Irreconcilable Principles: Minority Rights, Immigration, and a Religious State

Abigael C. Bosch
Indiana University Maurer School of Law, acbosch@indiana.edu

Follow this and additional works at: https://www.repository.law.indiana.edu/ijgls

Part of the Comparative and Foreign Law Commons, Immigration Law Commons, Jewish Studies Commons, and the Practical Theology Commons

Recommended Citation

This Note is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Journal of Global Legal Studies by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact rvaughan@indiana.edu.
Irreconcilable Principles: Minority Rights, Immigration, and a Religious State

ABIGAEL C. BOSCH*

ABSTRACT

A state formed to attract immigrant settlement in the aftermath of World War II, Israel was founded as an explicitly Jewish, yet democratic state. Israel's democratic and Zionist motivations are readily identifiable in its Declaration of Independence and have pervaded the country's legal landscape since its establishment. In recent years, however, the steady influx of African asylum seekers traveling to Israel in hopes of securing a better life have proven difficult for Israel to manage. Israel's commitment to preserving the state's Jewish character while still maintaining traditional democratic principles like equality creates a scenario where the so-called "infiltrator" asylum seekers may be reluctant to enter and remain, thereby forcing other countries to absorb them.

INTRODUCTION

Immigration is a phenomenon that has particularly global implications.\(^1\) Absorbing noncitizens, either temporarily or permanently, affects a state's culture, society, and economy.\(^2\) Similarly, a state that encourages citizens from other states to relocate elsewhere, intentionally or not, misses a valuable opportunity to gain human capital and diversify its body of citizens.

---

* Senior Managing Editor, Indiana Journal of Global Legal Studies, Volume 24; JD Candidate, Indiana University Maurer School of Law, 2017. The views expressed in the article are the author's alone. I am immensely grateful for my friends and mentors who offered their support during this process, and I specifically thank Professor Seth Lahn for his encouragement and guidance throughout my endeavors.


Despite these global effects, immigration is often regulated at the state level. Sovereign states have almost complete control over their immigration policies. In most cases, any noncitizen who wishes to enter a state, whether as an immigrant or as a tourist, is at the mercy of the state’s discretion. That discretion might be based on a wide array of considerations: the safety of the state in allowing more people within its borders, the cost of permitting a person to enter, and the potential economic and social gains that such entry may entail. Whatever the rationale, a state’s immigration policy is up to the state itself.

Unsurprisingly, the determination of why a person should or should not be allowed within a state’s borders often accompanies considerations of the state’s cultural character, whether implicitly or explicitly written into its immigration policy. For example, Israel, allows persons of a particular background to be more easily admitted into the state—the Right of Return, a founding principle of the state, permits every Jew worldwide to immigrate to Israel. This form of positive law ensures the state a large degree of control while avoiding the criticized aspects of negative immigration law, which denies a group entry based on its ethnicity or heritage. In addition, a state can prevent certain groups from settling within its borders by means other than explicit negative or positive law. One way to discourage immigration or encourage emigration, for example, is by disadvantaging the foreign party both socially and economically.

3. Zilbershats, supra note 1, at 128.
4. Id.
5. Id.
6. See id. at 133.
7. Id. at 128.
8. See id. at 133.
11. See Zilbershats, supra note 1, at 137-38 (describing how people are motivated to avoid negative phenomena like “persecution of religious and ethnic minorities and the denial of their human rights; various forms of political oppression; starvation and exploitation of the population in the homeland; inequality of women and subjection”); As Sweden Offers Shelter, Denmark Tries to Discourage Refugees, PBS NEWSHOUR, (Sept. 4, 2015, 6:35 PM), http://www.pbs.org/newshour/bb/sweden-offers-shelter-denmark-tries-discourage-refugees/ (suggesting that a refugee may choose not to immigrate based on the relative threat to his wellbeing in a given country based on things like sexuality, draft susceptibility, and so forth).
IRRECONCILABLE PRINCIPLES

As a state formed to attract immigrant settlement in the wake of World War II, Israel presents a curious case for review. Established in 1948, Israel was founded based on two main principles. First, Israel was established as a Jewish state. In this respect, Israel focuses on preserving three Zionist tenets: "(1) the right of return, i.e., the right of every Jew to immigrate to Israel; (2) the maintenance of a Jewish majority in the State, and (3) a connection between the Diaspora and the State of Israel."12 Second, Israel was founded a democratic state.13 By definition, Israel also seeks to protect "the principles of social equality and respect for the individual within the community."14 These democratic and Zionist motivations are readily identifiable in Israel's Declaration of Independence and have pervaded Israel's legal landscape since its establishment in 1948.

