, "The Politics of Immigration: Introduction," in *The Politics of Immigration in Western Europe*, eds. Martin Baldwin-Edwards and Martin A. Schain, (Oxford: Taylor & Francis, 1994), 1, 4; Philip L. Martin and Michael S. Teitelbaum, "The Mirage of Mexican Guest Workers," *Foreign Aff.* 80 (2001): 117, 119-25. And, in Israel, see Galia Tsabar, *We did not Come Here to Stay – African Migrant Workers to Israel and Back* (Tel-Aviv: Tel-Aviv University Press 2008), 38-35 [Hebrew].

111) Hanny Ben-Israel, "No Man's Land: Women Migrant Workers in Israel," Kav La'Oved Report (2011): 8-10, http://www.kavlaoved.org.il/UserFiles/File/ShetachHefker2011.pdf (accessed 30 August 2012).

112) Adriana Kemp, "Managing Migration, Reprioritizing National Citizenship: Undocumented Migrant Workers' Children and Policy Reforms in Israel," *Theoretical Inquiries in Law* 8, no. 2 (2007): 662, 675-7.

113) In 2008, the IA was consolidated with other agencies that deal with migration issues, and is known since then as the Population and Immigration and Borders Authority. Government Decision No. 2327, July 30, 2002 and No. 3434, April 13, 2008.

114) Sarah Willen, "Towards a Critical Phenomenology of 'Illegality': State Power, Criminalization and Abjectivity among Undocumented Migrant Workers in Tel-Aviv, Israel," *International Immigration* 45 (2007): 8.

particularly children.[115] It was argued that, while the parents could be seen as responsible for the undocumented stay, the children are no more than innocent bystanders that should not be uprooted from the environment they grew up in because of their parents' behavior.[116] In the Israeli social vocabulary, the mass deportations, dissolution of families, police chases after migrants, and the migrants' fear of public spaces and resulting search for hiding places, all struck a chord and resonated with the Jewish people's past experiences of persecution. Allusions to the latter were commonly and effectively used in the public campaigns against the deportation and the public debate around them, highlighting the violation of human rights caused by the government's policy and drawing on the particular moral commitment of the Jewish state to rely on a humanitarian imperative in the shaping of its immigration policies.[117]

In response to public criticism of the deportation of families and children, and after a long and convoluted political process, in 2006, the government approved a one-time amnesty for children of migrant workers and their families.[118] In order to be eligible for naturalization, the child had to be younger than 14 when he entered Israel, have resided in Israeli for at least six consecutive years, speak Hebrew and attend a public school, and the child's parents had to have entered Israel legally before he was born or before he joined them in Israel. The child's close family – only parents and siblings – who lived in the same household as the child were able to naturalize in a longer process, to be completed when the child turns 21.

While this decision deviated from Israel's JSR, it was presented as a one-time, limited, and individual process in the framework of a wider attempt to deport all other illegal migrants from Israel.[119] This deviation from the

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115) See, e.g., Eyal HaReu'veni, "Hundreds Demonstrated in Tel-Aviv Protesting the Deportation of Migrant Workers," *YNET NEWS*, September 3, 2003, http://www.ynet.co.il/articles/0,7340,L-2745119,00.html (accessed 30 August 2012); HCJ 9402/02 *Hotline for Migrant Workers v. The Government of Israel* (February 23, 2003), denying a petition by NGOs against the deportation of 50,000 migrant workers.

116) See, for example, the quote of the Minister of Interior at the time Avraham Poraz, cited at Kemp and Raijman, (see note 9), at 193.

117) Kemp, "Managing Migration", (see note 111).

118) Government decision no. 3807, June 26, 2005, and Government decision no. 156, June 18, 2006, http://www.pmo.gov.il/PMO/Archive/Decisions/2006/06/des156.htm (accessed 30 August 2012).

119) Government decision 156 concludes with the words, "This decision is a one-time arrangement that does not change governmental policy in this area."

regime, in fact, legitimized the more extensive deportation of tens of thousands of individuals.[120] The amnesty program was seen as a narrowly crafted exemption justified on humanitarian grounds: avoiding the deportation from Israel of children who know no other homeland. More than 500 families were naturalized following the 2006 decision. Applications of 295 families were denied.[121]

Neither the one-time amnesty program nor the massive deportations resolved the problem of the undocumented migrant population in Israel. In 2009, there were still approximately 200,000 undocumented migrants in Israel, including at least 2000 children born and raised in Israel.[122] Consequently, in 2008, the same measures were deployed again in an attempt to address the presence of undocumented workers in Israel: a governmental decision set goals for the rapid deportation of migrant workers and their families, until their complete removal from Israel by the end of 2013.[123] In parallel, an amnesty program was adopted in 2009 following the recommendation of an Inter-Ministerial Committee on the Issue of the Children

120) After Israel opened its gates to migrant workers in 1993 and, until 2002, the number of deportations was small, estimated at 20,000 during the entire period of 1995-2002. With the establishment of the IA in 2003, concerted efforts led to a significant rise in the number of deportations, peaking at 38,000 in 2003-4, and then decreasing again to several thousand a year ever since. Reports until 2008 are summarized in Roni Ben Tsuri, *Undocumented Migrant Workers that were deported in the year* 2008, Ministry of Industry and Labor Report (2008), http://www.moit.gov.il/NR/rdonlyres/10E53F4E-D8D0-41B2-B192-5E40BBE100D8/0/zarim2008.pdf (accessed 30 August 2012). For data since 2008, see the Population, Immigration and Border Authority's annual publications, available at http://www.piba.gov.il/publicationandtender/ foreignworkersstat/pages/default.aspx (accessed 30 August 2012).

121) Ittai Weissblay, "The Treatment of Children of Migrant Workers and Asylum Seekers," Knesset's Information and Research Center (2009), http://www.knesset.gov.il/mmm/data/pdf/m02269.pdf (accessed 30 August 2012).

122) Gilad Natan,"Removal of Illegal Foreign Workers from Israel," Knesset's Research and Information Center (2009), http://www.knesset.gov.il/mmm/data/pdf/m02279.pdf (accessed 30 August 2012).

123) Government Decision No. 3996, August 12, 2008. The goal was to deport 100,000 undocumented migrant workers from 2008-2012. Even if 100,000 individuals were to be deported, that would still be only half of the estimated undocumented population in Israel. Given that this decision was not coupled with limits on the admission of new migrant workers, and the low number of deportations during these years (see *supra* note 119), the intention to remove undocumented workers from Israel has not been fulfilled, but it is constantly being voiced and highlighted.

of Illegal Stayers in Israel.[124] The program's conditions were identical to the 2006 program, except the child's required period of residency in Israel was shortened to five years, and the child had to have been younger than 13 when he arrived in Israel.

