Is immigration detention a new form of territorial border? Lessons from detention of asylum-seekers in the Israeli "control society"

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Introduction

Over the past decade, tens of thousands of asylum-seekers from African countries entered the state of Israel via the borders of the Sinai Peninsula. Israel's attitude toward this population – currently consisting of approximately 40,000 people[2] – is complex. On the one hand, the Israeli government regards them as illegal "infiltrators", claiming they are not refugees but rather migrant workers. On the other, the government acknowledges that their deportation to their home countries is currently forbidden under the principle of non-refoulement, which is a cornerstone of international refugee law.[3] At the request of the United Nations, Israel has adopted a policy known as "temporary non-refoulement", under which it refrains generally from deporting asylum-seekers based on their country of origin.[4] Asylum-seekers residing in Israel are granted a "conditional release visa" that entitles them to temporarily remain in the country, with no additional rights.[5]

A main means of carrying out this bipolar policy has been the establishment of an extensive system of administrative detention for governing the asylum-seeking community. This system consists of both closed incarceration centers and more flexible detention alternatives. The decision whether to detain or release asylum-seekers is based on several criteria, such as age, gender, country of origin, and whether the asylum-seeker has been suspected of a crime during his residence in Israel. These criteria assist the Israeli authorities in classifying asylum-seekers into groups of perceived dangerousness, in order to prioritize their incapacitation and, consequently, the degree of their integration into Israeli society.

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[2] POPULATION, IMMIGRATION AND BORDER AUTHORITY – THE DEPARTMENT OF POLICY PLANNING, DATA REGARDING FOREIGNERS IN ISRAEL: 2017 SUMMARY 4 (2/2017 Edition), *available at* https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreign_workers_stats_q2_2017_1.pdf.

[3] United Nations Convention Relating to the Status of Refugees, art. 33, 28 July 1951, 189 U.N.T.S 137. Hereinafter: "the Refugee Convention"; UN High Commissioner for Refugees (UNHCR), UNHCR Note on the Principle of Non-Refoulement, November 1997, *available at* http://www.refworld.org/docid/438c6d972.html.

[4] Sharon Harel, *The Development of the State of Israel's Asylum System: The Process of Transferring the Authority of Treatment of Applications for Asylum from the UNHCR to the State of Israel*, *in* WHERE LEVINSKY MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAELI ASYLUM POLICY 43, 61 (Tally Kritzman-Amir ed., 2015) (Isr.).

[5] Entry into Israel Law, 5712–1952, § 2(a)(5), 6 L.S.I. 159 (1951-52) (Isr.). Hereinafter: "the Entry Law". Asylum-seekers in Israel are excluded from all aspects of the welfare state, with the exception of emergency medical treatment (In the sense that hospitals are forbidden by law to deny uninsured patients treatment in life threatening situations. See Patients' Rights Law, 5756–1996, § 3(b), SH No. 1591, P. 327 (Isr.)), and the right to public education (In the sense that they are able to enroll their children in schools, as the law obligating parents to school their children applies to all children residing in Israel, regardless of their status. See Compulsory Education Law, 5709–1949, § 2(a), SH No. 26, P. 287 (Isr.)). They are also formally excluded from the labor force, as their visas do not entitle them to a work permit.

Such use of detention as a mechanism of social exclusion, in face of the decline in the ability of border walls to keep out undocumented migration, has become common worldwide. It thus invokes the question whether immigration detention functions as a form of "border internalization", an institution that "stretches" the border into the territory of the nation state and compliments, if not replaces it, as a means of differentiating "insiders" from "outsiders". Is the expansion of immigration detention indicative of an attempt to return to the territorial border? Consequently, is it at odds with the view that the connection between territories and institutions has been severed since the mid-20th century?

This paper explores such questions by engaging in the case study of detention of asylum-seekers in Israel. The Israeli experience, I argue, indicates that immigration detention – particularly when applied to populations such as asylum-seekers, which are principally undeportable – plays a dual role in the efforts of the state to assert its sovereignty in a globalized world. While detention regimes aspire to exclude migrants physically and socially, they achieve this goal only partially and in fact contribute to the deconstruction of the border and the construction of various degrees of membership in the political community.

On one hand, the paper demonstrates that while enacting its detention system, Israel likewise constructed a fence on its southern border, causing the number of asylum-seekers entering the state to drop significantly. This effort to reinforce the territorial border has indeed been complimented by routine screening, monitoring and social exclusion of asylum-seekers residing in the territory, via detention and detention alternatives. On the other hand, however, the Israeli experience also demonstrates that immigration detention is largely shaped in the image of what Gilles Deleuze has termed a shift to the "control society" in the second half of the 20th century.[6] Immigration detention, I contend, is governed by the prime objectives underlying the control society, namely, handling aggregates of presumably deviant groups and, consequently, keeping dangerous behavior at an acceptable level. These objectives cause detention to abide by a logic of cost-effective risk management and operate through open sites and fluid techniques of power, which represent the shift in the spatiality of power typical of control societies.

The result is that immigration detention is prevented from truly replacing the territorial border in distinguishing "insiders" from "outsiders" to the nation state. Quite contrarily, it is highly selective in its responses to undocumented migration and enables many migrants that have managed to enter the territory to "slip through the cracks" and pursue their integration into society. Therefore, to say

[6] Gilles Deleuze, *Postscript on the Societies of Control*, 59 OCTOBER 3 (Winter 1992); a point similar to mine has been previously made by Robert Koulish, who has concentrated on alternatives to detention, claiming they comply with the logic of Deleuze's "control society" and Ulrich Beck's "risk society". See Robert Koulish, *Entering the risk society: A contested terrain for immigration enforcement*, *in* SOCIAL CONTROL AND JUSTICE: CRIMMIGRATION IN THE AGE OF FEAR 61 (Maria João Guia, Maartje van der Woude & Joanne van der Leun eds., 2012).

that detention serves objectives same as the border is to underestimate the extent to which the connection between territories and institutions has become disentangled in the age of globalization.

The layout of this paper is as follows. **Part I** reviews the literature that informs my case study analysis. Section A discusses the manners in which globalization processes have affected the territorial border and, consequently, the concept of citizenship. Section B discusses the rise of immigration detention as a means of complimenting the traditional border in order to assert the sovereignty of the nation state in the age of globalization. Section C introduces the notion of the control society and proceeds to demonstrate that its underlying principles have deeply affected immigration detention. It concludes by suggesting that these principles inherently compromise the ability of immigration detention to fulfill the objectives served by the territorial border, as they contribute to the construction of migrants as an intermediate category between "outsider" and "insider" to the political community.

Part II presents the case study analysis of Israel's detention policy towards asylum-seekers. Section A provides a theoretical background to the Israeli citizenship regime and the manner in which the asylum-seeking community living in Israel threatens this regime. Sections B and C focus on the underlining objectives, as well as the concrete day-to-day practices, of the Israeli immigration detention regime, in attempt to demonstrate the manner in which it has been constructed in the image of the control society. This regime was the product of a rushed and condensed process, triggered in response to what was considered a mass influx of asylum-seekers and consisting of an intensive four-year "ping-pong" between the High Court of Justice and the parliament.[7] This was a circular process, i.e. parliament enacting long periods of immigration detention, the court striking down these periods and referring the legislation back to parliament, and so forth. It took three petitions to the court and four amendments to the law, as well as some pertinent Supreme Court litigation,[8] to reach a detention policy considered constitutional by the court. When the court finally did settle for this policy, however, it did so based on justifications that strongly echoed the objectives underlying the control society. Consequently, asylum-seekers in Israel are constantly categorized into groups of risk, in order to prioritize the level of state supervision needed to keep their perceived dangerousness within what Michel Foucault has termed the "bandwidth of the acceptable". The practices used to manage the asylum-seeking community are highly flexible, both in the sense that they function primarily via open sites, and in terms of the wide discretion they grant to state officials. They accordingly allow the majority of the asylum-seeking community to remain free and settle in Israel long-term.

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[7] At the urging of the executive branch, that drafted the law.

[8] The Israeli Supreme Court functions both as the High Court of Justice and as the high appellate court. See Basic Law: The Judiciary, 5744–1984, § 15, SH No. 1110 P. 78 (Isr.). While the constitutional petitions challenging the Anti-Infiltration law were filed to the High Court of Justice, there were also several administrative appeals challenging the policy to detain asylum-seekers suspected or convicted of criminal activity, which were submitted to the appellate court. See discussion below in part III, section B.

Given the centrality of Supreme Court litigation to the making of the Israeli detention policy, I focus my enquiry on this litigation. The enquiry is based on the legislation (including the draft-bills) and executive orders that were contested at court, as well as the legal documents comprising the litigation, i.e., the court verdicts and the documents handed in by the litigating parties. These documents are examined through a methodology of textual analysis,[9] aiming to identify the perceptions and objectives guiding both the government and the court in "negotiating" the character of the Israeli immigration detention regime. I contend that the court's arguments, as well as the very fact that the logic of control had prevailed as the narrative agreed upon by all three branches of government, demonstrate just how powerful this logic has become. Observing the "negotiation process" between the branches of government thus enables us to examine the manner in which immigration detention is transformed into an apparatus of the control society.

Part III, devoted to discussion and conclusions, argues that the Israeli detention policy in particular and immigration detention in general, contribute to the delocalization and decentralization of the territorial border. This reality whereby the territorial border is delocalized and no longer possesses the exclusive power to determine who remains "outside" the state and who is allowed "inside", contributes to the construction of membership in the political community as a non-binary concept. Therefore, while detention attempts to replace the traditional border by enabling the nation state to cope with undesirable migrants through means other than full physical exclusion, it seems that its main contribution is to the dismantling of the concept of citizenship in a globalized world.

I. Literature review: immigration detention in the control society

A. Globalization, borders and citizenship

Many scholars have discussed the vast impact that globalization processes have had on the territorial border since the mid-20th century. Such processes have challenged the assumption that formal borders effectively continue to serve as the physical threshold of the political community, the site where citizenship as status originates and in which it is governed.[10] The border was once envisioned as a continuous line enclosing the domain of the nation state and defining its territory and sovereign authority. It corresponded with the image of states as rigidly defined territorial units, in which each state can gain power only at the expense of the others and each has total control over its own territory.[11] However, in a world of transnational migration borders have become porous, and

[9] Textual analysis is a methodology adopted for gathering information about how other human beings make sense of the world and glimpsing into the set of beliefs through which people from different cultures and sub-cultures operate. See, for example, ALAN MCKEE, *TEXTUAL ANALYSIS: A BEGINNER'S GUIDE (2003).*

[10] See, for example, LINDA BOSNIAK, THE CITIZEN AND THE ALIEN 126 – 129 (2006); Sassen, 1996.