Despite Israel's proclaimed commitment to democratic principles, various instances of rights discrimination in the state's short history—often and obviously related to the Middle East Conflict—have prevented the non-Jewish minority from achieving the same rights as Jewish Israelis.15 As recently as 2011, Israel has considered formal legislation that benefits its Jewish majority at the expense of non-Jewish Israelis. On August 3, 2011, forty of Israel's Knesset members signed a proposal that sought to interpret the phrase "Jewish and democratic state," which appears in Israel's Basic Law: Human Dignity and Liberty. Most notably, the proposal defined Israel as the nation state of the Jewish People.16 According to one source, "[t]hat not only means that the country's national holidays are Jewish religious holidays or that the flag is the Magen David; it also means that Jewish law will be the inspiration for Israel's legal system . . . ."17

In addition, the steady influx of African asylum seekers traveling to Israel in the past decade has made it even more difficult for Israel to retain its Jewish character while preserving democratic principles. According to a report issued by Israel’s Population and Immigration Authority (PIA) in April 2015, “nearly 65,000 Africans crossed illegally into Israel between 2006 and 2013.”\textsuperscript{18} These “infiltrators”—as Israel refers to them—have reportedly “created fear that the demographic changes resulting from a wave of impoverished Africans, mostly Muslims from Sudan and Christians from Eritrea, would overwhelm the Jewish nature of the state.”\textsuperscript{19} Israel’s treatment of the African entrants has been controversial: the state has authorized prolonged detention of asylum seekers and has built two detention camps to hold them while their applications for asylum are processed.\textsuperscript{20} Applications often take years to be reviewed and are rarely granted—less than one percent of asylum applications submitted since 2009 have been accepted.\textsuperscript{21} Moreover, African asylum seekers have been subject to pervasive racial violence and harassment.\textsuperscript{22}

Because the quality of life a person may achieve in a state is undoubtedly related to the willingness of minority groups to settle and stay there, Israel’s attitude toward its non-Jewish inhabitants is of critical importance to its immigration system. This Note argues that Israel’s commitment to preserving the state’s Jewish character while still maintaining traditional democratic principles like equality creates a scenario where non-Jewish immigrants—often Arabs or African asylum seekers—may be reluctant to enter and non-Jewish Israelis may

---


\textsuperscript{19} Id. (citing William Booth, Israeli Government to Refugees: Go Back to Africa or Go to Prison, WASH. POST (May 14, 2015), https://www.washingtonpost.com/world/middle-east/toughening-its-stance-toward-migrants-israel-pushes-africans-to-leave/2015/05/14/e1637bce-f350-11e4-bca5-21b51bd793e_story.html [https://perma.cc/7SWT-Q2L3] (internal quotations omitted)).

\textsuperscript{20} Can Israel Have a Fair Asylum Law Without Confronting the Nakba?, NAKBA FILES (June 29, 2016), http://nakbafiles.org/2016/06/29/can-israel-have-a-fair-asylum-law-without-confronting-the-nakba/.

\textsuperscript{21} Id.

\textsuperscript{22} Id.
be reluctant to stay. It examines how Israel's disparate treatment of its Jewish and non-Jewish residents is in part the result of Israel's irreconcilable founding principles as a Jewish, democratic state. Although not the only factor influencing immigration, of course, Israel's treatment of its non-Jewish population and its commitment to preserving Israel's Jewish character showcases how democracy, individual rights, and immigration policy intersect. The effects of that intersection in the global legal context show that seemingly permissive immigration laws may be weakened by structures within a state that indirectly discourage immigrants from starting a new life within a particular state.

Part I of this Note reviews the purposes for which Israel was created and how it is perceived by the majority and minority populations. Part I explains how Israel's irreconcilable founding principles render the Supreme Court's democratic role as a protector of rights particularly difficult to accomplish. Part I goes on to argue that because Israel's government is dominated by the Jewish majority, the state's commitment to Zionist goals will almost always prevail over democratic principles.

Part II describes how the Supreme Court balanced Israel's competing interests to protect individual rights before formal civil rights legislation even existed. Next, Part II analyzes how the enactment of Basic Law: Human Dignity and Liberty changed Israel's civil rights discourse. It then discusses how Basic Law: Human Dignity and Liberty ultimately did little to prevent Israel's irreconcilable principles from thwarting minority rights in the late twentieth century.

Part III connects Israel's treatment of minority rights to the state's immigration policy, and examines three major sources of immigration law: Israel's Law of Return, a form of positive law that encourages Jewish settlement;23 the Citizenship and Entry into Israel Law, a negative law that forbids certain Palestinians from settling within Israel's borders;24 and the Prevention of Infiltration (Offences and Jurisdiction) Law, a law designed to ensure heightened supervision of and control over Israel's borders.25 Part III then analyzes how these laws both contribute to the clash between Israel's founding principles and decrease the Israel Supreme Court's protection of minority rights.

Through this examination, it becomes clear that the paradoxical definition of a Jewish, democratic state discourages non-Jewish persons from settling or staying in Israel by leaving little room for minority rights protection in Israel's highest court.

Finally, Part IV of this Note analyzes how this implicit discouragement, combined with Israel's explicit laws that encourage Jewish immigration to the state while banning certain non-Jewish immigration, causes Israel's non-Jewish residents to emigrate to other states near and far. In addition, it assesses how Israel's treatment of minority settlers encourages immigrants to seek entry into other states. It further argues that Israel's attitude toward non-Jewish citizens and non-Jewish immigrants most obviously adds to the insurmountable conflict between Jews and non-Jews in the Middle East and worldwide.