The adoption of the committee's recommendations opened, for the second time in five years, a narrow path to residency, accompanied by a decision to deport from Israel entire families, and children, who do not fit the criteria. In the 2006 round of amnesty and deportations, the IA followed an unwritten rule to spare 'unprotected' children from deportation; however, the state clarified that, in the second round, it would deport children and families as well. The decision to deport children was explained as a protective act to preserve Israel's Jewish majority.[125] In the words of Prime Minister Netanyahu, "[T]his is a humanitarian problem on the one hand, and a problem of ensuring Israel's Jewish character on the other. We are committed to doing the right thing even if this does not seem like the right thing in popular public opinion."[126] It was estimated that approximately 400 children of migrant workers would be deported with their families as a result of this decision, and approximately 800 children and their families would be eligible to begin the naturalization process.[127]

The decision to deport children was highly controversial. A new NGO called "Israeli Children" was established in 2009 and launched an influential public campaign against the deportation of children. As the organization's name suggests, the thrust of the campaign was the argument that

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124) The Inter-Ministerial Committee on the Issue of the Children of Illegal Stayers and their families in Israel Recommendations, July 2010 [Hebrew], adopted by the Prime Minister's Decision as of January 11, 2009, and the Government decision 1274, January 24, 2010.

125) The demographic concern is repeated in all the official documents. See, for example, The Report of the Inter-Ministerial Committee on the Issue of the Children of Illegal Stayers and their families in Israel Recommendations, July 2010, 11 [Hebrew]: "Israel must preserve its Jewish-Zionist character. Already 30 percent of the total population of Israel today are non-Jews and Israel might become a multicultural state." Similarly, proposals for comprehensive legislation (detailed *supra* note 7) on immigration matters state the demographic concern in line with the traditional premises of the JSR.

126) Omri Nahmias, "The Government Confirmed the Recommendations of the Committee on the Status of Migrant Workers' Children: Approximately 400 will be Deported," *Nana10 news*, August 1, 2010, http://news.nana10.co.il/Article/?ArticleID=736023&TypeID=1&sid=126 (accessed 30 August 2012).

127) Aotila Shumpalbi, "The Government Decided: 400 Children will be Deported from Israel," *YNET NEWS,* August 10, 2010, http://www.ynet.co.il/articles/0,7340,L-3927786,00.html (accessed 30 August 2012).

these children are not "foreign" or "migrant". Rather, many of them were born in Israel, speak Hebrew, and Israel is the only country they know.[128] Deporting them is, therefore, illegitimate and inhumane. In the framework of the "Israeli children" campaign, public pressure was exerted on decision makers, large demonstrations were organized against the decision, media and public attention was focused on actions taken by the government to deport children, and families were assisted in the application process towards naturalization. The campaign was effective to some extent. First, it was arguably one of the reasons for the creation of a second amnesty program. Second, it was influential in postponing some of the planned deportations.[129] However, it did not prevent the deportation of children and their families, which began in 2012.[130]

The amnesty programs infused the migrant workers' sphere of migration with elements foreign to its dominant economic imperative. On the basis of the universal-humanitarian imperative, some migrant workers entered into an unprecedented process of full inclusion as permanent residents, and eventually citizens, in Israel. The humanitarian imperative managed to temporarily trump the economic and political imperatives, and to dent Israel's exclusive JSR by allowing non-Jews, who had no connection to Judaism through marriage or family relations, a pathway to naturalization.

The potential transformative power of the humanitarian imperative in the migrant workers' sphere of migration is also evident in the struggle against the Ministry of Interior's policy regarding "The Treatment of Pregnant Migrant Workers and Migrant Workers who Gave Birth".[131] The directive of that name stipulated that a documented pregnant migrant worker

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128) The Israeli Children website has the following explanation for the organization's name: "The organization's name, 'Israeli Children', stems from the fact that the children in question are just that, Israeli children. Hebrew is their mother tongue and they are educated in the Israeli public school system. The children celebrate Israeli holidays, and have never lived anywhere else other than Israel." http://www.israeli-children.org.il/?page_id=626 (accessed 30 August 2012).

129) Meital Yasour, "After the Oscar: Yishai Directed to Postpone the Children's Deportation," *YNET NEWS*, March 9, 2011, http://www.ynet.co.il/articles/0,7340,L-4039859,00.html (accessed 30 August 2012).

130) Meital Yasour, "The Deportations Began: A Nigerian Woman and Her Infant Daughter were Imprisoned and Deported," *YNET NEWS*, March 14, 2011, http://www.ynet.co.il/articles/0,7340,L-4042134,00.html (accessed 30 August 2012).

131) Ministry of Interior, *Procedure for Treatment of a Pregnant Migrant Worker and a Migrant Worker who Gave Birth in Israel*, Procedure 5.3.0023 (August 1, 2009).

must leave the country with her newborn within 90 days of the child's birth. The worker could then return to Israel without the child and continue her employment in Israel for an additional two years. While the "Israeli Children" campaign operated mostly in the sphere of public opinion, civil society organizations challenged this directive in the courtroom.[132]

The petitioners argued at two levels. One argument, which resonated with the dominant economic imperative, was that, due to the worker's economic interest and reasonable expectation of working in Israel for a total of at least 63 months, she has a right to complete her original allotted period of work in Israel, as stipulated in her visa, and not be limited to a mere two years of work after giving birth. A second line of argument, which was the more dominant, contested the economic imperative with the universal logic of the right to family. The petitioners argued that the directive violates workers' human rights, specifically the right to family and gender equality, as well as the right to human dignity enshrined in Israel's Basic Law: Human Dignity and Liberty.

The Ministry of Interior sought to steer the discussion back into the confines of the dominant economic imperative. It argued that the directive is part of a wider legitimate governmental policy to protect Israel's borders and shape its immigration regime; that, in recent years, Israel has had to deal with the illegal settlement of migrant workers, which negatively affects Israel's labor market structure, wage levels, and employment rates; and, moreover, that the worker has no legitimate economic interest to remain in Israel for the maximum time stipulated in her visa. The visa is conditional, requires occasional renewal, and can, therefore, be revoked or changed when circumstances change. In all this, the state sought to undermine the universal-humanitarian claims. However, it also contested the *actual* universal claim, arguing that the guest workers' right to family is not violated by the directive, since, for them, unlike Israeli citizens, it does not include the right to be a parent *in Israel*. Under the state's policy, a worker can choose to become a parent; she is merely required to do so outside Israel.[133]

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132) HCJ 11437/05 *Kav La'Oved and others vs. Ministry of Interior Affairs and others* (April 14, 2011). A petition to the court for a further hearing was denied. See Further Hearing 3860/11 *The Ministry of Interior Affairs et al. vs. Kav La'Oved et al.* (December 8, 2011).