[11] See for example William Walters, *Border/Control*, 9(2) EUROPEAN JOURNAL OF SOCIAL THEORY 187, 193 (2006).

separation of "outside" from "inside" has become elusive.[12] Globalization, in other words, severely challenges the efforts of the modern nation state to collectivize friends and enemies while eliminating "strangers", by way of defining its subjects and claiming their obedience on territorial grounds.[13] This challenge is intensified in the case of refugees and asylum-seekers, who have substantially increased in number in the last decades[14] and whose physical expulsion from the community is legally prohibited.[15] Such groups seem to epitomize Simmel's definition of the "stranger" as the person who "comes today and stays tomorrow".[16] Moreover, as Arendt argues, they radically call into question the fundamental categories of the nation state, by breaking the nexus between human being and citizen.[17]

Globalization, it has been suggested, has accordingly created a "post national" citizenship regime, in which the logic of personhood and individual rights overrides the logic of nationality and territory.[18] Noncitizen immigrants, while marginalized in significant ways, are also in some respects treated as subjects of the state and attain a type of paradoxical "noncitizen citizenship".[19] Alienage, as Bosniak explains, is an intrinsically hybrid legal category. It is governed both by governments' immigration power (the power to include or exclude newcomers) and by the rights of persons already residing within the national society – a domain in which government power to impose disabilities on people is considered far more limited. Given this hybrid legal character, government discrimination against aliens is constantly burdened by the question of whether such discrimination is a rightful extension of the government's power to regulate the border.[20]

Broadly speaking, there are two alternative models for answering this question. The first, which Bosniak refers to as the "separation model", supports a minimalist understanding of the scope of the government's authority to regulate membership, one which confines the exclusion of newcomers to the territorial margins of the state. The second, which Bosniak refers to as the "convergence model", supports an expansive understanding of the legitimate sphere of membership regulation, and argues that membership concerns are rightfully part of the regulation of social relationships among all

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[12] BOSNIAK, *supra* note 10, at 4, 7.
[13] Zygmunt Bauman, *Modernity and ambivalence*, 7(2) THEORY, CULTURE & SOCIETY 143 (1990).
[14] See, for example, PHILIP MARFLEET, REFUGEES IN A GLOBAL ERA (2006). However, as Marfleet demonstrates, the precise number of refugees remains unknown, and there is conflicting data on this issue. See pages 14 – 16.
[15] Refugee Convention, *supra* note 3, at article 33. The Refugee Convention determines the responsibilities of nations that grant asylum, and provides the most comprehensive codification of the rights of refugees at the international level. The main right it grants to refugees is the right to non-refoulement, which prohibits the deportation or return of refugees to any country in which their lives or freedom would be threatened.
[16] Georg Simmel, *The Stranger*, *in* THE SOCIOLOGY OF GEORG SIMMEL 402, 402 (Kurt H. Wolff. ed., 1964); See also Yonatan Berman, *Detention of Refugees and Asylum-Seekers in Israel*, *in* WHERE LEVINSKY MEETS ASMARA: SOCIAL AND LEGAL ASPECTS OF ISRAELI ASYLUM POLICY 147 (Tally Kritzman-Amir ed., 2015) (Isr.)..
[17] Arendt, 1951, at 267 – 302; Agamben, 1996, at 20 – 22.
[18] Sosyal, 1994.
[19] BOSNIAK, *supra* note 10, at 5.
[20] *Id.*, at 13 – 14.

territorially present persons. Under the convergence model, the border is no longer confined to the margins of the state and has expanded to the interior, while citizenship is no longer a binary concept. Status in the national community is envisioned as structured by a series of concentric circles of belonging, with those individuals in the innermost circle enjoying the full benefits and burdens of membership and those farther from the center possessing increasingly few claims towards the community.[21] The convergence model thus generally seems better suited for facing the challenges that globalization poses to the nation state's ability to control its borders, as it is designed to enable the state to exercise its sovereignty by alternative means.

Consequently, it seems that contemporary immigration policy has shifted from what may be termed as a "management of territory model", to what may be considered a "population-management model". An alternative characterization of this process might view it as a shift from a "binary border" to a "decentralized border" model. Under the former model ("management of territory"/"binary border"), immigration policy was highly focused on border control; however, those who managed to overcome this enhanced border security or who overstayed their permit enjoyed quite a solid set of rights and privileges.[22] This was particularly true for refugees and asylum-seekers, but to some extent also for other groups of undocumented migrants who were relatively tolerated.[23]

Under the current model, conversely, the nation state is forced to envision alternative means for controlling undesirable migration, which focus on interior enforcement. Coleman and Kocher, for instance, argue that American immigration policy has traditionally been conditioned by foreign policy considerations, and as such best thought of as constitutively 'between' the realms of foreign and domestic policy. However, it has recently been transformed from an outwards-looking power, located at the territorial margins of the state, into an inwards-looking power, focused on the day-to-day control of resident immigrants. Rather than remaining principally concerned with border control, and hence a form of "management of territory", it has been supplemented with a "management of population" strategy, focused on policing already present migrants.[24]

As the mechanisms designed by the nation state to govern populations of migrants cease to be confined to spatial-temporal practices, the border becomes delocalized, a process whereby it is both "externalized" and "internalized". "Border externalization" refers to the process of relocating the state's border authorities to other sovereign territories, and outsourcing border control responsibilities

[21] Id., at 74 – 76.
[22] Compare to Bauman's argument that prior to the age of globalization, immigration policy consisted of two binary options: "eating the strangers up" or "disgorging" them. ZYGMUNT BAUMAN, SOCIETY UNDER SIEGE 111 – 113 (2002).
[23] See, for example, Teresa Miller, *Citizenship & Severity: Recent Immigration Reforms and the New Penology*, 17 *GEO. IMMIGR. L.J.* 611, 619 (2003), who claims this was the case in the United States.
[24] Mathew Coleman & Austin Kocher, *Detention, deportation, devolution and immigrant incapacitation in the US, post 9/11*, 177(3) THE GEOGRAPHICAL JOURNAL 228 (2011).

to other countries.[25] By rethinking borders beyond the dividing line between nation states and extending the idea of the border into forms of dispersed management practices, externalization is an explicit effort to "stretch the border" and extend sovereignties.[26] Similarly, the process of "internalization" "stretches" the border into the territory of the nation state. Walters, for example, detects a disaggregation of border functions as migrants are screened and monitored routinely within the territory.[27] Kalhan similarly describes a trend of post-entry monitoring and enforcement, under which immigration officials in the United States have dramatically increased their efforts to oversee the residence of territorially present migrants via new surveillance and dataveillance technologies.[28] As the next section demonstrates, one of the main apparatuses utilized by the nation state for such purposes is immigration detention.

B. Immigration detention as border internalization

Since the 1980's, "Western" states have increased their reliance on administrative detention and detention alternatives for enforcing decisions to deport noncitizens.[29] Not only has incarceration become a major feature of immigration enforcement, but in some countries, migrants who face removal or are waiting to learn whether they would be allowed to remain in the country, represent a substantial portion of all state prisoners.[30]

Refugees and asylum-seekers are far from exempt from this occurrence. The policy to detain such groups is at odds with the Refugee Convention, which acknowledges that seeking asylum may cause refugees to breach immigration rules and requires that, subject to specific exceptions, refugees should not be penalized for their illegal entry or stay in the state of asylum.[31] Depriving asylum-seekers of their liberty via detention, for the mere reason of having entered or stayed illegally, is considered a penalty prohibited by the convention, regardless of whether immigration detention is formally defined by the state as an act of penalization.[32] This is consistent with the norms of international law governing

[25] Maribel Casas-Cortes et al, *New keywords: migration and borders*, 29(1) CULTURAL STUDIES 73 – 76 (2015); a main example of border externalization is the practice of "offshore processing" of asylum-seekers, i.e., stopping asylum-seekers at sea, before or immediately after they enter the state's territorial waters, and transferring them to other countries for the purpose of examining their asylum claims. See Michelle Foster & Jason Pobjoy, *A Failed Case of Legal Exceptionalism - Refugee Status Determination in Australia's Excised Territory*, 23(4) INTERNATIONAL JOURNAL OF REFUGEE LAW 583 (2011).
[26] Casas-Cortes et al, *id.*, at 73.
[27] Walters, *supra* note 11.
[28] Anil Kalhan, *Immigration Surveillance*, 74 MD. L. REV. 1 (2014-2015).
[29] See, for example, Cesar Cuauhtemoc Garcia Hernandez, *Immigration Detention as Punishment*, 61(5) UCLA L. REV. 1346 (2013-2014); Anil Kalhan, *Rethinking Immigration Detention (sidebar)*, 110 COLUM. L. REV. 42 (2010).
[30] This, for example, is the situation in the Unites States. See Hernandez, *Immigration Detention as Punishment*, *id.*
[31] *Id.*, at article 31.
[32] ALICE EDWARDS, BACK TO BASICS: THE RIGHT TO LIBERTY AND SECURITY OF PERSON AND 'ALTERNATIVES TO DETENTION' OF REFUGEES, ASYLUM-SEEKERS, STATELESS PERSONS AND OTHER MIGRANTS IV (UNCHR Legal and Protection Policy Research Series, April 2011), *available at*

immigration detention in general (i.e., the detention of all migrants residing in the country illegally), which prohibit prolonged detention that is not accompanied by effective deportation proceedings.[33] Therefore, the convention stipulates that any restrictions on asylum-seekers' freedom of movement, including detention, must be "necessary".[34] This principle has been developed in the UNHCR guidelines relating to the detention of asylum-seekers,[35] which stipulate that the state of asylum must not resort to detention before first considering alternatives.[36]

In practice, however, many countries make extensive use of immigration detention towards asylum-seekers, both to ensure the deportation of rejected asylum-seekers and to control the whereabouts of asylum-seekers whose claims are under review. In most European countries, administrative detention generally exists only as a measure to assist the state in carrying out the deportation of rejected asylum-seekers.[37] However, most common-law countries have adopted legislation allowing relatively long detention periods of undocumented asylum-seekers upon their arrival.[38] This may be considered an attempt to create a type of internal border – a mechanism for excluding undesirable migrants from society despite their physical residence in the territory of the nation state.

It is likewise common for released asylum-seekers, both in the common-law world and the continent, to be subjected to some type of detention alternative. These arrangements may entail various restrictions, such as an obligation to register one's place of residence; to surrender one's passport or other documentation; to appear for appointments and asylum procedures or to report to the authorities

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http://www.unhcr.org/protection/globalconsult/4dc949c49/17-basics-right-liberty-security-person-alternatives-detention-refugees.html; Gregor Noll, *Article 31 (Refugees lawfully in the country of refuge), in* THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS PROTOCOL: A COMMENTARY 1243 (Andreas Zimmermann ed., 2011); the phrase "penalties" in article 31 has thus been interpreted broadly, to include not only forms of criminal punishment, but also administrative measures imposed on asylum-seekers due to their entry. See JAMES HATHAWAY, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 408, 411 (2005).