I. ISRAEL'S IRRECONCILABLE FOUNDING PRINCIPLES

THE STATE OF ISRAEL will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture.26

Excerpted above, Israel's Declaration of Independence identifies the country's two main founding principles: first, Israel is a home to Jewish immigrants; second, Israel is based on democratic principles. With respect to the first principle, Israel was established following World War II as a safe haven for exiled Jews. Between 1945 and 1948, thousands of displaced European Jews who were persecuted and disadvantaged in their home countries fled to Palestine.27 The British authorities who then controlled Palestine, however, severely limited immigration and "interned many of the would-be immigrants to Palestine in detention camps in Cyprus."28

Jewish immigrants who attempted to relocate outside Palestine faced similar difficulties. The Allies of World War II "offered no concrete proposal for rescue" of the Jewish refugees and "feared an influx of

refugees" in their own nations.\textsuperscript{29} The United States strictly limited the number of Jewish refugees it would accept; Great Britain itself limited immigrant intake; Switzerland took approximately thirty thousand Jews while rejecting a similar amount at its border; Spain took a limited number of refugees that it quickly passed on to the Portuguese port of Lisbon.\textsuperscript{30}

It was not until Israel's establishment in 1948 that displaced Jews all over the world had a place to go. Founded as a Jewish homeland open for the "ingathering of the exiles,"\textsuperscript{31} the state absorbed nearly 140,000 Holocaust survivors in the years immediately following Israel's establishment.\textsuperscript{32} In addition, it has accepted "about 586,000 Jews from Arab countries who were dispossessed of their homes both before and after the establishment of Israel."\textsuperscript{33} To date, Israel has continued to admit immigrants from all over the world, including almost a million Jews and their non-Jewish relatives.\textsuperscript{34}

As its second founding principle, Israel made a pledge "to freedom, justice and peace . . . complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex . . . freedom of religion, conscience, language, education and culture."\textsuperscript{35} Taken together, Israel's two founding principles amount to a "paradoxical combination of commitments to a racial and religious character and to democracy and human rights."\textsuperscript{36} Although in a traditional democratic state, all policies—including immigration policy—are based on a civic rationale, ethnic bias in Israel's regulations leads to undemocratic, unequal status of different ethnic groups.\textsuperscript{37}

Moreover, the majority and minority populations within Israel value the state's two founding principles differently. The Palestinian-Israeli minority fights for rights like equality, but historically has been unsupportive of the State's Jewish definition.\textsuperscript{38} On the other hand, although the Jewish majority in Israel supports democratic rights in principle, it often hesitates to give non-Jewish Israelis an equal degree

\textsuperscript{29} Id.
\textsuperscript{30} Id.
\textsuperscript{31} Declaration of Israel, supra note 13.
\textsuperscript{32} Refugee Law and Policy: Israel, supra note 18.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} Declaration of Israel, supra note 13.
\textsuperscript{36} Wan, supra note 24, at 1346.
\textsuperscript{37} Justyna Stypińska, Jewish Majority and Arab Minority in Israel—Demographic Struggle, 157 POLISH SOC. REV. 105, 113 (2007).
\textsuperscript{38} See Gross, supra note 15, at 86.
of those rights. One reason why is closely tied to the centuries-old conflict in the Middle East: "the Arab minority within Israel is perceived as a threat to the stability and continuity of a Jewish nation-State."40

How these conflicting interests affect minority rights in Israel is especially apparent when we assess how rights are protected. In a democracy, laws affecting minority rights are generally promulgated by the legislative branch and interpreted by the courts.41 Ultimately, the Israel Supreme Court balances competing interests to achieve "an optimal accommodation of minority-protection and majoritarian goals."42 While doing so, the Court also focuses on the long-term goals of the State.43 In each case, the Supreme Court weighs not only one party's interest against another but also those interests against the fundamental ideals of the nation.

In the case of Israel, where neither the majority nor minority populations fully support both of Israel's founding principles, the task of properly balancing the competing interests presents a challenge. Adding to the weight against the non-Jewish minority in cases where minority interests conflict with majoritarian, Zionist principles, the Jewish majority consistently dominates Israel's legislative and executive branches.44 Despite the Supreme Court's best efforts to be just, it may legitimize discriminatory laws to serve one interest at the clear expense of another. The definition of Israel in the Basic Laws as a "Jewish and democratic state," for instance, may justify laws that discriminate against non-Jewish Israelis. Because the Jewish majority dominates Israel's government, strong incentives to preserve Israel's Zionist motivations outweigh those to maintain its commitment to "complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex."45

40. Id.
43. See id.
45. Declaration of Israel, supra note 13.
II. RIGHTS PROTECTION IN ISRAEL

The struggle to protect minority rights amidst a government controlled by the Jewish majority is compounded by Israel's lack of a supreme constitution. Three bodies of law instead govern Israeli individual rights: (1) Supreme Court precedents called the “judicial bill of rights,” 46 (2) a series of “Basic Laws” meant to form a makeshift constitution, 47 and (3) additional legislation that embraces minority rights. 48 These laws often contain loopholes to permit violations of individual rights in cases where Israel's Jewish character is at stake. 49 Without an overarching constitution rendering such provisions intolerable, Israel's court of last resort has little basis for protecting minority rights at the expense of Israel's Zionist mission.