133) This view is also endorsed by scholars, particularly in the context of the Palestinian reunification cases that are described hereon. See Yafa Zilbershatz, "On the Migration of non-Jewish Foreigners: an Invitation to Open a Discussion," *Mishpat U-Mimshal* 10 (2007): 87 [Hebrew].

Furthermore, it was argued that the directive is necessary for the implementation of Israel's immigration regime, because, otherwise, given the government's 2006 amnesty program, workers would have a significant incentive to give birth in Israel and overstay their visas in the hope of eventually receiving permanent legal status. Therefore, even if the directive infringes the workers' right to family and dignity, it withstands the violation of rights clause in the Basic Law since it is for a proper purpose and to an extent no greater than required.[134]

The High Court of Justice accepted both the economic and the humanitarian arguments proposed by the petitioners and struck down the directive. With regards to the dominant economic imperative, the court recognized the policy's infringement of the workers' property right, construed widely to include her legitimate economic expectation of benefiting from her full allotted period of work in Israel. More significant was the acceptance of the universal imperative. The majority opinion acknowledged the state's sovereign right to shape its immigration policy. However, it found that the directive infringed disproportionately, and to an extent greater than required, on the workers' constitutional right to family and parenthood that derives from the right to dignity. The court found that, while the directive had a proper purpose, the state could have dealt with the negative effects on the Israeli labor market and the unemployment rates in other ways than by severely infringing the workers' right to family.[135] Finally, the court noted the directive's discriminatory effect on pregnant workers in violation of Israel's antidiscrimination laws.[136] Accordingly, the Supreme Court declared the directive invalid, although it qualified its opinion by suggesting that the state could craft a new, less restrictive directive. For example, the court suggested that a directive that limits the workers' period of work to the completion of her 63 months in Israel, denying possible extensions, may be constitutional. In addition, a new directive may stipulate that the child's status derives from and will not exceed his mother's legal status. Furthermore, it may require the worker to provide reasonable assurances guaranteeing that she will leave the country when her visa expires. Finally, the court noted that the worker's visa can be conditioned on her ability to combine her new family commitments with her

134) *Basic Law: Human Dignity and Liberty*, s. 8.

135) HCJ 11437/05 *Kav La'Oved and others*, (see note 131), at paras. 63-5.

136) *Ibid.*, at para. 52.

obligations at work. It further clarified that its opinion applies only to documented migrant workers and does not cover undocumented workers.[137]

The successful humanitarian challenge to Israel's JSR by the amnesty programs for children of migrant workers and their families, and the invalidation of the pregnant migrant worker directive altogether, suggest that the migrant workers' sphere of migration is malleable and sensitive to humanitarian concerns. Yet, despite the successful challenges to the sphere's logic, the limits of the humanitarian imperative are also evident. While it has some transformative potential in this sphere, it is still clearly limited by the dominant economic imperative and is still in the shadow of the political imperative that colors Israel's JSR more generally. The 2006 and 2009 amnesty programs were a clear and direct challenge to Israel's exclusive JSR, yet the strict criteria for eligibility, the one-time nature of the programs, and the small number of beneficiaries suggest that the programs represent merely a minor dent in Israel's JSR, rather than its full-blown transformation. The invalidation of the pregnant migrant worker directive represents an even milder challenge to Israel's JSR. While the court has clearly expanded the possibilities for migrant workers to enjoy family life while in Israel, such enjoyment is still conditioned on Israeli economic interests, as defined by the state. The court has suggested that the worker's ability to perform her work as a mother can be part of the conditions of her stay, the child's rights limited to those of his mother, and the mother required to post reasonable securities to guarantee her eventual departure. Accordingly, as opposed to the "Israeli Children" campaign, which challenged the basic tenets of Israel's JSR, here the humanitarian imperative operated to soften the exclusionary principles of the JSR, but did not transform it at its core.[138]

The limitation of the humanitarian imperative is all the more evident in the ongoing legal controversy over the state's policy on family reunification of Israeli Palestinians who have married Palestinians from the OPT. Within this sphere of migration, which is dominated by the political imperative,

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137) *Ibid.*, at paras. 68-70.

138) New guidelines were published in 2012: Guidelines for the Treatment of a Pregnant Foreign Worker or a Foreign Worker who gave Birth (February 22, 2012). The new guidelines allow the woman to stay in Israel with her child and continue to work, as long as her availability is not impaired. She may also leave and return to Israel without her child within 12 months of her departure.

and specifically - the relationship between Israel and the Palestinians - the universal imperative, specifically the right to family, bows to political considerations.[139]

In 2003, following the second Palestinian uprising (*intifadah*), the Knesset enacted The Citizenship and Entry into Israel (Temporary Order) Law.[140] The Temporary Order prohibited granting Israeli citizenship or permanent residency to Palestinian residents of the OPT who apply for citizenship as part of family reunification.[141] The "temporary" order has been extended every year since. By implication, it deprives Israeli (almost all of whom are Palestinian) citizens of the right to unite with their non-citizen spouses from the OPT. A group of NGOs, individual petitioners and some Knesset members and political parties petitioned the HCJ against the temporary order. The petition was denied in 2006, and denied again after its resubmission in 2012, each time by a slim 6 to 5 majority of the court.

As in the litigation over migrant workers' right to have a child in Israel, the petitioners argued at two levels. First, in line with the dominant political imperative, they argued that there is little evidence that spouses and children from the OPT, as a group, pose a security risk to Israel. To the extent that a certain individual poses a security risk, they should be checked on an individual basis. That Palestinian entrants, as a group, do not necessarily pose a security risk is evident from the fact that Israel allows the entrance of Palestinian day laborers to work in Israel. Therefore, what underlies the Temporary Order is an illegitimate "demographic" motive: to limit the growth of the Palestinian population in Israel. Second, the petitioners attempted to override the political with a universal imperative, arguing that the law violates Israeli citizens' right to family. Prior to the law's enactment, and, to this day, in relation to spouses not from the OPT, non-citizens who married Israeli citizens could become naturalized through a gradual, 4.5-year process, during which the authenticity of the marriage was examined and the spouse underwent annual reviews to ensure she does not pose

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139) HCJ 7052/03 *Adalah v. Minister of the Interior* (May 14, 2006); HCJ 544/07 *The Association for Civil Rights in Israel v. Minister of the Interior* (January 11, 2012).