[33] International law does not explicitly address the issue of immigration detention in general (as opposed to the detention of refugees and asylum-seekers). However, the rights to liberty and to protection from arbitrary arrest are specified under two provisions of the Universal Declaration of Human Rights and were subsequently transferred into article 9 of the International Covenant on Civil and Political Rights, which guarantees liberty and security of person and prohibits arbitrary deprivation of such liberty. See A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 3, 9 (Dec. 10, 1948); United Nations General Assembly, International Covenant on Civil and Political Rights, art. 9, Dec. 16 1966, treaty Series, vol. 999, p. 171, *available at* http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx; these articles have been interpreted to prevent immigration detention that does not serve as an aid to deportation proceedings. See, for example, European Convention for the Protection of Human Rights and Fundamental Freedoms, art. 5(1)(f), Nov. 4, 1950, E.T.S no. 005, *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf.

[34] *Id.* at article 31(2).

[35] UN High Commissioner for Refugees (UNHCR), Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, 2012, *available at* http://www.refworld.org/docid/503489533b8.html.

[36] *Id.* at guideline 2.

[37] See OXFORD PRO BONO PUBLICO, REMEDIES AND PROCEDURES ON THE RIGHT OF ANYONE DEPRIVED OF HIS OR HER LIBERTY BY ARREST OR DETENTION TO BRING PROCEEDINGS BEFORE A COURT: A COMPARATIVE AND ANALYTICAL REVIEW OF STATE PRACTICE (2014), *available at* http://ohrh.law.ox.ac.uk/wordpress/wp-content/uploads/2014/05/2014.6-Arbitrary-Detention-Project.pdf.

[38] The length of these periods differs from country to country. See *id.*

periodically.[39] Some restrictions rely mainly on crime control mechanisms, such as various types of parole, bail,[40] electronic bracelets[41] as well as other biometric technologies,[42] and in extreme cases even partial house arrest.[43] Others, such as obligating asylum-seekers to reside in special housing centers, while their asylum claims are under review[44] or while awaiting deportation upon the denial of their claims,[45] are less penal by nature and give more weight to humanitarian concerns.

All of these detention alternatives, however, represent the type of post-entry monitoring and enforcement typical of the "population-management model". Detention alternatives allow for various degrees of presence and involvement of undocumented migrants in the community, while creating barriers that differentiate them from full members of the community and allow the state authorities to control their whereabouts. Some alternatives, such as periodical appointments and reporting requirements, create constant opportunities for the authorities to reevaluate the temporary status of migrants or the conditions for retaining such status. As such, they may be considered a domestic domain that replaces or, at the very least, compliments the territorial border as the site in which membership in the community originates.

C. Immigration detention as an apparatus of the "control society"

In his lectures "Security, Territory, Population",[46] Foucault introduces the apparatus of security, claiming that it differs substantially from the disciplinary form of power. Discipline, designed to individuate the human body according to its modern societal tasks, operates by first establishing an optimal normative model, then attempting to cause individuals to conform to it. The normal and abnormal thus derive from a norm that is determined a-priori.[47] Security, conversely, does not abide

[39] For example, France, Luxembourg and South Africa require asylum-seekers to present themselves in person to renew identity documentation. Other countries, such as Austria, Canada, Denmark, Greece, Hong Kong, Ireland, Japan, Norway, Sweden and the United States, have legal frameworks that can require individuals to report to the police or immigration authorities at regular intervals. See EDWARDS, *supra* note 32, at 53 – 54.
[40] *Id.* at 54 – 55.
[41] Michael Welch, *Economic man and diffused sovereignty: a critique of Australia's asylum regime*, 61 CRIME LAW SOC. CHANGE 81 (2014); Robert Koulish, *Spiderman's Web and the Governmentality of Electronic Immigrant Detention*, LAW, CULTURE AND THE HUMANITIES (Published electronically, February 13 2012); Jonathan Darling, *Becoming Bare Life: Asylum, Hospitality and the Politics of Encampment*, 27 ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 649 (2009).
[42] Koulish, *Spiderman's Web*, *id*.
[43] EDWARDS, *supra* note 32, at 78.
[44] For example, Germany in Switzerland obligate asylum-seekers to reside in a reception center upon their arrival. See, respectively, Asylverfahrensgesetz, AsylVfG [Asylum Procedure Act] art. 47 (Ger.); Ordonnance 1 sur l'asile relative à la procedure [Asylum Act] art. 26 (Swi.).
[45] For example, Belgium has established "return houses", aimed at facilitating the return of families with minor children who had no right to remain in the country. Families residing in these housing projects are only obligated to stay there during the night. A similar project exists in Scotland. See EDWARDS, *supra* note 32, at 69 – 78.
[46] MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE 1977-1978, 20 (2009).
[47] *Id.*, at 57.

by an optimal, a-priori normative model. It establishes the norm based on statistics, causing what is considered normal or abnormal to be subject to constant negotiation.[48]

As demonstrated by Foucault, “disciplinary normalization” had transformed criminal punishment by introducing to it the objective of correcting the individual through techniques of surveillance and diagnosis.[49] This task required that penal institutions be designed according to a particular model, which Foucault found in Bentham's Panopticon.[50] “Security normalization”, conversely, is concerned less with the individual offender and more with the costs of crime as a whole. Unlike the traditional legal/juridical mechanism, security does not establish a binary division between the permitted and the prohibited. Rather, it constitutes an average considered optimal on the one hand, and, on the other, a "bandwidth of the acceptable" that must not be exceeded.[51] The apparatus of security thus does not aspire to eliminate dangerous activity altogether, nor does it aspire to eliminate it from the conduct of a particular individual. Instead, it aims to manage society as a whole to reduce dangerousness to an acceptable level. It is by nature not panoptic, but biopolitical, as it works on probabilities, on minimizing what is inconvenient rather than suppressing it.[52]

Building on Foucault's notions of "discipline" and "security", Deleuze introduces the concept of "control", arguing that a gradual transformation of disciplinary societies into “control societies” has occurred in the second half of the 20th century.[53] Like "security", control abides by norms derived from statistics that are constantly subject to modulation,[54] causing the “normal” and “abnormal” to become obscured. It abandons the dream of an all-encompassing, normalized society and replaces the quest to train and moralize individuals with the goal of managing aggregates of presumably dangerous groups.[55] Control societies thus enable the neglect of their marginal elements and function as a particular strategy of social division. Populations that risk society's security, or are unable to partake in its patterns of consumption, are excluded from it upon being constructed as “dangerous classes”. They are, however, simultaneously included in society, by way of their classification as "outsiders", who serve to mobilize fear.[56]

The control society is characterized by certain key transformations. First, there is a shift in the spatiality of power. While disciplinary power is concentrated in sites of enclosure and works by

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[48] *Id.*, at 63.
[49] For disciplinary normalization see, generally, MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON (translated from the French by Alan Sheridan, 1977).
[50] JEREMY BENTHAM, THE PANOPTICON WRITINGS (1995).
[51] FOUCAULT, SECURITY, TERRITORY, POPULATION, *supra* note 46, at 6.
[52] *Id.* at 4 – 6, 19.
[53] Deleuze, *Postscript on the Societies of Control*, *supra* note 6.
[54] *Id.*, at 5; on modulation see also William Bogard, *Welcome to the Societies of Control*, *in* THE NEW POLITICS OF SURVEILLANCE AND VISIBILITY 55, 61 – 64 (Kevin D. Haggerty and Richard V. Ericson eds., 2006).
[55] NIKOLAS ROSE, POWERS OF FREEDOM: REFRAMING POLITICAL THOUGHT 234 (1999).
[56] Walters, *supra* note 11, at 192.

spatio-temporal practices, in control societies, power has become decentralized and fluid. It operates in open sites – community service or electronic monitoring as a substitute to prison; day clinics as a substitute to hospitals – and functions through mechanisms such as restrictions on freedom of movement.[57] Physical barriers have therefore become secondary to codes, or passwords, in determining access (to places, to information), and it is the computer – capable of tracking a person's location at any given time – that is best suited to manage the society of control.[58] These new techniques, Deleuze *emphasizes*, must not be confused with indicators of liberalization or considered more tolerant than their parallels. Rather, they compete with the harshest forms of incarceration and play an equal part in strategies of supervision.[59]

Second, there is a shift in assumptions about the subject of power. Whereas the disciplinary society is concerned with individuals, their education and reform, the control society has given rise to "dividuals" – entities that are subject to control at multiple levels of the organization of the individual.[60] Unlike individuals, indivisible and complete entities whose identities are tied to the spaces in which they circulate, "dividuals", with their heterogeneous activities and identities, are fragmented and fractured.[61]

The rise of the control society in the 20th century is inherently tied to the process of globalization[62] and the pertinent changes in immigration policy. Control is largely a product of globalization, as it has no necessary connection to the territorial nation state and is infinitely extendable.[63] In the context of immigration, it has been argued that the shift to the control society, manifest in strategies of cost-effective risk-management, symbolizes a concession to unauthorized border crossings, an understanding that it is an unstoppable global phenomenon.[64] Moreover, the control society entails techniques of power that are particularly suited for governing immigration under the "population-management model". Such techniques have indeed been observed in the field of immigration.

First, contemporary immigration policy is characterized by the construction of immigrants as a dangerous class and the abandonment of goals such as assimilation and integration.[65] It is losing interest in the individual (the immigrant, who, upon overcoming border security, may be integrated

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[57] *Id.* at 191.
[58] Deleuze, *Postscript on the Societies of Control*, *supra* note 6, at 5 – 7.
[59] *Id.* at 4.
[60] GILLES DELEUZE, NEGOTIATIONS 1972 – 1990 180 (translated by Martin Joughin, 1995).
[61] Deleuze, *Postscript on the Societies of Control*, *supra* note 6, at 5; Walters, *supra* note 11, at 191.
[62] David Murakami Wood, *What is global surveillance? Towards a relational political economy of the global surveillant assemblage*, 49 GEOFORUM 317, 319 (2013).
[63] *Id.* at 319, 323; Ayse Ceyhan, *Surveillance as biopower*, *in* ROUTLEDGE HANDBOOK OF SURVEILLANCE STUDIES 38, 38 – 45 (2012).
[64] Koulish, *Entering the risk society*, supra note 6, at 62.
[65] See, for example, Jonathan Simon, *Refugees in a Carceral Age: The Rebirth of Immigration Prisons in the United States*, 10(3) PUBLIC CULTURE 577 (1998); Miller, *supra* note 23.

into society and perhaps naturalized) and focusing increasingly on aggregates. Shamir, for example, argues that we are currently witnessing the emergence of a global mobility regime, oriented to closure and blocking of access, which is premised on a "paradigm of suspicion".[66] This implies that the primary principle for determining the "license to move" both across borders and in public spaces within borders, has become the degree to which the agents of mobility are suspected of representing the threats of crime, undesirable immigration, and terrorism. The new mobility regime relies heavily on biosocial profiling – a technology of social intervention that objectifies whole strata of people by assigning them into suspect categories. In contrast to the modality of law, which operates through a binary guilty/innocent distinction, and contrary to the modality of discipline, which corrects behavior, profiling predicts behavior and regulates mobility by situating subjects in groups of risk.[67]