A. Israel's Lack of a Constitution

Although Israel's Declaration of Independence stipulated that a Constitution be drawn up by a Constituent Assembly not later than the first day of October 1948, Israel has no formal constitution. 50 After Israel's formation, two factions raised objections to drafting and implementing a constitution: first, the Mapai Party objected to a constitution because it was hesitant to constrain the government's power in any way; 51 second, the religious parties "rejected the very idea of anything but the Torah serving as the Jewish State's constitution." 52 The religious parties were also concerned that "a constitution with a commitment to civil rights would infringe on religious legislation that they supported." 53

The proponents and opponents of adopting a constitution eventually reached a compromise: the Harari Resolution. 54 Under the Harari

46. Gross, supra note 15, at 84.
47. See id. at 82-83.
48. See id. at 94-95 (discussing a case where a law other than the Basic Laws was reviewed for its infringement on freedom of occupation).
49. See id. at 88.
52. Id.
53. Id. at 82.
54. Id. at 81; see also Suzie Navot, The Constitution of Israel: A Contextual Analysis 9 (Peter Leyland & Andrew Harding eds., 2014).
Resolution, the Knesset, Israel's legislative body, was to promulgate a series of "Basic Laws" in lieu of a formal constitution.\textsuperscript{55} Passed in the 1950s onward, these Basic Laws were meant to act as individual chapters compiling a constitution.\textsuperscript{56} Most of the early Basic Laws, however, dealt only with the institutional parts of government and not civil or individual rights.\textsuperscript{57}

To account for previously unprotected individual rights, the Knesset passed Basic Law: Human Dignity and Liberty in 1992, "which guarantees the right to life, physical integrity, human dignity and property, and freedom of movement from and to Israel."\textsuperscript{58} This Basic Law includes a limitations clause that permits restriction of protected rights "(1) by a law; (2) fitting the values of the State of Israel; (3) designed for a proper purpose; and (4) to an extent no greater than necessary, or pursuant to a law enacted with explicit authorization therein."\textsuperscript{59} It also grants immunity from scrutiny to all legislation existing before the Basic Law's enactment.\textsuperscript{60} These explicit loopholes indicate that in some cases Israel may abandon its founding, democratic principles in favor of protecting the state's Jewish character.

\textbf{B. Judicial Activism Before Basic Law: Human Dignity and Liberty}

Without a document that explicitly limits the authority of government over the individual, the Israeli Supreme Court's role as guardian of individual rights has historically been of particular importance. Though meant to act as a constitution governing the executive, legislative, and judicial branches of government, Israel's early Basic Laws did not provide its Supreme Court with the power of judicial review as we know it in the United States today. During Israel's early years, the permitted type of judicial review was limited to only administrative action and not legislation.\textsuperscript{61}

Despite its limited judicial review during this period, Israel's Supreme Court scrutinized administrative acts that violated freedoms it believed were basic rights of citizens.\textsuperscript{62} Without legislation protecting

\begin{itemize}
  \item \textsuperscript{55} Gross, \textit{supra} note 15, at 81.
  \item \textsuperscript{56} Id.
  \item \textsuperscript{57} Id. at 82.
  \item \textsuperscript{58} Id. at 88.
  \item \textsuperscript{59} Id. at 88-89 (citing Basic Law: Human Dignity and Liberty § 8 (1992)).
  \item \textsuperscript{60} Id. at 89.
  \item \textsuperscript{61} Id. at 84; see also Rivka Weill, \textit{Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care}, 30 \textit{BERKELEY J. INT'L L.} 349, 381-82 (2012).
  \item \textsuperscript{62} \textit{See} Yoram Rabin & Yuval Shany, \textit{The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?}, 37 \textit{ISR. L. REV.} 299, 316 (2003); Gross, \textit{supra} note 15, at 85.
\end{itemize}
individual rights until 1992, the Supreme Court "void[ed] parliamentary resolutions and various executive actions, including decisions made by cabinet ministers" that infringed upon the rights they identified. The resulting line of precedents became termed the "judicial bill of rights" and was used to determine cases where individual rights were in question.

The paradigm for this type of rights protection was established in the 1953 case, *Kol Ha'am v. Minister of the Interior*. Here, dealing with a communist newspaper that was temporarily closed down by the Minister of the Interior, the Court ruled that "the Minister could only apply his discretion when there is a 'near certainty' of risk to public safety." Aeyal Gross identifies three specific elements of the *Kol Ha'am* opinion that influenced subsequent rights-conscious decisions and illuminated the relationship between democratic freedoms, goals of Israel as a state, and judicial intervention in Israel. First, the Supreme Court conceptualized a bill of rights. In *Kol Ha'am*, the Supreme Court recognized the freedom of speech by identifying it as a key component to democracy and thus integral to the success of Israel as a democratic state. Similarly, other cases recognized individual rights like equality by drawing upon the democratic ideals enumerated in the Declaration of Israel.

Second, the Supreme Court exercised a form of judicial review. In *Kol Ha'am*, the Court examined the case based solely on administrative acts because legislative scrutiny was not accepted until the enactment of Basic Law: Human Dignity and Liberty. Nonetheless, the version of judicial review the Court applied successfully protected the rights the Supreme Court specifically identified. In this sense, the Supreme Court

64. Id.; Rabin & Shany, supra note 62, at 316.
67. Id.; see also Amos Shapira, The Supreme Court as the Defender of Fundamental Civil Rights in Israel—A Protected Fortress or a Paper Tiger?, 3 TEL AVIV U. L. REV. 625, 627 (1973).
68. Gross, supra note 15, at 84.
69. Id.
70. Id.
71. See id.; PNINA LAHAV, JUDGMENT IN JERUSALEM—CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY 116 (1997). See generally Lahav, supra note 65 (discussing the significance of the Kol Ha'am opinion as it relates to judicial review).
72. See Gross, supra note 15, at 84.
asserted its legitimacy as a democratic institution and protector of rights.