140) Citizenship and Entry into Israel (Temporary Order) Law, 2003, S.H. 544. The law continued an executive order on the issue that had been in place since 2002. See Government Decision no. 1813, May 12, 2002.

141) The law included few exceptions, most notably exceptional treatment of collaborators with the Israeli security services. The Citizenship and Entry into Israel (Temporary Order) Law, 2003, Article 3(2).

a security or criminal threat.[142] Petitioners argued that, after its enactment, Israeli citizens who married residents of the OPT could no longer fulfill their right to family in Israel. Moreover, this disproportionately affected Palestinian Israelis, thus constituting a discriminatory infringement of the right to family of that group in particular.

The state rejected the universal claims and asserted the political imperative, arguing that the only purpose the law serves is security. It is aimed at preventing spouses from the OPT from assisting or committing terror attacks in Israel, and is legitimate as long as the conflict persists. The state denied the petitioners' suggestion that any demographic motivation lies behind the law.

In the first petition against the Temporary Order, the Supreme Court, sitting in an expanded panel of 11 justices, denied the petition by a 6 to 5 majority. All the justices agreed that the law is based on security alone and has no demographic motivation. The main majority opinion argued that, given the renewed armed conflict between Israel and the Palestinians, the security threat that allowing the entrance of Palestinians from the OPT to Israel poses is real and significant, and can, therefore, justify some infringement of Israeli Palestinian citizens' right to family. Some of the majority's judges rejected the relevance of the right to family altogether. Others accepted its relevance, but held that the imperatives must be balanced and accepted the state's balance. Given the high security threat, denying all Palestinian residents of the OPT the right to family unification is justified since it guarantees greater security for all Israeli citizens and residents.

The main dissenting opinion, by Chief Justice Barak, found that the law is unconstitutional because the group denial of family reunification excessively infringes on the right to family, and does not withstand the constitutional limitation clause. The minority opinion argued that the law fails the required proportionality test because the margin of security created by the group denial of family reunification does not justify the violation of the Palestinian citizens' rights to equality and to family in Israel.

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142) The common procedure for naturalization of non-Jewish spouses is rooted in The Nationality Law (1952), Article 5: "Adults may acquire Israeli citizenship by naturalization at the discretion of the Minister of the Interior and subject to a number of requirements…" The current procedures stem from one of the more important cases in the post-JSR immigration regime: HCJ 3648/97 *Stamka* (see note 17).

The family reunification restriction and the court's decision were received with harsh criticism in some quarters[143] and staunch support in others.[144] Since the court handed down its opinion, the Temporary Order has been regularly extended. In 2005, following the criticism of the Temporary Order by the HCJ, the restrictions were "softened" so as to allow the Minister of Interior, at his discretion, to grant temporary residencies to certain family members depending on their age group.[145] In a later attempt to petition the court against a revised version of the Temporary Order, the court remained split 6 to 5, with different variations in the argumentation, but overall acceptance by the majority opinions of the political imperative's priority.[146]

In sum, the Supreme Court did not flatly reject the claims framed by the universal imperative. Some judges accorded such claims greater weight. Others preferred to balance the claims of the different imperatives in favor of the political imperative. Only a minority of the judges claimed that the right to family is immaterial. However, clearly, the thrust of universal claims in the context of the Israeli-Palestinian nexus carries much less weight than in the sphere of non-Palestinian migrant workers. Hence, similar claims are weighted contextually. Universal claims of human rights fare somewhat better in the sphere that is dominated by economic interests than in the sphere marked predominantly by the political imperative.

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143) Guy Davidov et al., "State or Family? The Nationality and Entry into Israel Law (Temporary Order) 2003," *Mishpat U-Mimshal* 8 (2005): 643 [Hebrew]; Aeyal Gross, "From Friend to Foe: Justice, Truth, Equity and Common Sense Between Israel and Utopia in the Citizenship Law HCJ Case," *Ha-Mishpat* 23 (2007): 79 [Hebrew]; Yoav Peled, "Citizenship Betrayed: Israel's Emerging Immigration and Citizenship Regime," *Theoretical Inquiries in Law* 8, no. 2 (2007): 333; Yaakov Ben-Shemesh, "Constitutional Rights, Migration and Demographics," *Mishpat U-Mimshal* 10 (2007): 47 [Hebrew]; Na'ama Carmi, "The Nationality and Entry into Israel Case before the Supreme Court of Israel," *Israel Studies Forum* 22 (2007): 26.

144) Advisory Committee for the Examination of an Immigration Policy for the State of Israel, Interim Report (February 2, 2006); Amnon Rubinstein and Liav Orgad, "Security of the State, Jewish Majority and Human Rights: The Case of Marriage Migration," *Ha-Praklit* 48 (2006): 315 [Hebrew]. Zilbershats, "On the Migration of non-Jewish Foreigners", (see note 132).

145) Article 3 of the revised Temporary Order allows discretion to grant temporary residency to men over 35, women over 25, and children under 14 whose wives, husbands or parents, respectively, are legal residents of Israel. It also grants discretion in special humanitarian cases.

146) HCJ 544/07 *The Association for Civil Rights in Israel v. Minister of the Interior* (January 11, 2012).

c. Regime Development and the Search for a Dominant Imperative

The most recent development challenging Israel's JSR concerns African asylum-seekers entering Israel across the Egyptian border. At the outset, the sphere of migration of asylum-seekers and refugees was dominated by the universal imperative. However, as discussed in the previous section, the process for assessing claims of refugee status was underdeveloped and reconsidered only after the growing wave of entrants seeking asylum. Within the framework of the humanitarian imperative, NGOs have been pushing for improvement in the institutional implementation of the principles established by the international regime of protection for refugees. Most notably, they are calling for a more effective and rigorous RSD process, the extension of rights to applicants during the status determination process, and granting of citizenship (or permanent residence) rights to those recognized as refugees.[147]

However, the state has been more receptive to universal humanitarian claims when it has controlled the entry of asylum-seekers, as was demonstrated by the anecdotal opening of the gates to the Vietnamese refugees. The state became reluctant to accept the humanitarian arguments when it came to the recent 'unwelcome' wave of entrants across the Egyptian border. Moreover, the more the state has been confronted by its obligation to develop and improve the RSD administrative process in a just and fair way, the longer and more cumbersome the process has become, thus making it even more difficult to apply to the growing number of entrants. There is also a governmental concern that a better RSD process will only serve to make Israel more of a magnet for asylum-seekers. Consequently, side by side with its acknowledgment of Israel's humanitarian obligations under the Refugee Convention, the state has incorporated other imperatives to undermine the coverage of the humanitarian obligation. It has framed the phenomenon in political terms, highlighting the illegal trespassing of borders ('infiltration'), and in economic terms, emphasizing that many asylum-seekers are actually economic migrants.