Second, such exclusive immigration policies were yet never aimed to eliminate unauthorized migration. Quite contrarily, they have become increasingly selective in their responses and do not muster the type of concentrated, focused management found in disciplinary power. As Bauman argues, the fact that governments are largely stripped of their sovereign prerogatives by globalization forces leaves them no alternative but to carefully select targets, which they can conceivably overpower. They thus search for "spheres of activity" in which they can assert their sovereignty.[68] This is true for border control, which, as Doty notes, generally exerts only the efforts necessary to give the appearance of a border security consistent with the "bandwidth of acceptability".[69] It also applies to other types of immigration control. For example, although all undocumented migrants are de-jure subject to deportation, de-facto immigration enforcement is about selective policing and the subsequent production of a population of territorially present, yet not legal, residents, who live under the ongoing *threat* of deportation.[70]

This is particularly characteristic of immigration detention. Detention, like contemporary immigration control in general, represents the substitution of the promise of territorial integrity with the strategy of cost-effective risk-management.[71] One indication of this fact is that, whereas a growing number of undocumented migrants, including refugees and asylum-seekers, are incarcerated each year, there is also substantial growth in the utilization of the various detention alternatives described in section B. Such alternatives, which represent the fluid technologies of power governing the post-

[66] Ronen Shamir, *Without Borders? Notes on Globalization as a Mobility Regime*, 23(2) SOCIOLOGICAL THEORY 197 (2005).
[67] *Id.* at 213.
[68] ZYGMUNT BAUMAN, WASTED LIVES: MODERNITY AND ITS OUTCASTS 56 – 57 (2013).
[69] Roxanne L. Doty, *Bare Life: Border-Crossing Deaths and Spaces of Moral Alibi*, 29(4) ENVIRONMENT AND PLANNING D: SOCIETY AND SPACE 599, 606 (2011).
[70] Coleman & Kocher, *supra* note 24, at 235.
[71] Robert Koulish, *Sovereign Bias, Crimmigration and Risk, in* IMMIGRATION DETENTION, RISK AND HUMAN RIGHTS: STUDIES ON IMMIGRATION AND CRIME 1 (Maria João Guia, Robert Koulish & Valsamis Mitsilegas eds., 2016); Koulish, *Entering the risk society*, supra note 6.

panoptic world described by Deleuze,[72] are available to the state as a more efficient method for remaining within the bandwidth of acceptability than full detention. As Koulish points out, such technologies disaggregate the individual into both fragments and aggregates of identity data. They are designed to dissolve the notion of a concrete individual and to replace it with a combination of risk factors.[73] In this way, they partake in the formation of what Deleuze has termed "dividuals".[74]

While detention alternatives that take place in open and semi-open sites (house arrest, open residence centers, limitations on freedom of movement, etc.) certainly restrict personal liberties, it is important to note their limitations in terms of preventing migrants from integrating into society. Such alternatives substitute the actual expulsion of undesirable migrants from the territory with symbolic banishment. Detention alternatives premised on residence in the community are limited even in their ability to serve as a symbolic border, as they allow populations of migrants to develop ties to the community and remain a visible part of society. Moreover, even full detention, which physically excludes migrants from society, seems limited in its ability to substitute the territorial border. The logic of risk-management that guides the control society and leads to constant categorization into groups of dangerousness dictates that many migrants will in fact remain free. Only those considered to pose a particular threat to the nation state will be incarcerated. Such narrow scope of detention may serve at most as a "sphere of activity" – a measure creating the illusion of sovereignty in face of the state's inability to secure its borders.[75] Moreover, it causes those migrants classified as "low risk" to take on a role of neither "outsiders" nor "insiders", as they are left to pursue their assimilation into society while deprived of any formal membership status. This contributes to the construction of a spectrum of "non-membership" consisting of a variety of groups, whose precise classification (normal/abnormal; outsiders/insiders) is open to negotiation and modulation.

II. Detention of asylum-seekers in Israel

A. Asylum-seekers as a "threat" to the Israeli citizenship regime

The unique status of statelessness of the refugee causes refugees and asylum-seekers worldwide to be perceived as a threat to the unity and stability of the modern nation state.[76] Refugees are perceived as the "enemy other" not because of any intrinsic flaw within them, but rather because they are

[72] Koulish, *Spiderman's Web*, *supra* note 41, at 15 – 25; Koulish, *Entering the risk society*, *id.*; for an account of control as "post-panoptic" see ROSE, *supra* note 55, at 234.
[73] Koulish, *Spiderman's Web*, *ibid*, at 15.
[74] Deleuze, *Postscript on the Societies of Control*, *supra* note 6, at 5.
[75] For the argument that this is essentially the role that immigration detention plays today see Berman, *supra* note 16, at 149 – 151.
[76] For the unique position of the refugee and its ramifications see HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 295 – 299 (1986).

outsiders to the statist legal order and different from the state's nationals.[77] They are physically and symbolically "out of place" and constitute the "other in our midst".[78] Their liminal status threatens the perceived national order of things and throws into crisis the original fiction of sovereignty, by breaking up the identity between man and citizen, nativity and nationality.[79] The rapid increase in the number of asylum-seekers arriving at the borders of "Western" democracies, caused by the aftermath of the cold war and unequal economic globalization, has forced the receiving societies to address issues of membership, rights and belonging, as well as their moral obligations to these "others".[80] Consequently, the manners in which asylum-seeking communities are defined as "deserving" or "undeserving" of rights and state support, form a central part of the material and symbolic boundary-making activity of Western nation-states today.[81]

This general tendency to view asylum-seekers as a "dangerous class" is further enhanced by the unique geopolitical and normative conditions under which the Israeli nation-state operates. Normatively, Israel is a self-proclaimed Jewish and democratic state. Geopolitically, Israel is situated between several Muslim and Arab states, some of which are enemy states to Israel, and is embroiled in an ongoing conflict with the Palestinian people who, since the 1967 war, are under Israeli occupation. All of these factors have affected Israel's immigration and citizenship regime, which determines who to exclude and who to include roughly based on a Jewish/other distinction.[82]

A product of the Zionist political movement, Israel was founded on the idea of a Jewish homeland and the right of the Jewish people to self-determination. This ideology directly affected the way in which migration patterns developed and caused engineered population movement to play a central role in the Zionist nation-building project: by increasing the proportion of Jewish settlers in the area perceived in Jewish history and religion as the "promised land", the early Zionists sought to legitimize and consolidate their vision of statehood.[83] This quest for demographic majority continued in the post-independence period and has been dominant in the shaping of Israeli migration policy. The most fundamental component of Israel's immigration laws is the Law of Return,[84] the general premise of

[77] CARL SCHMITT, THE CONCEPT OF THE POLITICAL 19-35 (1976).
[78] Madeleine Arnot, Halleli Pinson & Mano Candappa, *Compassion, caring and justice: teachers' strategies to maintain moral integrity in the face of national hostility to the "non-citizen*, 61(3) EDUCATIONAL REVIEW 249 (2009).
[79] Arendt, 1978; Agamben, 1995; see also Yonathan Paz, Ordered disorder: African asylum seekers in Israel and discursive challenges to an emerging refugee regime, NEW ISSUES IN REFUGEE RESEARCH (Research Paper No. 205) (March 2011).
[80] SEYLA BENHABIB, THE RIGHTS OF OTHERS: ALIENS, RESIDENTS AND CITIZENS (2004).
[81] Arnot, Pinson & Candappa, *supra* note 78.
[82] Tally Kritzman-Amir, *'Otherness' as the Underlying Principle in Israel's Asylum Regime*, 42 ISR. L. REV. 603 (2009) (Isr.).
[83] Karin Fathimath Afeef, A promised land for refugees? Asylum and migration in Israel (Research Paper No. 183), UNHCR Policy Development and Evaluation Service 3 (December 2009).
[84] Law of Return, 5710-1950, Passed by the Knesset on the 20th of Tammuz, 5710 (July 5, 1950) and published in Sefer HaChukkim No. 51 of the 21st of Tammuz, 5710 (July 5, 1950) at 159

which is that every Jew has the right to immigrate to Israel.[85] The law of return was amended in 1970 to include a broad category of descendants of Jews and their family members who are eligible for a right of return.[86] Through this amendment, tens of thousands of persons who are not considered Jewish under Jewish law or according to their own self-definition may immigrate to Israel.[87] The Israeli state actively promotes Jewish immigration in accordance with this law and provides immediate citizenship as well as generous social benefits to Jews and people of Jewish ancestry who choose to move to the country.[88] According to some studies, this policy is intended to create a "demographic counter-force" to the Palestinian minority in Israel.[89]

It is widely agreed upon that the Law of Return defines Israel as an "Aliyah" state – a state of Jewish return – rather than an immigration state.[90] "Aliyah" is regarded more a "homecoming" or "return" of Jews to an ancestral homeland rather than as migration to a new land,[91] and is not considered to be comparable with other forms of non-Jewish migration to Israel. Thus, the two forms of migration have always been treated as distinct administrative and normative categories by the Israeli state. In contrast to the treatment of Jewish immigrants, non-Jewish migrants are discouraged from entering Israel, as their presence undermines and challenges the state's ethnonational foundations. With few exceptions, non-Jewish migrants are excluded from membership in the Israeli polity and do not have access to citizenship or basic rights in the state.[92] They do not hold a right to immigrate to Israel, and their arrival at the state is restricted through the Entry Law.[93] Consequently, most non-Jewish immigrants can only come to Israel as temporary labor migrants, who are essentially excluded from the Israeli welfare state.[94] Particularly exclusive by nature is the legislation pertaining to persons from areas that are considered to be in conflict with Israel. Such legislation allows for the relatively easy

[85] *Id.*, at article 1.
[86] *Id.*, at Arts. 4a and 4b.
[87] Kritzman-Amir, *'Otherness', supra* note 82.
[88] Afeef, *supra* note 83.
[89] Ian Lustick, *Israel as a Non-Arab State: The Political Implications of Mass Immigration of Non-Jews*, 53(3) MIDDLE EAST JOURNAL 101 (1999).
[90] Kritzman-Amir, *'Otherness', supra* note 82, at 311; Zeev Rosenhek & Erik Cohen, *Incorporation patterns of 'foreign workers' and the Israeli migration regime: A comparative analysis*, 3 ISRAELI SOCIOLOGY 53, 60 (2000).
[91] Shuval, Judith, 1998. Migration to Israel: The mythology of 'uniqueness', International Migration 36(1): 3–24.
[92] Afeef, *supra* note 83.
[93] See Supra Note 5.
[94] Labor migrants are eligible for some social security benefits. Children of labor migrants are eligible for partially state-sponsored health care and can attend the public school system. Kritzman-Amir, *'Otherness', supra* note 82, at 312.

annulment of the status of Palestinian residents and citizens,[95] and almost categorically denies any possibility of immigration or citizenship to Palestinians and citizens of Arab countries.[96]