Third, the *Kol Ha'am* decision balanced the rights of the petitioner with the conflicting interest of the public. In doing so, the Supreme Court demonstrated how commitments to both democratic rights and larger state goals are not mutually exclusive, and the outcome of a specific case depends on a balance between the two. Indeed, *Kol Ha'am* suggested that Israel's Supreme Court was ready and willing to fulfill its democratic role as a neutral arbiter of interests.

The proposition that the Supreme Court would faithfully preserve Israel's commitment to democratic principles was rebuffed in subsequent cases where the state's Jewish character was at stake. Although the issue in *Kol Ha'am* did not directly posit democratic rights against the Zionist goals of Israel, cases decided shortly after posited such a dilemma. In *Rogzinski et al. v. State of Israel*, the Court considered whether the requirement for Jews to marry in Israel under Jewish religious law conflicts with freedom of religion and freedom of conscience. The Supreme Court "held that when the legislature's explicit will is obvious, the Court is required to uphold that will, even if it conflicts with the rights outlined in the Declaration of Independence." The court's conclusion that Israel's religious interests outweighed the individual liberties at stake, however, was in large part based on deference to the Knesset—a legislature unsurprisingly dominated by the Jewish majority.

Similarly, in *Yeredor v. Chairman of the Central Elections Committee to the Sixth Knesset*, the Supreme Court upheld a Central Elections Committee decision to disqualify the Arab Socialist Party from running in elections. The Court based its ruling on its finding of "the party platform to be a repudiation of the existence of the State." Like in *Rogzinski*, the court ruled against the rights of its Palestinian minority for reasons of protecting Israel's Jewish character. In both cases, the democratic rights the minority petitioners sought were

73. Id.
74. See id.
76. Gross, supra note 15, at 84.
77. Id.
78. HCJ 1/65, Yeredor v. Chairman of the Cent. Elections Comm. to the Sixth Knesset, 19(3) PD 365 (1965) (Isr.).
80. Gross, supra note 15, at 84
81. See id.
diminished in order to preserve a majoritarian founding purpose—maintaining the definition of Israel as a Jewish State.

**C. Israel’s Constitutional Revolution**

The Knesset’s passage of Basic Law: Human Dignity and Liberty sparked what is often called “the constitutional revolution” of Israel in 1992. Providing protection for the rights to life, liberty, honor, the integrity of the body, private property, privacy, and movement in and out of the country, the legislation supported the judicial bill of rights that the Supreme Court had built leading up to Basic Law: Human Dignity and Liberty’s adoption.\(^\text{82}\) As a result, Basic Law: Human Dignity and Liberty created a great deal of excitement for those seeking equal rights between Jewish and Palestinian Israelis.\(^\text{83}\)

Still, Basic Law: Human Dignity and Liberty was not passed without limitations. Similar to other Basic Law legislation, Basic Law: Human Dignity and Liberty is not entrenched, and subsequent legislation can infringe upon it in accordance with a limitation clause.\(^\text{84}\) Legislation may limit the rights contained in Basic Law: Human Dignity and Liberty if it is consistent with Israel’s values as a Jewish and democratic state, is enacted for a worthy purpose, and the infringement is proportional to that purpose.\(^\text{85}\) In addition, all previously existing legislation is immune forever from scrutiny for its accordance with Basic Law: Human Dignity and Liberty.\(^\text{86}\) Basic Law: Human Dignity and Liberty bases its limitation clause, in part, on the contradictory principles of Israel as a Jewish, democratic state, which in turn limits its effectiveness in providing the minority rights protections for which activists had hoped.

Additionally, some scholars assert that the “definition of the State of Israel in the Basic Laws as a ‘Jewish and democratic state’ may serve to legitimize laws that discriminate in favor of Jews.”\(^\text{87}\) Supreme Court precedent suggests the same.\(^\text{88}\) In *Salhat v. The Government of Israel,*\(^\text{89}\)

\(^{82}\) See Doron Navot & Yoav Peled, *Toward a Constitutional Counter-Revolution in Israel?*, 16 CONSTELLATIONS 429, 434 (2009).

\(^{83}\) See id.


\(^{86}\) Gross, supra note 15, at 89.

\(^{87}\) Id. at 103.

\(^{88}\) Gross, supra note 15, at 104.
the petitioners argued that the General Security Services used torture mechanisms that infringed upon the petitioner's right to human dignity under Basic Law: Human Dignity and Liberty. Instead of deciding on the merits of the case, as critics suggest it should have, the Supreme Court declined to issue an opinion until more specific, concrete cases challenging the practices of the General Security Services were presented. In Hamdan v. General Security Services and Mubarak v. General Security Services, the minority petitioners challenged the investigative practices of the Israeli General Security Services.

In Mubarak v. General Security Services, when Palestinian petitioners asked the Court to instruct the General Security Services to refrain from using torture in its investigations, the Court rejected the petitions. The Supreme Court’s reasoning points to the problematic definition of the State of Israel: the court was convinced these torture mechanisms were a necessary measure to properly investigate citizens thought to threaten the Jewish character of the state.

Beyond these cases, the Court’s willingness to apply Basic Law: Human Dignity and Liberty to protect the Israeli-Palestinian minority has historically been sporadic at best: “petitions brought by Israeli-Palestinians, citizens of the State of Israel, on civil rights issues, such as freedom of speech, or on equality issues, have regularly been rejected by the Court.” Such trends make clear that Israel’s dual definition as a Jewish, democratic state containing a non-Jewish minority is problematic. At a minimum, the dual definition has diminished the Supreme Court’s willingness to protect minority rights in cases where doing so is at the expense of majoritarian interests and sacrifices one of Israel’s major founding principles. In the end, by preserving Israel’s Zionist mission, the Supreme Court sacrifices the state’s democratic character and fails to fully accomplish its role as a protector of minority rights.