While the state almost flatly denies all the applications for refugee status,[148] it does grant temporary group protection to individuals who arrived

147) See cases cited in note 64. Also, see Yuval Livnat, "Refuge and Permanent Status in the Receiving State," in *Refugees and Asylum Seekers*, ed. Tali Kritzman (Van Leer Institute, forthcoming 2013).

148) See data in note 65.

in Israel from designated regions and countries.[149] Drawing on the distinction made in the previous section between the political and economic imperatives, the substitution of RSD with temporary group protection can be conceived as the replacement of the humanitarian by the political imperative. The political imperative, characterized by foreign relations, trumps the state's obligations towards individuals. The temporary group protection creates partial measures of protection for identified groups of people, from designated states, without addressing their individual needs, individual stories, and life prospects.

Much like in the context of migrant workers, the move from the individual humanitarian obligation to collective political framing has had uneven effects on different groups of border crossers. On the one hand, temporary group protection provides asylum-seekers with an easily obtained right to stay in Israel without being deported, a right that, perhaps, may not be granted to some of them upon individual review of their cases. At the same time, the political framing enables the state not only to accommodate large groups, but also to revoke their permit wholesale when the situation in the country of origin changes, as was the case for citizens of Côte d'Ivoire after the general elections that were conducted there in 2010,[150] and for citizens of South Sudan when that state declared its independence.[151] Admittedly, individuals within groups who have lost their temporary group protection status have the option of applying for individual RSD. However, while the burden of proof is on the state when revoking a refugee status, the burden of proof in the transition from temporary group status to refugee is on the

149) The status of temporary group protection is not clearly grounded in legislation. It is revealed in the case law in incremental fashion. See, for example, Admin. Court (Jerusalem) 53765-03-12 *ASSAF and Others vs. The Minister of Interior and others* (June 7, 2012).

150) On May 2011, the Immigration Authority declared that, due to the elections in Côte d'Ivoire, its citizens should prepare to leave Israel. Consequently, since January 1, 2012, citizens of Côte d'Ivoire have become "illegal stayers". See http://piba.gov.il/spokesmanshipmessagess/pages/ivory_coast.aspx [Hebrew] (accessed 30 August 2012); Admin. Court (Jeruslaem) 58162-01-12 *Abu Bakayauku vs. Minister of Interior Affairs* (June 24, 2012), rejecting a petition against the Ministry of Interior's decision to lift the group protection given to Côte d'Ivoire citizens.

151) With the independence of South Sudan, the state revoked the temporary group protection for its subjects and, following the court's approval, in 2012, it began promoting a 'voluntary return' combined with forced deportations. See Admin. Court 53765-03-12, (see note 148).

asylum seeker.[152] Moreover, the revocation of the temporary group protection may be based on an improved political situation in the country of origin, a finding that, in turn, may reduce individual applications' chances of succeeding. Individuals who have lost their temporary protection status, therefore, face a dual challenge. First, they must go through the slow and underdeveloped RSD process like asylum-seekers from countries to which no group protection has been applied. Second, their claim must confront a presumption that the political climate in their country of origin no longer puts most citizens at risk. Given that COI (country of origin information) reports are material to individual asylum claims,[153] the state's a-priori position is that the situation in the country of origin has improved. The burden of proof on individuals in this situation is, therefore, augmented.

The political framing not only makes it possible to depersonalize (or politicize) a situation in which many are crossing the border into Israel, but also entrusts the state with a responsibility towards collective wrongdoings in the process of entry. This is being met by ongoing political negotiations between Israel and Egypt. Such negotiations can lead to protective outcomes that extend greater protection to entrants. However, they often lead to exclusionary outcomes, with stronger border controls and the denial of entry to 'infiltrators' altogether.[154] Israel has further claimed that, given asylum-seekers' arrival in Egypt, they should pursue refugee status there rather than in Israel. In fact, Israel claims that requests for refugee status should be measured by observing the applicants' status in Egypt, and not in their home countries.[155]

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152) On the burden of proof in terminating refugee status, see Convention Relating to the Status of Refugees (1951), Article 1(C)(5).

153) On the importance of COI reports, see Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), *Researching Country of Origin Information: A Training Manual* (ACCORD COI Network & Training, 2004), http://www.unhcr.org/refworld/docid/42ad40184.html (accessed 30 August 2012); UNHCR, Country of Origin Information: Towards Enhanced International Cooperation (UNHCR, 2004), http://www.unhcr.org/refworld/docid/403b2522a.html (accessed 30 August 2012).

154) On the situation in Egypt, see Chantal Thomas, "Migrant Domestic Workers in Egypt," *American Journal of Comparative Law* 58, no. 4 (2010): 987, 1019-20.

155) In response to the petition filed by NGOs against the practice of "hot return" (HCJ 7302/07, (see note 71)), the state argued that the "hot return" policy is consistent with the 58th adopted conclusion (1989) of The Executive Committee of the United Nation High Commissioner for Refugees, http://www.unhcr.org/refworld/pdfid/4b28bf1f2.pdf (accessed 30 August 2012), which states that "…(e) Refugees and asylum-seekers, who have found protection in a particular country, should normally not move from that country in an irregular

The powerful restrictive effect of the political imperative has led NGOs representing asylum-seekers to shape arguments in different forms. The first type of argument is internal to the political imperative. It is characterized by accepting the collective protection arrangement, while contesting some of the political measures that are used to re-categorize, and thereby shrink, the group of asylum-seekers. For example, NGOs and public interest lawyers argued that the Ministry of Interior's revocation of group protection for citizens of Côte d'Ivoire and South Sudan is based on a mistaken assessment of the political situation in those countries.[156] They have also urged the state to assume greater responsibility for the perilous journey to Israel, criticizing measures that seek to distance the state from such responsibility, e.g., the practice of 'hot return', and demanding that the state take stronger action to prevent grave violations of human rights, including torture, on the way to Israel.[157]

The second type of argument is external to the political and seeks to reassert the dominance of the universal (humanitarian) imperative beside the political. Such arguments find fault with the preemption of the RSD process by temporary group protection. For example, several NGOs have contested the construction of a large detention camp for infiltrators, claiming that the state is mistaken in its assumption that broad temporary group protection measures remove 'infiltrators' from the status of asylum-seekers and relieve the state of its responsibility towards asylum-seekers. The state cannot hold both ends of the stick, goes the argument, granting temporary group protection in lieu of conducting RSD on the one hand, while asserting that asylum-seekers are mostly labor migrants and, therefore, non-eligible claimants on the other hand. Hence, the

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manner in order to find durable solutions elsewhere but should take advantage of durable solutions available in that country through action…" See paragraph 4 of Chief Justice Beinish's opinion in HCJ 7302/07, *Hotline for Migrant Workers et al.*, (see note 71).