In addition to severely limiting non-Jewish migration, the state of Israel also limits the capacity of its non-Jewish citizens to enjoy the full benefits associated with membership in the political community. This is especially true for Israel's large Palestinian minority,[97] which formally receives equal rights but is yet highly marginalized, due to both the definition of Israel as a Jewish state and its ongoing conflict with the Palestinians residing in the occupied territories.[98] While Israel's Palestinian citizens have separate institutions in such spheres as local government, education and religion, most of these institutions are not autonomous from the state. Nor are Jews and Palestinians treated equally as collectives in terms of resource allocation and political representation.[99]

The combination of these traits has caused Israeli sociologist Sammy Smooha to define Israel as an "ethnic democracy" – a regime that combines majoritarian electoral procedures and respect for the rule of law and individual citizenship rights, with the institutionalized dominance of a majority ethnic group.[100] Under this regime, non-ethnics are conceived as a serious threat to the survival and integrity of Israel, one related not only to demographic concerns, but also to such concerns as cultural downgrading, security danger, subversion and political instability.[101] Many scholars have followed

[95] Palestinians are more likely to lose their citizenship status, since one of the grounds on which citizenship may be revoked is entering into enemy countries or acquiring citizenship in one of those countries, in which many of the Palestinian citizens of Israel have family ties or other affiliations. See Art. 11 to the Nationality Law, 5712-1952, Passed by the Knesset on the 6th of Nisan, 5712 (April 1, 1952) and published in Sefer HaChukkim No. 95 of the 13th of Nisan, 5712 (April 8, 1952) at 146. Indeed, the few rare occasions on which citizenship has been revoked involved Palestinian citizens. Additionally, a significant number of non-Jews do not have citizenship status, but rather hold an inferior residency status, which they can easily lose if they relocate, even temporarily, to another country. See, e.g., Hatem Siaj v. The Minister of Interior, Adm.Pet. (Jerusalem) 384/07 (regarding the loss of residency of a person who left Israel to study abroad); Omri v. The Minister of Interior, Adm.Pet. (Jerusalem) 247/07 (regarding the loss of residency of a person who left Israel to live with a spouse in his country of citizenship and wanted to regain his residency following the divorce)). See also Kritzman-Amir, *'Otherness'*, *supra* note 82.

[96] For many years, the ability of non-Jews who resided in Israel prior its independence and their descendants to acquire citizenship was restricted, since those who left Israel during the 1948 war were ineligible for citizenship. See Art. 11 to the Nationality Law, id.. Additionally, Palestinian citizens of Israel are almost categorically denied the right to family reunification. Nationality and Entry into Israel (Temporary Order) Law, 5763-2003, Passed by the Knesset on July 31, 2003; the Bill and an Explanatory Note were published in Reshumot (June 4, 2003); see Kritzman-Amir, *'Otherness'*, *supra* note 82.

[97] Approximately 17% of Israel's population is comprised of non-Jewish Palestinians. See…

[98] Oren Yiftachel, *'Ethnocracy': The Politics of Judaizing Israel/Palestine*, 3 CONSTELLATIONS 364 (2002); Sammy Smooha, *Minority Status in an Ethnic Democracy: The Status of the Arab Minority in Israel*, 13 ETHNIC AND RACIAL STUDIES 389 (1999); Yoav Peled, *Ethnic Democracy and Legal Construction of Citizenship: Arab Citizens of the Jewish State*, 86 AMERICAN POLITICAL SCIENCE REVIEW 432 (1992).

[99] YOAV PELED, THE CHALLENGE OF ETHNIC DEMOCRACY: THE STATE AND MINORITY GROUPS IN ISRAEL, POLAND AND NORTHERN IRELAND 3 (2014).

[100] Smooha, 1990; 2002; 2005.

[101] Sammy Smooha, *The model of ethnic democracy: Israel as a Jewish and democratic state*, 8(4) NATIONS AND NATIONALISM 475, 478 (2002).

in Smooha's footsteps,[102] with some going farther to describe Israel as an "ethnocracy" – a state ruled not by the Israeli *demos*, but rather by the Jewish *ethnos*, and thus not a democracy at all.[103]

The dual migration regime that exists in Israel – consisting of one system for those with Jewish ancestry and another for migrants of non-Jewish origin – therefore mirrors what Mundlak has termed Israel's "bipolar model of citizenship".[104] However, as Mundlak[105] and others[106] have pointed out, a vast increase in non-Jewish migration to the country since the 1990's has challenged this conception of citizenship, gradually causing the bipolar model to be broken down. Broadly speaking, three main patterns of migration to Israel have challenged the state's definitional features.[107] First, during the 1990's Israel absorbed over one million Jewish and non-Jewish migrants from the collapsing Soviet Union who were primarily driven by economic considerations. Second, in 1993 the government began to encourage labor migration from overseas to replace Palestinian workers from the West Bank and Gaza.[108] During that year, Israel imposed severe restrictions on movement from the Occupied Territories, and, for the first time since 1967, Palestinians were unavailable to their Israeli employers for an extended period.[109] In addition, the logic of the two-state solution advocated during the Oslo peace process implied distinct and separate Palestinian and Israeli labor markets. This served to further reinforce the exclusion of Palestinians from the Israeli labor market,[110] causing high levels of demand for cheap labor.[111] In the same period, the Israeli economy experienced considerable growth, making it an increasingly attractive destination country for immigrants seeking to improve their economic situation.[112] The arrival of hundreds of thousands of Jews from the former Soviet Union

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[102] See, for example, PELED, THE CHALLENGE OF ETHNIC DEMOCRACY, *supra* note 99. Peled argues that Israel is in fact the archetypal example of such regimes.

[103] The term "ethnocracy" was introduced by Oren Yiftachel in response to Smooha's characterization of Israel as an "ethnic democracy". It is based on a wider definition of democracy than Smooha's, as well as on the rejection of the distinction between the sovereign state of Israel within its pre-1967 borders and the Israeli occupation of the Palestinian territories. See Yiftachel, *supra* note 98.

[104] Mundlak, Guy, 2007. ―Litigating citizenship beyond the Law of Return, in Sarah S. Willen, ed., Transnational migration to Israel in global comparative context.; for this link between Israel's migration and citizenship regimes see Afeef, *supra* note 83, at 3.

[105] Mundlak, Litigating citizenship beyond the Law of Return, *id.*; see also Hila Shamir & Guy Mundlak, *Spheres of Migration*, 5 MIDDLE EAST LAW AND GOVERNANCE 112 (2013).

[106] Guy Ben-Porat & Bryan S. Turner, *Contemporary dilemmas of Israeli citizenship*, 12(3) CITIZENSHIP STUDIES 195, 196 (2008).

[107] Paz, *supra* note 79.

[108] Ruth Klinov, *Palestinian Workers and Foreign Workers*, *in* CROSSROADS IN ISRAELI SOCIETY, 262, 263 – 265 (Dvora HaCohen & Moshe Lissak eds., 2010).

[109] Bartram, David, 1998. ―Foreign workers in Israel: History and theory‖, International Migration Review 32(2): 303, 312.

[110] Rebeca Raijman & Adriana Kemp, *Labor migration, managing the ethno-national conflict, and client politics in Israel*, *in* TRANSNATIONAL MIGRATION TO ISRAEL IN GLOBAL COMPARATIVE CONTEXT 31 (Sarah S. Willen, ed., 2007); Ruth Klinov, *Palestinian Workers and Foreign Workers*, *in* CROSSROADS IN ISRAELI SOCIETY, 262, 263 – 265 (Dvora HaCohen & Moshe Lissak eds., 2010).

[111] Afeef, *supra* note 83, at 4 – 5.

[112] Yinon Cohen, *From haven to heaven: Changing patterns of immigration to Israel*, *in* CHALLENGING ETHNIC CITIZENSHIP: GERMAN AND ISRAELI PERSPECTIVES ON IMMIGRATION (Daniel Levy & Yfaat Weiss, eds, 2002); this process was embedded in a broad set of political and economic processes associated with the globalization of labor markets. See

also led to a boom in the construction sector, as demand for housing increased significantly.[113] The Israeli authorities were initially reluctant to open the gates to imported labor, as they hoped that new Jewish immigrants and other unemployed Israelis would fill the labor-market demands. However, fierce lobbying by employers' groups eventually caused the government to ease restrictions on work permits to workers from various countries, mostly in Asia (e.g., China, Thailand, the Philippines, Nepal, and India) and Eastern Europe (e.g., Romania, Bulgaria, and Moldova), but also Latin America and Africa.[114] These workers were recruited for jobs in three main sectors: construction, agriculture, and care-giving for elderly and disabled people.[115]

By the early 2000s, Israel hosted proportionally more labor migrants than most European countries,[116] making it one of the industrialized countries most heavily reliant on labor migration.[117] By the end of 2008, 115,000 labor migrants with permits were registered, and in addition to this, the government estimated that approximately 107,000 undocumented workers remained in the country.[118] From the government's viewpoint, these new labor migrants were not perceived as immigrants but only as workers who met the state's economic needs.[119] Accordingly, government policy towards them varied and consisted of some policies that were exclusive by nature, including a large-scale governmental deportation campaign targeted at workers who overstayed their visas.[120] The government also restricted the legal possibility of settling down in Israel and offered these workers no path to naturalization. However, some groups of labor migrants, mainly from Latin America and Africa, invested every effort and a great deal of money in consolidating their position in Israel.[121] These efforts led the Israeli government in 2005 to recognize the de-facto assimilation of these migrants.[122] The government resolution stipulated that all children of labor migrants aged ten and over who were born in Israel, speak Hebrew, and are attending or have completed the Israeli education system, were to be granted permanent residency and, thereafter, citizenship. Their parents and younger siblings were to be granted temporary resident status, to be renewed annually, thereby entitling them to full

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Sarah S. Willen, *Introduction*, *in* TRANSNATIONAL MIGRATION TO ISRAEL IN GLOBAL COMPARATIVE CONTEXT (Sarah S. Willen, ed., 2007).

[113] David Bartram, *Foreign workers in Israel: History and theory*, 32(2) INTERNATIONAL MIGRATION REVIEW 303 (1998).

[114] *Id.*; Afeef, *supra* note 83, at 4 – 5; Barak Kalir, *Finding Jesus in the Holy Land and Taking Him to China*, 70(2) SOCIOLOGY OF RELIGION, 130, 132 – 136 (2009).

[115] Kalir, *Id.*, 132 – 136.

[116] Yinon Cohen, *supra* note 112.

[117] Raijman & Kemp, *supra* note 110.

[118] (Central Bureau of Statistics. 2009. —Press Release 30 July 2009; available at http://www1.cbs.gov.il/reader/newhodaot/hodaa_template.html?hodaa=200920161); see also Afeef, *supra* note 83, at 4 – 5.

[119] Kemp and Reijman 2008; Reijman 2009; Kemp 2010; Paz, *supra* note 79.

[120] Willen, *supra* note 112; Paz, *id.*

[121] Kalir, 2006.