91. Id.
92. HC 8049/91 Hamdan v. General Security Services [unpublished] (Isr.).
93. HC 3124/69 Murabarak v. General Security Services [unpublished] (Isr.).
94. Id.
95. See id.
III. ISRAEL’S IMMIGRATION LAW

Israel has been termed “a land of immigrants.” Of the roughly eighty percent of the citizenry that is Jewish, a significant number are foreign-born. Following the large influx of Jews born in the former Soviet Union in the mid-1990s, approximately thirty-eight percent of the Jewish population in Israel had been born outside the country. In addition, one in every three Israelis was an immigrant. To compare Israel’s immigration statistics to the landscape in the United States, “in 1997 nearly one in ten residents of the United States... was foreign-born,” and that is in the context of one of the largest immigration waves in United States history.

Yet Israel is not uniformly welcoming of all immigrants from all backgrounds. From 1948 to about 1980, Israel encouraged mass migration of Jews to help support the Jewish State after its founding. Adding to the encouragement, in the early 1950s, the Israeli Parliament passed the Law of Return, 1950; the Nationality Law, 1952; and the Entry into Israel Law, 1952. These provisions of Israeli immigration law benefited Jewish immigrants who sought to settle in Israel by providing flexible requirements for citizenship.

In contrast, Israel’s Knesset has also passed restrictive laws aimed at limiting non-Jewish immigration. The Citizenship and Entry Into Israel Law, drafted in 2003 as a temporary measure, prevents

---

98. Id.
99. Id. (citing 48 STAT. ABSTRACT OF ISR. 1997 at 49).
100. Id.
101. Id. (citing Press Release, U.S. Census Bureau, Foreign Born Population Reaches 25.8 Million, According to Census Bureau (Apr. 9, 1998) (on file with author)).
residents of Palestinian territories from gaining Israeli citizenship.  

"[T]he Prevention of Infiltration Act was originally enacted in 1954 to address the phenomenon of Palestinian fedayeen, armed militia members who attempted to infiltrate to attack Israeli targets, which was considered to be a security threat at the time . . . ."  

As a deterrent to immigration, the act was amended in 2012 to reach asylum seekers from Africa who were entering Israel through its southern border and to authorize their automatic detention.

The difference between Israel's laws that encourage Jewish Immigration and those that discourage other foreign settlers is stark. A comparison between the Law of Return, on the one hand, and the Citizenship and Entry Into Israel Law and Prevention of Infiltration Law, on the other, showcases how Israel simply cannot serve its Zionist founding principle without sacrificing its democratic one.

A. Law of Return

The Law of Return is central to Israeli immigration law. By this principle, Israel asserts that every Jew has a near-absolute claim to settle in the country. Many scholars take differing views on how the Law of Return affects Israel's existence. "Some claim that the Law of Return is not only a central feature of Israeli immigration law, but an essential constitutional feature of the Israeli state." Others forcefully maintain that the Law of Return is the state's raison d'être:

[T]hey note that when in the European Jewry's darkest hour, while fleeing extermination in Nazi death-camps, the British (who maintained quasi-sovereign control over the region under the League of Nations' mandate)

110. Ziegler, supra note 109.
111. Ernst, supra note 23, at 564.
112. Id.
113. Id. at 564-65 (citing DAVID KRETZMER, THE LEGAL STATUS OF THE ARABS IN ISRAEL 89 (1990)).
refused all but a few of the Jewish immigrants seeking refuge in the land that the British had previously declared would serve as "a national home for the Jewish people."  

Whichever be the more accurate description of the Law of Return, one thing is clear: the tenet encourages the free immigration of Jewish people into Israel.

Some scholars have argued "that the Law of Return creates a clear-cut differentiation between the civil rights of Jews and those of Arabs." Indeed, before the 1980 Amendment to Israel's Nationality Law, "children born to Jewish Israeli citizens acquired citizenship by Return even if they were born in Israel, while children born to non-Jewish Israeli citizens acquired citizenship by birth, thus there was a difference in how citizenship was acquired." One justification for this difference is the fact that a Jew's immigration to Israel allows that person to join a "historical continuity of the Jewish community over myriad generations"—a concept referred to as an individual's "communal" good. By contrast, a non-Jew seeking entry into Israel not only lacks the cultural and religious tie to Israel's stated founding purpose, but also may disrupt the homogeneity of Israel's desired community.