156) This course of action was advanced by attempts to draw on the judiciary to prevent the permit's revocation. For the case of South Sudan, see Admin. Court (Jerusalem) 53765-03-12, (see note 148). On Cote d'Ivoire, see: Admin. Court 58162-01-12, (see note 149). In both cases, the courts refused to intervene in the state's decision to revoke the permit.

157) On the attempts to restrain the use of "hot return" measures, see HCJ 7302/07 *Hotline for Migrant Workers et al.*, (see note 71). On the debates over the state's responsibility for inhumane practices that take place on Egyptian soil, see the Knesset Special Committee on Foreign Workers, protocol of meeting held on February 21, 2012 on the topic of trafficking in human beings in Sinai, on the path of asylum-seekers to Israel.

solution should be to extend the RSD process to all those who have entered Israel.[158]

While the two strategies of argumentation are not mutually exclusive, they do display two distinct approaches that are currently voiced by civil society. The first accepts, even if reluctantly, the current form of politicization and the emphasis on temporary group protection. It takes these arrangements as the point of departure, seeking to improve the rights of those who enjoy temporary group protection, despite the limitations and fragility of this status. The second strategy seeks to abandon the current political framing and install the RSD process as the sole acceptable institution for this recent wave of migration.

The importance of observing the entire gamut of imperatives being used is highlighted by a third type of argument that seeks to emphasize the economic imperative. While NGOs disagree with the state's claim that most asylum-seekers are actually economic migrants, they still draw on economic arguments to insist on extending social and economic rights as an integral part of the legal regime governing asylum-seekers' migration.[159] They argue against the political framing that culminates in the denial of individual economic rights, the right to work in particular.

The controversy over asylum-seekers' right to work can be seen as a humanitarian argument anchored in the universal imperative. However, it is also characterized, at times, by purely economic concerns. The Israeli government's policy in relation to asylum-seekers' work exhibits this duality. The state dictates an erratic policy on the matter of work, enabling and criminalizing it at the same time. For example, despite the general proscription against labor market participation by asylum-seekers,[160] over time, some of the 'infiltrators' who were initially placed in detention centers have been released to work in places where there was a shortage of labor supply, most notably in the hotel industry in Eilat.[161] Another such

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158) A letter written to the planning authorities by five NGOS: Amnesty international, The Workers Hotline, The Hotline for Migrant Workers, ASSAF, and Physicians For Human Rights (November 6, 2011), http://www.amnesty.org.il/_Uploads/dbsAttachedFiles/Objection.pdf paragraphs 12-29, [Hebrew] (accessed 30 August 2012).

159) HCJ 6312/10 *Kav La'Oved et al. vs. Ministry of the Interior et al.* (January 19, 2011).

160) For the details of convoluted policies on the right to work, see Livnat, "Refugees, Employers and 'Practical Solutions", (see note 74), at 23-6.

161) On the employment crisis in Eilat, see the protocols of the Knesset Committee on Foreign Workers (January 9, 2007 and October 16, 2007) [Hebrew]. While the objective was

policy was the permission to work outside the country's central metropolitan area (the "Hedera-Gedera" arrangement, marked by two towns that form the boundaries of the metropolitan area), to avoid the concentration of asylum-seekers in the central cities.[162] When towns in the periphery that absorbed large numbers of asylum-seekers argued that the state is engaging in economic and social 'dumping' on weak peripheral towns, the Ministry of Interior granted a group of asylum-seekers a temporary refugee visa (despite the fact that they were not given refugee status) that entitled them to work; another group was granted migrant workers' visas.[163] Later, a new policy was introduced: the passports of asylum-seekers going through RSD were stamped with a restriction on working in Israel. Kav La'Oved challenged this policy in the Supreme Court. In response, the state asserted that the new policy is a mere formality: the stamp states the longstanding legal situation, but, substantively, the restriction will continue not to be enforced, and neither the workers nor their employers will be punished.[164] While the fluctuating policy on work can be viewed as the result of contestation within the purview of the universal-humanitarian imperative, it is all too often reflective of changing economic needs, the pressures of economic interests and NIMBY concerns of local communities, and is, therefore, better understood as nesting within the confines of the economic imperative.

The response of NGOs to the ever-shifting policy on work has been framed in universal terms, emphasizing the right of asylum-seekers and the

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to replace foreign workers with Israeli workers, the tourism industry opted to employ asylum-seekers. See the protocols of the Knesset Committee on Foreign Workers (July 25, 2007); Tamar Dressler, "From Darfur to Eilat," *YNET*, June 14, 2007 [Hebrew]. By July 2008, the state started giving out restricted visas denying the right to work in Eilat. See HCJ 10463/08 *The African Refugee Development Center and others vs. The Ministry of Interior* (6.8.2009).

162) On February 2008, the Ministry of the Interior issued the geographical restriction known as "Hedera-Gedera", limiting asylum-seekers' presence to the northern and southern parts of the country, as part of the A/5 visa conditions. It was never articulated as a formal procedure, nor were the reasons for it clarified. See HCJ petition 5616/09 *The African Refugee Development Center vs. The Ministry of Interior* (26.8.2009) [Hebrew]. The petition was dismissed once the Minister of Interior, Eliyahu Ishai, decided to abolish the Hedera-Gedera policy on August 3, 2009.

163) This group consisted predominantly of Eritrean asylum-seekers. See HCJ 10463/08, (see note 159).