[122] Kalir, 2009, *supra* note 114, at 132 – 136.

social rights. Moreover, once the younger siblings enlist in the army, they too receive Israeli citizenship and the parents receive permanent residency.[123]

The third pattern of non-Jewish migration to Israel consisted of the tens of thousands of asylum-seekers from African countries that began arriving in the mid-2000s.[124] Most of these asylum-seekers came from Eritrea[125] and Sudan[126] and entered the country through the Sinai border,[127] which, despite being guarded on both sides, is yet not as heavily monitored as Israel's other international borders, due to the relatively peaceful relations between Israel and Egypt.[128] This is the result of ongoing repression and conflict that endanger the nationals of Sudan and Eritrea. A relatively young state, Eritrea established formal independence from Ethiopia in 1993, following an UN-monitored referendum on independence. Eritrea is currently a single party state (governed by "the People's Front for Democracy and Justice"), which, to date, has never held democratic elections. Torture, arbitrary detention and severe restrictions on freedom of expression, association, and religious freedom are the norm in Eritrea,[129] as are forced labor and military restrictions that the country imposes on its youth and that consist of military service that may be prolonged indefinitely.[130] In Sudan, citizens face equally heavy repression and fear for their safety, especially within the conflicted region of Darfur, where civil war and genocide has taken place since 2003, and has caused over 400,000 people their

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[123] GOVERNMENT RESOLUTION NO. 3807, TEMPORARY ARRANGEMENT FOR GIVING STATUS TO CHILDREN OF ILLEGAL RESIDENTS, THEIR PARENTS AND SIBLINGS WHO RESIDE IN ISRAEL (June 26, 2005) (Isr.); Adriana Kemp, *Managing migration, reprioritizing national citizenship: undocumented migrant workers' children and policy reforms in Israel*, 8(2) THEORETICAL INQUIRIES IN LAW 663, 664 (2007).

[124] Paz, *supra* note 79.

[125] At the end of 2016, 72% of the asylum-seeking population were Eritrean nationals. See https://www.gov.il/BlobFolder/generalpage/foreign_workers_stats/he/foreigners_in_Israel_data_2016_0.pdf

[126] At the end of 2016, 20% of the asylum-seeking population were Sudanese nationals. *Id.*

[127] Afeef, *supra* note 83, at 8. Although the steep increase in asylum migration to Israel since 2005 can largely be attributed to the entry of Sudanese and Eritrean nationals, the asylum-seeking community in Israel is in fact more diverse and includes individuals from countries such as Côte d'Ivoire, the DRC, the Philippines, Nigeria, Colombia, Sri Lanka and Burma/Myanmar. Not all of these asylum-seekers enter the country through the Egypt–Israel border. Some West-African asylum seekers, for instance, follow the pilgrimage route and enter Israel as part of organized religious tours. Others have lived in the country as labor migrants for several years and who originally entered the country on work visas and approached UNHCR once their visa had expired. See Afeef, *supra* note 83, at 10.

[128] It should be noted, however, that following the large-scale entry of asylum-seekers through the Sinai border, the Israeli government built a fence on this border, causing it to become far more secured and the number of asylum-seekers that manage to overcome it drop significantly. See discussion in chapter 3.

[129] Many Eritreans lack basic legal rights. Residents are routinely subject to imprisonment without explanation, trial, or any form of due process. These terms of imprisonment often last indefinitely. Most basic human rights guarantees are restricted. Since 2001, no independent press has existed within Eritrea, and all domestic media is controlled by the government. The government acknowledges a right to exist for four "recognized" religious groups: the Orthodox Church, Sunni Islam, Roman Catholicism, and the Evangelical (Lutheran) Church. Those that do not affiliate themselves with one of the four recognized religions face arrest and torture that the government uses to compel them to recant their faith. See Edward N. Krakauer, *Divergent Paths, Similar Results: How African Asylum Seekers Have Been Failed in Both Israel and Malta Despite Varying Procedures and Treatment*, 21 UNIVERSITY OF MIAMI INTERNATIONAL AND COMPARATIVE LAW REVIEW 265, 267 – 269 (2014).

[130] Children may be forced into military training at the age of 14 as part of their school curriculum. If they refuse training, they risk their family members' arrest. Refusing to join the military may lead to on-the-spot execution, and desertion can lead to "shoot to kill" orders and detention for prolonged periods. Eritrean law states that able-bodied adults between the ages of 18 and 40 must serve eighteen months of military service. However, government practice prolongs that period indefinitely. See Krakauer, *id.*, at 267 – 269.

lives through violence, malnutrition, and disease. This genocide remains separate from the atrocities that occurred in southern Sudan before that portion of the country became an autonomous state in 2005 and attained its independence in 2011. The situation in Darfur alone has led to the exile of over one million refugees and the displacement of over 2,500,000 people.[131] Additionally, the government infringes on rights to speech and assembly, Sudanese residents face constant political repression and media restrictions, and those suspected of ties to targeted opposition parties are detained.[132]

The mass arrival of African asylum-seekers posed a severe challenge to Israel's asylum and immigration regime. On one hand, Israel accepts these asylum-seekers, in the sense that it refrains from deporting them and thus abides by the non-refoulement principle. Eritrean nationals have received informal temporary protection, since Israel's diplomatic interests have prevented declaring that these countries are "in crisis".[133] The protection from deportation extended to Sudanese refugees may be perceived as a thin form of de-facto temporary protection. Asylum-seekers that have arrived from the Democratic Republic of Congo, Sierra Leone, and Togo have received formal temporary protection following a government decision labeling their countries of origin as "countries in crisis".[134]

On the other hand, however, the asylum-seeking population entered an asylum system that, as Kritzman-Amir has demonstrated, is essentially an extension of Israel's immigration and citizenship regime, as it excludes non-Jewish refugees and frames them as "others".[135] Despite the fact that Israel was instrumental in the formulation of the Refugee Convention[136] and one of the first countries to ratify the Convention, as well as its 1967 protocol,[137] it has yet to incorporate the convention into its domestic legislation.[138] In fact, since its establishment Israel has consistently refrained from adopting a clear asylum policy. Israeli law consists of no designated refugee status, meaning that refugees are granted a "generic" status that is given to persons in the process of naturalization in Israel. To date, the Minister of Interior has never exercised his discretion to naturalize a refugee. A side effect of the temporary status is that refugees are unable to participate fully in Israeli society, politics, and the welfare state.[139]

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[131] *Id.*, at 269 – 270.
[132] *Id.*
[133] The same goes for national of Myanmar. Kritzman-Amir, *'Otherness'*, *supra* note 82.
[134] *Id.*
[135] *Id.*
[136] Harel, *supra* note 4, at 43.
[137] Israel ratified the Refugee Convention in 1954 and accepted the protocol in 1968. See *id.* at 43. From a legal standpoint, the acceptance of the obligations stipulated in the protocol – "accession" – is the same as its "ratification". *Id.*
[138] Sharon Harel, *supra* note 4; the only domestic legal norm obligating the state to act in accordance with the convention is thus the "presumption of compatibility", which requires the Israeli courts to interpret domestic legislation in a way that is compatible with the state's international obligations. See David Kretzmer, *Israel*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY, 287 (David Sloss ed., December 2009).
[139] Harel, *Id.*

In other words, asylum-seekers are subjected to a policy that, coupled with Israel's immigration and citizenship policies, is largely designed to sustain and enhance the existing social order of the Israeli "ethnic democracy". This policy excludes and marginalizes asylum-seekers, leaving them, at best, the opportunity to partake in the work market through participation in low-skilled, often undocumented, jobs.[140]

It is therefore not surprising that the mass arrival of African asylum-seekers to Israel has triggered a heightened anxiety over the transforming ethnonational character of the Israeli nation-state.[141] Not only are these asylum-seekers of non-Jewish origin, but some of them are nationals of Sudan, which is formally considered an enemy of Israel.[142] Most of the asylum-seekers have entered Israel upon crossing at least one enemy state on their way to Israel,[143] and through the notorious Egyptian border, which has been repeatedly infiltrated by suicide bombers during the first decade of the new millennium.[144] These facts raised security concerns, coupled with the demographic concern that unknown multitudes of Eritreans and Sudanese will enter Israel and tip the demographic balance away from a Jewish majority.[145] A third concern may be that impoverished African asylum-seekers may become a financial burden on the state. Tellingly, Jewish Ethiopians have suffered persistent socioeconomic problems since immigrating to Israel in the 1980s and 1990s, and still remain one of the most disadvantaged groups in Israel. Reluctance to assimilate Sudanese and Eritreans into Israel may stem in part from worries that these groups will disproportionately burden the state's resources, in effect replicating the experience of Ethiopians in Israel.[146]

The asylum-seekers were thus greeted with fear and suspicion, and swiftly categorized as a dangerous class. The motivation behind their arrival is constantly questioned, and they are often referred to as "work infiltrators".[147] Politicians and public officials inflamed this debate by releasing controversial statements.[148] Former PM Olmert described their mass arrival as a "tsunami".[149] Current PM Netanyahu claimed "infiltrators cause cultural, social and economic damage, and pull us towards the

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[140] *Id.*
[141] Paz, *supra* note 79.
[142] An enemy state need not have formally declared war on Israel to have earned such a designation. The presumption of dangerousness of the Sudanese asylum-seekers stems from the classification of Sudan as a state sponsor of terrorism by the United States Department of State, as well as from reliable representations by Israel that arms and explosives originating in Sudan are smuggled via Egypt to Israel or to the Gaza Strip. See Avi Perry, *Solving Israel's African Refugee Crisis*, 51(1) VIRGINIA JOURNAL OF INTERNATIONAL LAW 157, 163 – 164 (2010).
[143] Kritzman-Amir, *'Otherness'*, *supra* note 82.
[144] Perry, *Solving Israel's African Refugee Crisis*, supra Note 142, at 174.
[145] *Id.*
[146] *Id.*, at 178.
[147] Kritzman-Amir, *'Otherness'*, *supra* note 82.
[148] Paz, *supra* note 79.
[149] Roni Sofer, *Olmert: We must curb infiltrations from Egypt*, YNET 2008, *available at* http://www.ynetnews.com/articles/0,7340,L-3522476,00.html (last visited 11.6.17).

Third World".[150] A member of parliament (who is currently the Minister of Culture) described this population as a "cancer" on Israeli society.[151] The head of the "Special Parliamentary Committee on the Problem of Foreign Workers" defined it as an immediate "demographic, cultural, religious and social threat", warning that "the Jewish people have spent 100 years building a Jewish state and in 10 years the infiltrators can wash it all down the drain".[152] The mayor of Eilat, the nearest city to the southern border, launched a media campaign concerning the municipal burden associated with the number of African asylum seekers in his city and called Israel's inaction "national suicide".[153]

Finally, some of the local population have met the asylum-seeking population with scrutiny and outrage, particularly residents of the Southern neighborhoods of Tel Aviv, which are known for low-income housing. The majority of asylum-seekers that are not in detention has settled in these neighborhoods, where they compete with other low-income residents for employment. Some local residents are concerned with the effect that this population may have on the Jewish identity of their surroundings; others are primarily concerned with the effect on their quality of life and about a lawless society that may ensue, as they view the African migrants as more prone to dangerous and illegal behavior.[154]

Israel's new immigration detention policy was triggered in direct response to these perceived threats. This policy was designed to overcome the challenge of excluding the asylum-seeking population from society to sustain Israel's ethnonational character, while simultaneously allowing their continued physical presence in the territory, in accordance with international law. As we will see in the next sections, the Israeli government was only partially successful in this mission. For, as this policy was increasingly shaped in the image of the objectives and techniques of power typical of the "control society", its limitations in preventing the asylum-seeking community from becoming a permanent part of Israeli society became clear.