B. Citizenship and Entry into Israel

Despite the establishment of civil rights legislation in Israel, Basic Law: Human Dignity and Liberty has proven particularly ineffective in protecting Israeli-Palestinian rights in the case of Israel's Citizenship and Entry into Israel Law. Though Israel initially passed the law in 2003 as a temporary measure, Israel has extended its authority multiple times, and it is still in effect today. The law "prohibits granting Israeli citizenship and residency to Palestinians from the West

114. Id. at 565 (citing Letter from Lord Arthur Balfour, Foreign Secretary of UK, to Lord Rothschild (Nov. 2, 1917)).
115. Id. at 571 (referencing Yiftat Weiss, The Golem and Its Creator, or How the Jewish Nation-State Became Multiethnic, in CHALLENGING ETHNIC CITIZENSHIP: GERMAN AND ISRAELI PERSPECTIVES ON IMMIGRATION 82-83 (Daniel Levy & Yiftat Weiss eds., 2002)).
116. Id.
117. Id. at 576.
Bank and the Gaza Strip, and prevents, inter alia, Israeli Arabs from living in Israel with their Palestinian spouses."119

From the perspective of Israeli-Palestinian citizens, the law prevents their Palestinian spouses from entering the country in hopes of obtaining a family life in Israel.120 In several cases brought before the Israel Supreme Court, Palestinian petitioners have argued that such a restriction erodes their basic democratic rights.121 Given that Palestinian-Israelis are more frequently married to Palestinians in the restricted locations, many argue that the law unequally discriminates against the non-Jewish minority.122

Though the Court has consistently affirmed the law because of the security threat posed by some Palestinians who had gained citizenship rights through marriage to Israeli citizens, some arguments against the measure point to the nation's demographic goal of ensuring a Jewish majority in Israel.123 As has often occurred in cases involving these conflicting interests, the Court's decision to uphold the law is based on a shift in focus away from the necessity of minority rights to the protective benefit of the Jewish society at large. In his analysis of the court's decision to extend the Citizenship and Entry into Israel law, Ben-Shemesh discusses how "[i]mmigration and citizenship policies are used as the main means to affect the demographic balance between Jews and Palestinians in Israel."124 These demographic concerns of respondents in the Citizenship Law cases, though supportive of Israel's founding principles as a whole, clearly conflict with Israel's claimed commitment to democratic values when it comes to minority petitioners' rights.125

These conflicting interests, even with proper rights legislation like Basic Law: Human Dignity and Liberty, are difficult to balance without compromising minority rights. As described by Navot and Peled, "the curtailment of the Palestinian citizens’ right to family unification, presented as a temporary measure undertaken under a state of exception, but affirmed by the Court as a permanent feature of Israel’s citizenship regime, may be only the first step in a long and dangerous road."126

119. See Ben-Shemesh, supra note 15, at 1.
121. Id.
122. Id.
123. See Bilsky, supra note 39, at 167-69.
124. See Ben-Shemesh, supra note 15, at 5.
125. See id at 7.
126. Navot & Peled, supra note 83, at 442.
D. Prevention of Infiltration Law

Israel's Prevention of Infiltration (Offences and Jurisdiction) Law\(^{127}\) is designed to "improve the security at the state borders and the general security by improving the legal measures that are used against infiltrators."\(^{128}\) "Infiltrators" are "persons who are not Israeli residents, do not possess an Oleh\(^{129}\) or a permanent residence visa, and have entered Israel via a border that has not been designated as an international border crossing by the Minister of Interior."\(^{130}\)

Although Israel has no state-based legal structure that governs immigrants seeking asylum, it amended the Prevention of Infiltration Law in 2012 to apply to many of the African asylum seekers who have sought safety in Israel since 2004.\(^{131}\) Under the law, asylum-seekers can be held in a detention camp in the desert for up to twenty months.\(^{132}\) Some activists argue that "[t]he purpose of the law is to coerce the asylum-seekers into 'voluntarily' leaving Israel, since Israel cannot deport them by force."\(^{133}\)

Immigrants who manage to avoid detention under the Law and join Israeli society, however, still face serious obstacles in achieving the same quality of life as the Jewish majority. African immigrants battle severe racism,\(^{134}\) police brutality,\(^{135}\) difficulty securing housing,\(^{136}\) and an overall lower economic status.\(^{137}\) "The asylum-seekers, who make up about 0.5% of Israel's population, are also presented as a demographic


\(^{128}\) Refugee Law and Policy: Israel, supra note 18 (internal citation omitted).

\(^{129}\) An Oleh's visa is granted to "every Jew who has expressed his desire to settle in Israel" and often his family members. The Law of Return, 4 LSI 114 (Isr.), available at http://www.jewishvirtuallibrary.org/jsource/Politics/Other_Law_Law_of_Return.html.

\(^{130}\) Refugee Law and Policy: Israel, supra note 18; see also Prevention of Infiltration, 8 LSI 133, §1 (Isr.), available at https://www.jewishvirtuallibrary.org/jsource/History/1954law.pdf.


\(^{132}\) Id.

\(^{133}\) Id.


\(^{135}\) Id.


and a security threat." The State and many Israeli media outlets use the language of the Prevention of Infiltration Law to label the immigrants as "infiltrators," a term originally used for Palestinian refugees who entered Israel in the 1950s to commit sabotage and terror attacks.

IV. CIVIL RIGHTS, IMMIGRATION, AND THE GLOBAL LANDSCAPE

Immigration, entering another country, and emigration, leaving one country, go hand-in-hand. With the exception of Russia in the 1980s, "all civilized modern states are imbued with the firm belief that the right to emigrate is one of the inalienable rights belonging to each citizen, and that each person is free to change nationality." Scholars assert that this widely recognized freedom to emigrate is "the direct consequence of the new social and political order which has at its foundation respect for human beings and the interests that concern them." One reason for emigration from a country and immigration to another is often mistreatment in the home nation. These emigrants and immigrants perhaps leave a country where their civil rights are compromised in hope of finding a better life elsewhere. As some describe it, however, "emigration causes a disruption in the community, resulting in the alienation of the emigrant from her home." Displacement of refugees and immigrants alike also affects the nations receiving them. As a result, both the state and the newly entered persons struggle to find a way to make the change more smoothly and allow immigrants to transition into their new society.