164) HCJ 6312/10 *Kav La'Oved et al.*, (see note 157). For a critique of this policy, emphasizing the gap between the law on the books and the law in action, see Livnat, "Refugees, Employers and 'Practical Solutions", (see note 74).

beneficiaries of temporary group permits to gainful income. However, their arguments also highlight the economic deficiency of the state's strategy. They have argued, for example, that the state is constantly opening its gates to migrant workers, even when there is no real labor shortage, while at the same time it denies asylum-seekers the right to work, voicing concerns about their impact on the labor market. Such arguments resonate with the calculus that is characteristic of the economic imperative and highlights individual economic needs and rights, similar in kind to those voiced in the context of the equalization levy and the binding arrangement. This type of argument seeks recognition of the individual permit-holder as deserving of access to gainful employment, recognizes the state's ongoing economic need for 'foreign' workers, and seeks to satisfy the demand for workers within Israel.

Straddling the universal imperative, on the one hand, and the political and economic imperatives, on the other, both the state and NGOs move back and forth between different types of argumentation. None of the imperatives is used exclusively to improve or withdraw rights categorically. The large numbers of entrants from Africa into Israel as asylum-seekers today pose the greatest challenge to Israel's JSR. Yet, due to constant developments, policy changes, and disputes over policymaking, it is difficult to characterize the nature of the emerging third sphere of post-JSR migration. Arguments are posed strategically within and across the three imperatives. Consequently, at present, this sphere cannot be said to comply with the universal imperative. Instead, interchangeable humanitarian, political, and economic claims are being made by all sides. It is, therefore, best characterized as a sphere whose boundaries (the size of the sphere) and content (the imperative governing it) are still being configured.

Conclusion

In this article, we have offered a framework for conceptualizing the changes in Israel's immigration regime in relation to non-Jews. Our main argument is that, due to globalization and economic and political changes in Israel and the region, in the last two decades, Israel's Jewish-Settler Regime (JSR) has been transformed into what we call a post-JSR. Israel's post-JSR is made up of three main spheres of migration, governing Palestinians from the OPT, migrant workers, and asylum-seekers, respectively. Each of these spheres was originally carefully carved out in order to preserve Israel's JSR,

on the one hand, while nevertheless acknowledging the presence of "aliens" in Israel, on the other hand. Each sphere is dominated by a different functional imperative – political, economic, and universal-humanitarian, respectively. In the article, we have attempted to show that the legal regime that developed within each sphere roughly corresponds to that sphere's dominant functional imperative, yet moments of transformation are often the result of sphere contestation – incidents in which various stakeholders attempt to redefine the imperatives infusing the sphere's legal regime.

The description resonates, to some extent, with previous studies that have described Israel's immigration regime as dominated by economic (capitalist) consideration, or by a Zionist-nationalist ones. However, our study suggests that, although both the capitalist and Zionist logics have significant explanatory power, neither of them, alone, can explain all aspects of the changing regime. Moreover, the two explanations would be incomplete even if taken together,[165] since certain – even if, admittedly, limited – aspects of the changing regime are influenced by universalist-humanitarian considerations.

Despite the fact that the three imperatives work in tandem in Israel's post-JSR, and each may exert its dominance in the separate spheres, the case studies suggest that they are not of equal strength when in competition. The political-nationalist imperative on which Israel's JSR was based appears to have a strong lingering effect on Israel's post-JSR, not only as part of the political imperative within the sphere of Palestinian migration, but also as an interloper in the other two spheres, offering strong competition to the economic and universal imperatives. The dominance of the political imperative is evident in the trilogy of family reunification cases, and in the attempts to redraw the categorization of asylum-seekers and replace the state's humanitarian responsibilities with collective permits for temporary stay.

One particular aspect of the political imperative in Israel is the ongoing Palestinian-Israeli conflict, which haunts the development of the immigration regime, inside as well as outside the sphere of Palestinian migration.[166]

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165) Amiram Gil and Yossi Dahan, "Between Neo-Liberalism and Ethno-Nationalism: Theory, Policy and Law regarding Deportation of Migrant Workers in Israel," *Mishpat U-Mimshal* 10 (2007): 347 [Hebrew].

166) Compare Christian Joppke and Zeev Rosenhek, "Contesting Ethnic Immigration: Germany and Israel Compared," *Arch. Europ. Sociol.* XLIII, no. 3 (2002): 301, 307.

For example, the criteria for naturalization in the amnesty program for children of migrant workers were explicitly designed to exclude children of Palestinians from the OPT that were born and raised in Israel.[167] The conflict has shaped the treatment of asylum-seekers, especially those from 'enemy countries' who enter Israel across the Egyptian border.[168] For example, the strict Prevention of Infiltration Act – 1954, currently used mostly in relation to such border crossers, was originally crafted in the 1950s to combat the *Fadayun,* the general term for illegal Palestinian border crossers that entered Israel in the 1950s and 60's.[169] It is, therefore, not surprising that some researchers have proposed that Israel's immigration regime is unlikely to undergo any significant liberalization and transformation until the resolution of the Arab-Israeli conflict.[170]

However, despite the strength of the political imperative, in both its general form and its particular manifestation against the backdrop of the Israeli-Palestinian conflict, it hardly exhausts the repertoire of considerations that constitute Israel's post-JSR. The development of the guest worker program, the admission of Palestinian day workers, and turning a blind eye to asylum-seekers' employment are all indicative of the economic imperative's powerful influence in all spheres. In fact, Israel's immigration regime can be told as the story of creation and re-creation of Israel's secondary, unskilled, labor force through waves of migration. The Jewish immigrants from Africa and the Middle East (*Mizrahi* Jews) who immigrated in the 1950s and joined Israel's secondary labor market, were replaced by Palestinian workers, who were then replaced by migrant workers, who were then complemented by asylum-seekers.[171] The role of the economic

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167) Kemp, "Managing Migration", (see note 111).

168) Michael Kagan, "Refugees and Israel's Changing Approach to 'Enemy Nationals'," in *Refugees and Asylum Seekers in Israel*, ed. Tali Kritzman (Jerusalem: Van Leer institute, forthcoming 2013).

169) See the explanatory notes for the original version of the Law, Proposed Bills, no. 161 (1953): 172.

170) Adrian Kemp, "Managing Migration, Strengthening Citizenship," in *Citizenship Gaps*, eds. Yosi Yona and Adriana Kemp (2010) [Hebrew]; Joppke and Rosenhek, "Contesting Ethnic Immigration", (see note 164), at 331.

171) Joppke and Rosenhek, "Contesting Ethnic Immigration", (see note 164), at 310-1, discussing the Mizrachi immigrants; Noah Lewin-Epstein, *Hewers of Wood, Drawers of Water* (Ithaca: ILR, Cornell University Press, 1987), discussing the replacement of the Mizrachi with Palestinian workers; Bartram, "Foreign Workers in Israel", (see note 26), discussing the substitution of Palestinian workers by migrant workers. "These immigrants were

imperative in each wave of migration suggests that the assumption that the Zionist Jewish immigration regime would be self-sufficient was undermined from Israel's earliest days, since the Israeli labor market always depended on waves of migration to guarantee the flexibility of the labor supply.