B. The amendments to the Israeli Anti-Infiltration Law

On December 11 2011, the Israeli government reached a resolution entitled "the establishment of a detention center for the residence of infiltrators and the curbing of the illegal infiltration of Israel".[155]

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[150] Goldstein 2010.
[151] http://www.ynet.co.il/articles/0,7340,L-4233655,00.html (last visited, 21.6.2017).
[152] Paz, *supra* note 79.
[153] *Id.*
[154] Edward N. Krakauer, *Divergent Paths, Similar Results: How African Asylum Seekers Have Been Failed in Both Israel and Malta Despite Varying Procedures and Treatment*, 21 University of Miami International and Comparative Law Review 265, 279 – 281 (2014). There are conflicting reports as to the effect the asylum-seeking community actually has on crime rates. See Krakauer, *Divergent Paths, Similar Results*, id., as well as discussion in chapter 3 below.
[155] GOVERNMENT RESOLUTION NO. 3936, THE ESTABLISHMENT OF A DETENTION CENTER FOR THE RESIDENCE OF INFILTRATORS AND THE CURBING OF THE ILLEGAL INFILTRATION OF ISRAEL (Dec. 11, 2011) (Isr.).

The resolution consisted of two main components. First, the allocation of 280 million NIS for completing the Egypt-Eilat border fence. Second, the establishment of several special internment centers, operated by the State Correctional Authority, for detaining undocumented migrants who may not, at the time, be deported. Shortly after this resolution, work on the Egypt-Eilat border fence began. Simultaneously, parliament introduced an amendment to the Israeli "Anti-Infiltration Law".[156] This law considers any person who has entered Israel by any means other than a designated border check-post an illegal "infiltrator", and does not exempt persons filing for asylum in accordance with the Refugee Convention.[157] The 2012 amendment authorized the automatic detention of "infiltrators" for a minimum period of three years. Thereafter, they would only be released provided that they did not pose a threat to national security, public safety or public health.[158]

However, several asylum-seekers and human rights organizations responded by filing a petition to the High Court of Justice, challenging the constitutionality of the 2012 amendment.[159] The petitioners claimed the amendment constituted a disproportional infringement upon the right to liberty and freedom of movement, which did not meet the requirements of the Basic Law: Human Dignity and Liberty.[160] The main argument of the petition was that the mandatory three-year detention period violated the principle – acknowledged in both international and local Israeli law – allowing immigration detention only as a short-term measure to assist the state in carrying out the deportation of undocumented migrants.[161]

In an 8-1 verdict, the High Court of Justice granted the petition and struck down the entire 2012 amendment, deeming it disproportional in its infringement upon the right to liberty, and thus unconstitutional.[162] Justice Arbel, who wrote the majority opinion, agreed that immigration detention could generally be applied only as a means of carrying out deportation. Justice Arbel ruled that the long-term incarceration of asylum-seekers without a trial and with no option of deportation in sight, constituted a fatal blow to their right to liberty. This infringement upon their constitutional rights was amplified by the fact that it was not based on individual guilt and had nothing to do with their personal characteristics or conduct.

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[156] Anti-Infiltration Law (offences and judgment) (Amendment no. 3 and temporary order), 5772–2012, SH No. 2332 P. 119 (Isr.). Hereinafter: "the 2012 amendment".

[157] The law therefore does not mention the term "asylum-seeker" but only the term "infiltrator". Consequently, this article likewise uses the term "infiltrator" when referring to the language of the law. In all other instances referring to the population of asylum-seekers in Israel, however, I use the term "asylum-seeker".

[158] The 2012 amendment, *supra* note 156, at § 30A(D).

[159] HCJ 7146/12 Adam and others v. the Knesset and others (petition, submitted Oct. 4, 2012) (Isr.), *available at* http://www.acri.org.il/he/33661.

[160] Basic Law: Human Dignity and Liberty, 5756–1992, § 8, SH No. 1391, P. 150 (Isr.).

[161] *Adam and others* (petition), *supra* note 159, at paragraphs 119 – 125.

[162] HCJ 7146/12 Adam and others v. the Knesset and others (Sep. 16, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

In response to the verdict, parliament amended the law once again.[163] The 2013 amendment determined that "infiltrators" who entered Israel be sent to a closed detention center for a one-year period. However, the amendment also instituted a second type of detention, which takes place in an open residence center. This center, known by the name "Holot", is located in the middle of the desert and is likewise managed by the State Correctional Authority. The 2013 amendment stipulated that after the initial one-year period in the closed center, "infiltrators" were to be transferred to "Holot" and reside there until their deportation became possible. The amendment stipulated no maximum period of residence at Holot,[164] and obligated those residing at the center to sleep their and report back three times a day.[165]

Like the 2012 amendment, the 2013 amendment entailed a highly exclusive attitude towards the asylum-seeking population. However, it acknowledged that incapacitation could no longer be achieved exclusively through full confinement. Thus, it established a more open site for the purpose of governing asylum-seekers, where the type of fluid techniques of power typical of the control society were implemented.

However, the High Court of Justice struck down the 2013 amendment, ruling that both the one-year detention period in the closed center and the obligation to reside indefinitely at Holot were unconstitutional.[166] Justice Fogelman, who wrote the majority opinion, ruled that Holot was by nature more similar to a closed detention facility than to an open one.[167] The fact that its residents were obligated to report to it three times a day, coupled with its location in the middle of the desert, afar from any major city, amounted to a de-facto deprivation of liberty, for:

> The infiltrator is thus prevented from developing his personality . . . how could he meet a romantic partner? Which hobbies could he possibly pursue? When would he meet his friends, whom have yet to receive notice to report to Holot? Could he attempt to acquire an education? It is clear that the infiltrator is denied the possibility of realizing his individual autonomy.[168]

This reasoning may be construed as an objection to the prioritization of the aggregate over the individual that is typical of the control society. In Justice Fogelman's view, an asylum-seeker is

[163] Anti-Infiltration Law (offences and judgment) (Amendment no. 4 and temporary order), 5774–2013, SH No. 2419, P. 74 (Isr.). Hereinafter: "the 2013 amendment".
[164] *Id.* at chapter 4.
[165] *Id.* at 126.
[166] HCJ 7385/13 Eitan and others v. the Israeli government and others (Sep. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[167] *Id.* at paragraph 98 (majority opinion).
[168] *Id.* at paragraph 125. The use of the singular 'he' is in the original text - R.R.R.

primarily a concrete individual who is a bearer of rights, including the right to develop his or her personality. This must be taken into consideration when applying detention and detention alternatives. However, Justice Fogelman and the majority opinion did not reject the use of other detention alternatives, which could serve to restrict asylum-seekers' freedom of movement. The court commented that other countries had adopted measures such as open housing centers, confinement to a certain geographic area, electronic bracelets and the posting of bail for supervising asylum-seekers, all of which may be acceptable in the Israeli case.[169]

Parliament quickly responded to the verdict rendering void the 2013 amendment, by introducing yet a third amendment to the law.[170] The 2014 amendment stipulated that any "infiltrator" who entered Israel would be confined at the closed center for three months.[171] It furthermore stated that asylum-seekers already residing in Israel may be sent to Holot for a period of twenty months, during which they would only be required to report to the center in the evenings.[172] Consequently, a third petition was filed to the court, focusing mainly on the period of residence at Holot.[173] The petitioners described in detail the living conditions at Holot,[174] emphasizing the various restrictions posed on the every-day lives of the residents.[175] Also emphasized were the grave consequences that transporting asylum-seekers to Holot after a long period of residence in Israel had on such persons' ties to the community.[176] Rather than sending asylum-seekers to Holot, the petitioners suggested that the government regulate the employment of asylum-seekers, a policy that would reduce their incentives for criminal conduct.[177] The state strongly objected to this suggestion in its response, emphasizing that such a policy of "containment" and "acceptance" would incentivize future "infiltrators" to enter Israel.[178]

On this occasion, the High Court of Justice sustained the petition only partially. The court ruled that the initial three-month detention period was reasonable, despite the fact that it was not used to review individual asylum claims or expected to lead to deportation.[179] It likewise ruled that while the period

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[169] See, for example, *id.* at paragraph 63; *id.* at paragraph 5 (Naor, J., concurring).
[170] Anti-Infiltration and Guaranteed Exit of Infiltrators Law (Amendments and temporary order), 5775–2014, SH No. 2483, P. 95 (Isr.), at § 32H, 32J(A)(5). Hereinafter: "the 2014 amendment".
[171] *Id.* at § 1(1)(c).
[172] *Id.* at § 32H(b).
[173] However, the initial three-month detention period in the closed center was likewise challenged. See HCJ 8665/14 Desta and others v. the Israeli parliament and others (Petition, submitted Dec. 18, 2014) (Isr.), *available at* http://www.acri.org.il/he/33661.
[174] *Id.* at paragraphs 97 – 135.
[175] *Id.* at paragraphs 104, 112 – 113.
[176] *Id.* at paragraph 107.
[177] *Id.* at Paragraph 330.
[178] HCJ 8665/14 Desta and others v. the Israeli parliament and others (Response, submitted Jan. 27, 2015) (Isr.), *available at* http://www.acri.org.il/he/33661. See paragraph 10.
[179] HCJ 8665/14 Desta and others v. the Israeli parliament and others (August 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

of residence at Holot must be reduced, the government may principally continue to obligate asylum-seekers to reside at the center.[180]

Perhaps the most interesting aspect of the court's third verdict was its struggle to articulate an objective that would justify the policy of detaining asylum-seekers at Holot. Chief Justice Naor, who wrote the majority opinion,[181] accepted the state's position that it could not be obligated to adopt an inclusive policy of "'containment and absorption" toward the asylum-seeking community.[182] Moreover, she accepted the state's position that the main purpose of Holot was legitimately preventing asylum-seekers from settling in Israeli cities. The problem with this justification, however, was clear: Holot could house only a small percentage of the asylum-seeking population and the state was prohibited from indefinitely detaining asylum-seekers there until their deportation became possible. Then, in what way exactly would Holot prevent asylum-seekers from settling in Israel?