One potential result of Israel's inconsistent treatment of the non-Israeli minority, the State's immigration policies favoring Jews, and the troubles associated with asylum seekers is placing the burden on neighboring countries to accept Israeli emigrants and African asylum seekers. Still, statistics show emigration rates from Israel are fairly

138. Refugees, supra note 131.
139. Id.
141. Id.
144. See id.
As of October 2012, Israel had “the lowest emigration rates since the founding of the state in 1948.” It is difficult to say, however, what proportion of emigrating Israelis are of the State’s non-Jewish minority.

Despite the relatively poor treatment of the non-Jewish minority, recent studies indicate that Israeli Arabs are happy where they are. “According to polls, 77 percent of Israeli Arabs prefer to live in Israel while only 21 percent want to live in a Palestinian state.” One plausible explanation draws upon the deep historical tie many Palestinian-Israelis have to the land. Regardless of their status as a relatively unprotected minority, Arab Israelis may feel too personally connected to the Middle East Conflict to leave.

African asylum-seekers, however, present a more serious problem for the global landscape. Israel has one of the lowest asylum acceptance rates in the Western world. The State accepts less than one percent of all who seek asylum there. Moreover, those who do enter Israeli society are likely to leave as soon as they are able to find safety in their home state or elsewhere. In some cases, Israel has offered to pay those seeking asylum to leave Israel and seek safety outside the state, often in their home countries. As one source describes, “Israel’s policy toward African asylum-seekers is to pressure them to self-deport or, as the former interior minister Eli Yishai put it, to ‘make their lives miserable’ until they give up and let the government deport them.” The reason for Israel’s harsh treatment of its asylum-seekers is unsurprising; according to Prime Minister Benjamin Netanyahu, “If we don’t stop their entry, the problem that currently stands at 60,000 could grow to 273,000 in a few years.”

---

145. Yinon Cohen, Israeli-Born Emigrants: Size, Destinations and Selectivity, 52 INT’L J. COMP. SOC. 45, 45 (2011) (“[R]elative to other countries, the share of Israeli-born residing outside Israel is not high.”).
147. Although perhaps an indication of emigration patterns rather than frequency Arabs are overrepresented among Israeli-born over fifty-five years old in the United States. Cohen, supra note 146, at 61 n.11.
149. See id.
151. Can Israel Have a Fair Asylum Law Without Confronting the Nakba?, supra note 20.
152. Fezehai, supra note 150.
153. Id.
That Israel accepts such a small number of asylum-seekers puts the burden on other countries to take in more immigrants than they otherwise would. The number of African asylum-seekers across the globe is astronomical, and many countries already struggle to accommodate all who need protection. As an attempted remedy, the European Union recently announced that it would give financial support to African frontline states that are expected to take on the burden of hosting migrants who cannot seek asylum in Europe. Although Israel might consider following suit, this paternalistic approach has its criticisms. Accepting asylum-seekers and treating them as citizens of the accepting state is always preferred.

CONCLUSION

“Our constitution reflects the profound concepts of Israeli society; it protects both the ruling structures and human rights, and balances the collective good against that of the individual. It is the role of the judge to preserve this structure of constitutional balancing.” Former Chief Justice of the Supreme Court of Israel Aharon Barak emphasized the role of the judiciary in maintaining a balance between individual liberties and State goals, a process that was developed well before Israel even passed formal rights legislation.

The balancing process developed to protect these rights, however, is complicated by Israel’s irreconcilable founding principles. Through its limited judicial review in the 1970s and 1980s, the Court demonstrated a commitment to Israel’s democratic ideals, yet its application of protections to non-Jewish citizens, and Palestinians in particular, indicates these ideals may conflict with the State’s Jewish definition. In addition, although the Basic Law: Human Dignity and Liberty solidified the rights that Israel’s democratic society sought to protect, instances where the Supreme Court declined to extend those securities to Israeli-Palestinians show that the Jewish character of Israel conflicts

154. Id.
156. Id.
157. See id.
158. See id.
159. Barak, supra note 41, at 17.
160. Id.
with its democratic principles. Moreover, the final example of the Citizenship and Entry into Israel Law demonstrates just how detrimental Israel's incompatible founding principles can be to minority interests, especially when it comes to immigration law.

Yet Israel's treatment of minority rights spurs more than purely local effects. All over the world, countries who accept immigrants and asylum-seekers that otherwise would settle in Israel appreciate the consequences of Israel's irreconcilable principles. As the Supreme Court sanctions undemocratic measures to protect the State's Jewish citizens, non-Jewish Israelis and prospective immigrants, even those who are unsupportive of, or unconnected, to violence against Jewish Israelis, endure the consequences.

Ben-Shemesh asserts, "Preserving the Jewish majority in Israel is justified only to the extent that it is justified for Israel to attempt to maintain its Jewish nature." But is the neglect of democratic principles and minority rights justified by Israel's Jewish nature? If so, the question of compatibility of these two principles should be placed within a broader context—the attempt to reconcile democracy with Jewish nationalism. In light of the Israel Supreme Court's questionable effectiveness in reconciling the principles thus far, combined with the state of affairs in the Middle East and Africa, the future of Israel may be marked by a retreat from its founding principles in the name of Zionism, or else worldwide consequences for asylum seekers and the nations strained to accept them will persist.