Finally, in the hierarchy of imperatives, the universal humanitarian imperative has proved to be the least powerful, but not insignificant. Key elements of the emerging regime, such as the amnesty program for children of migrant workers, the improvement of the RSD process and its procedural justice, and the striking down of the pregnant migrant worker policy and the binding policy, as well as the development of the IOM agreement in relation to Thai workers, cannot be explained without taking into account the impact of the universal imperative. The universal imperative gained strength following the constitutionalization of Israel's immigration policy in the early 90's, as part of the so-called "constitutional revolution" in Israel, with the legislation of Basic Laws establishing recognized human rights (akin to a constitutional bill of rights). International human rights and humanitarian discourse merged with the constitutional framing of immigration issues, strongly coloring the legal debate around the immigration regime. While we do not deny that expressions of the universal imperative may sometimes be minor giveaways for the purpose of legitimating Israel's highly restrictive post-JSR in the international as well as the national arena, we still find that the universal imperative, and respect for the rule of law, constitutional order, and international commitments that it stands for, play an important part in the transformation of Israel's immigration regime.

The analysis further suggests that each of the three imperatives is multifaceted, can push the regime in either a restrictive or inclusive direction, and is, therefore, used strategically by different actors at different incidents of contestation. Accordingly, although the political imperative mostly operates to support restrictive and exclusionary policies – for example, in relation to Palestinian day workers, Palestinian family reunification, 'infiltrators', and undocumented workers – in some cases, it may have the potential to expand state responsibility towards entrants, as we have seen in relation to

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considered mainly as an instrument for pursuing material state-building tasks, especially in increasing the Jewish population ratio, for planting Jews in the peripheral areas of the country with a high concentration of Palestinians, and for strengthening Israeli state and society in economic and military terms."

the development of bilateral and trilateral agreements seeking to grant indirect political voice to migrant workers. Similarly, the economic imperative has a rent-seeking version, pushing to liberalize the regime and permit the entry of workers, and a protectionist version, pushing to limit entry and increase reliance on Israeli labor. This dialectic quality of the economic imperative is further complicated, however, by the fact that its rent-seeking version appears liberal in terms of entry policies, but tends to be exclusionary in relation to social and economic rights while in the country, and to justify temporality, binding arrangements, denial of access to social security, etc. At the same time, the protectionist version of the economic imperative is exclusionary in relation to entry, but, once migrants have entered the country, it tends to support equal rights, decent wages, and economic inclusion to raise the costs of migrants' employment. Finally, the humanitarian argument predominantly pushes for regime liberalization and inclusion, but, at times, may push for restrictive policies in relation to entry to the country as well as shortening workers' stay under protectionist or paternalist arguments, as, for example, in the case of the ban on the arrival of new Nepalese workers due to workers' rights violations.

The three imperatives create a complex dialectic argumentation within each sphere in incidents of contestation over its dominant imperative. The selection of cases in this article suggests that the immigration regime's development is path-dependent and structured on the basis of incremental interaction between the three imperatives.[172] Both external shocks, such as the massive entry across the Egyptian border since 2007, or endogenous ones, such as the decision to admit migrant workers in 1993, compel response and adaptation. This is an incremental process in which strategies and institutions developed in one sphere affect those developed in other spheres. Such interactions include, for the most part, the layering of new institutional forms over older, ill-adapted forms, and the transformation of old forms that change their nature in new circumstances.[173] At such critical junctures, sphere contestation creates an option for further change. As in any path-dependent evolution, the question then becomes when and how the institutional trajectory can be diverted, permitting the creation of new directions. We have tried to provide a rough explanation of the process of

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172) See Kritzman and Kemp, "Between State and Civil Society", (see note 55).

173) Streeck and Thelen, "Institutional Change", (see note 13); Pierson, *Politics in Time*, (see note 13).

transformation, path-dependent development, and deviations through our study of cases highlighting the interaction between the three imperatives, their role within each sphere, and their relative strength in incidents of contestation. Sphere transformation and deviation from path-dependence occur, this article suggests, through attempts to transgress the respective dominant imperative of each sphere and deflect the nature of the regime at junctures along the way. Sometimes these junctures are identified in advance as cardinal to the modus operandi of the sphere, sometimes not. In both cases, deflection depends on the arguments or strategies that the parties deploy and the relative power of the imperative used, given the sphere that is being contested. The effect of moments of change is cumulative within each sphere and may reflect on possibilities in other spheres.

Following our description of preservation and transformation in the JSR, a significant question that remains unsettled is whether the ongoing contestation has actually culminated in a "post-JSR" or the changes are too nuanced and minor to undermine the premises of the original JSR. For example, along the axis of contestation between the universal, on the one hand, and the protective-economic and political imperatives, on the other, does the humanitarian, liberal challenge to the exclusionary regime transform its underlying premises, or is it merely a token for the sake of legitimacy? Similarly, is the emergence of the political imperative in the sphere of migrant workers sufficient to forgo the reliance on a "reserve army of labor" and forge a greater sense of accountability to the migrant workers themselves? Does the temporary group protection for border crossers from African countries represent a deep structural change in Israel's political obligations in the region and a necessary adaptation of the humanitarian sphere in conditions of mass entry? Or is it, perhaps, a measure intended to avoid more far-reaching obligations and fortify the borders?

We have no simple answers to these questions. While our analysis suggests that Israel's JSR has undergone some transformation and liberalization, the extent of the transformation varies due to the uneven developments in the different spheres. We, therefore, believe that it is justified to talk about a new and evolving post-JSR regime, but we still find ourselves going back to the JSR as its cornerstone.

Although our analysis is, in the first place, contextual, relating to the particular Zionist characteristics of the State of Israel, many of the lessons can be generalized to other sovereign nation states. Indeed, the Zionist elements of the regime – the Jewish ethno-national criteria – or the specific elements resulting from the occupation, such as the exclusion of

Palestinians from the OPT – are prominent in the story of Israel's changing immigration regime. However, the regime's transformation has much in common with the wider challenge that globalization poses to Westphalian sovereignty and restrictive migration regimes around the globe. In particular, the methodological approach is transferable to other immigration regimes, namely identifying the separate roles the various imperatives play, the interplay between them, and the incidents of contestation that steer path-dependent developments in new directions.