The answer, according to the court, was that Holot was not intended precisely for preventing any given individual from developing ties to Israel. It was rather designed for reducing the general burden on Israeli cities by dispersing the population of "infiltrators" that resides in these cities. This goal, Chief Justice Naor explained

> [D]oes not focus on the individual infiltrator or the risk posed by him to society . . . I believe that in order to fulfill this goal there is no need to hold any particular infiltrator at the residence center. It is enough to hold any group of infiltrators at the center. Indeed, we may assume that with the release of one infiltrator from the center another will take his place. This changeover achieves the purpose of the law. It is enough that at every given moment a part of the population of infiltrators . . . will be removed from the city centers. Such a "revolving door" policy causes a lesser infringement upon the constitutional rights of the infiltrators called to the residence center and it achieves the purpose of the law. It is therefore possible to make do with a significantly shorter period of residence at the center, for the purpose of complying with the objectives of the law.[183]

If Justice Fogelman formerly insisted on "individualizing" the asylum-seeking population, Chief Justice Naor seems to do the opposite. By Chief Justice Naor's logic, individual asylum-seekers are meaningless, not in the sense that they have no personal rights (on the contrary, the constitutional rights of asylum-seekers are part of the rationale of the decision), but in the sense that they are simply

[180] *Id*; for the minority opinion of Justice Hendel that upheld the constitutionality of the entire amendment, see *id.* at 116 – 133 (Hendel, J., dissenting).
[181] *Id.* at 2 – 70 (majority opinion).
[182] *Id.* at paragraph 80.
[183] *Id*. at paragraph 100. The use of the singular 'him' is in the original text - R.R.R.

not the entity with which the Israeli detention policy is concerned. This policy is about aggregates, about reducing the population as a whole, in order to diminish the general undesirable consequences that its presence has on Israeli society. It is quite simply a numbers game. Following this logic, Chief Justice Naor ruled that the maximum period of residence at Holot should be decreased, as shorter periods would sufficiently attain this objective. In response, parliament amended the Anti-Infiltration law to entail a twelve-month residence period.[184] This fourth and final amendment is still valid today.

The 2012 amendment and, to lesser extent, the 2013 amendment, focused on containing the asylum-seeking population in concentrated sites of enclosure. The 2014 and 2016 amendments, conversely, strived to exclude asylum-seekers from Israeli society by flexible measures, considered sufficient to reduce the undesirable effects of undocumented immigration as a whole. While from the perspective of the asylum-seeking population they undoubtedly still constitute a grave infringement upon the right to liberty, they are yet more open by nature than their predecessors are. This development will be discussed in section III.

C. Particular mechanisms for controlling asylum-seekers involved in criminal activity

These new mechanisms for detaining and controlling asylum-seekers, established by the amendments to the Anti-Infiltration Law, are complemented by two further arrangements, designed specifically for controlling crime within the asylum-seeking community. The first is an executive directive allowing the use of immigration detention in order to confine and sanction "infiltrators" who have demonstrated unlawful behavior during their release into the community.[185] The directive allows the head of the Border Authority to revoke the conditional release visa and detain an asylum-seeker convicted or merely suspected of any offense that the head of the authority considers might jeopardize national security or public safety.[186] Convicted asylum-seekers are detained in accordance with the directive upon completion of their sentence, which results in a de-facto double punishment. As for asylum-seekers who have yet to be convicted, the directive permits the incarceration without trial of those suspected of a crime or misdemeanor whose case was closed due to insufficient evidence, if the evidence of guilt is similar to the level of proof sufficient for a criminal conviction. In these cases, the directive hence serves as a type of alternative criminal procedure for asylum-seekers, one consisting of relaxed evidentiary standards and far fewer procedural safeguards. The offences

[184] Anti-Infiltration Law (offences and judgment) (Amendment no. 5 and temporary order), 5776–2016, SH No. 2530, P. 544 (Isr.). Hereinafter: "the 2016 amendment".
[185] GUIDELINE FOR COORDINATING THE TREATMENT OF INFILTRATORS INVOLVED IN CRIMINAL ACTIVITY BETWEEN THE POLICE AND THE 'POPULATION, IMMIGRATION AND BORDER AUTHORITY' (2014) (On file with author). Hereinafter: "the directive".
[186] In accordance with § 13F to the Entry Law. See *supra* note 5.

allowing the enforcement of the directive include severe crimes, such as security related offences, sexual offences, drug distribution, and aggravated assault, alongside some relatively minor crimes and misdemeanors.[187]

The second mechanism is a disciplinary hearing, instigated by the amendment to the Anti-Infiltration Law and designed to sanction asylum-seekers who have demonstrated unlawful behavior during their residence at Holot. The hearing may result in various sanctions – including a reprimand, a fine and a prohibition of the asylum-seeker from leaving Holot – the most severe of which is a four-month period at a closed detention center.[188]

Much like the final amendment to the Anti-Infiltration Law, these mechanisms were also preceded by more extreme versions, and negotiated through Supreme Court litigation. The directive initially[189] permitted the detention of asylum-seekers suspected of a wider range of offences,[190] demanded a lower burden of proof[191] and was not limited to cases closed due to insufficient evidence.[192] These conditions were revised following several petitions to the Supreme Court, challenging the directive's legality. The court's verdicts expressed some uneasiness about the directive and stated that principally speaking, the criminal process was the appropriate way of coping with suspected criminals.[193] The court likewise ruled that decisions to detain asylum-seekers in accordance with the directive were subject to judicial review and should abide by the principle of proportionality.[194]

However, unlike its reaction to the amendments to the Anti-Infiltration Law, in respect of the long-term detention of asylum-seekers accused of breaking the law, the court refused to make a general ruling that such a policy was unconstitutional. The court was unwilling to rule that the criminal process was the only acceptable way for determining guilt or innocence,[195] or that immigration detention was permitted only to enable deportation and not to control crime,[196] claiming that such general rulings might prevent the state from securing its citizens.

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[187] GUIDELINE FOR COORDINATING THE TREATMENT OF INFILTRATORS INVOLVED IN CRIMINAL ACTIVITY, *supra* note 185.
[188] The 2014 amendment, *supra* note 170, at § 32T(b).
[189] The guideline was originally termed the PROCEDURE OF TREATMENT OF INFILTRATORS INVOLVED IN CRIMINAL PROCEEDINGS, Regulation No. 10.1.0010 (2013) (Isr.), *available at* http://www.justice.gov.il/Pubilcations/News/Documents/NohalMistanenim.pdf. Hereinafter: "the procedure".
[190] *Id*. The procedure applied to any offence potentially compromising public order.
[191] *Id*. The procedure required "clear and convincing evidence".
[192] *Id.* The procedure applied also to cases closed due to insufficient public interest.
[193] See, for example, AdminA 4326/13 Halhalu v. The ministry of interior (Nov. 3, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); AdminA 298/14 the State of Israel v. Ismail (Mar. 17, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.); AdminA 4496/13 Habtum v. The Ministry of Interior (Nov. 12, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.), at paragraph 16.
[194] *Habtum*.
[195] See, for Example, AdminA 8642/12 Taspahuna v. The ministry of interior (Feb. 4, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.); *Ismail*.
[196] See, for example *Habtum*; *Ismail*.

Such rulings were issued by the court not only before, but also after its decision to annul the 2012 amendment to the Anti-Infiltration Law. For example, in the case of **Habtum**, Justice Rubinstein rejected the petitioners' claim that immigration detention could only be exercised when it was expected to lead to deportation, stating that:

> Such a binary result is unfitting . . . for, it would possibly mean that in the absence of the immediate option of deportation, the authorities and the courts would not be able to perform their duty to protect public safety. This result is unreasonable . . . It is difficult to accept the argument that the state and the courts must ignore the public interest and allow those illegal residents who jeopardize public safety – and of course, not all of them do – and who cannot at this time be deported, to freely roam the streets.[197]

The court thus accepted that asylum-seekers were illegal residents, whose noncompliance with the law of the community could lead to the revocation of their immigration status.[198] It rejected the position that asylum-seekers and citizens who commit crimes should be treated equally, under the same evidentiary rules and procedural safeguards, or be considered to pose a similar threat to public security. This is evident in the court's insistence that forbidding the use of immigration detention for controlling crime would unreasonably jeopardize the safety of the Israeli public. Such a claim ignores the numerous tools that conventional criminal law and procedure offer to the state in its efforts to suppress criminal activity, such as pre-charge and pre-trial detention, detention alternatives and imprisonment. It likewise ignores the fact that when citizens are concerned, administrative evidence is generally considered unsatisfactory grounds for depriving liberty. Furthermore, when deciding to close criminal cases due to insufficient evidence, the state declares its willingness to allow an individual who may potentially compromise public safety to "freely roam the streets". The court thus partakes in the classification of asylum-seekers as a dangerous class that poses a particular danger to Israeli society.

As for the disciplinary hearing, when it was first instigated as part of the 2013 amendment to the Anti-Infiltration Law, it entailed a maximum sanction of a one-year period at a closed detention center.[199] However, the High Court of Justice nullified it in its verdict granting the petition against the 2013 amendment. The court ruled that while the hearing was formally defined as disciplinary rather than criminal, this did not obscure the fact that it entailed the criminal sanction of imprisonment. Such a

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[197] *Habtum*, at paragraph 16.
[198] For similar rhetoric see, for example, AMN (Be'er Sheva) 4254-12-13 the State of Israel v. Gbharna (Dec. 25, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.).
[199] The 2013 amendment, *supra* note 163, at § 32T.

sanction could only be imposed by a member of the judiciary and upon applying the procedural safeguards typical of the criminal process.[200] Following this ruling, the disciplinary hearing was revised and its current version, enacted by the 2014 amendment, introduced the more lenient sanction of a four-month detention period.

The revised disciplinary hearing was challenged in the petition against the 2014 amendment to the Anti-Infiltration Law, and was upheld by the court. Nonetheless, an interesting dispute arose between Justice Joubran, who joined the majority opinion, and Justice Fogelman. Justice Fogelman's minority opinion[201] was that the revision made in the hearing was insufficient, as it did not change the fact that the sanctions it entailed were criminal by nature. In order for or the hearing to comply with constitutional requirements, the legislator must further reduce the maximum penalties it entails, so that they become compatible with those prevalent in other disciplinary procedures. Justice Fogelman pointed out three such procedures that exist under Israeli law: disciplinary hearings held in the military, disciplinary hearings held for employees of the State Correctional Authority, and disciplinary hearings held for police officers, all of which entail substantially shorter incarceration periods.

Justice Joubran, conversely, rejected this comparison:

> The infiltrators are a group of people who have violated the law to begin with – due to illegal entry and/or residence. The group of soldiers, jailers and police officers, by contrast, are professionals who serve the country. When an infiltrator commits a disciplinary offence, this offence is added to the one he has already committed (I am not addressing the question of the reason for his illegal entry) . . . It seems to me that we must distinguish between the powers of an executive figure to discipline a group of people that are under his care due to breaking the law, and his power to discipline a group of people who reside under his authority in a professional capacity.[202]

Therefore, the court has accepted the premise that asylum-seekers who have demonstrated unlawful behavior may be treated differently than citizens who have done so. It seems that asylum-seekers involved in criminal activity evoke a type of "double illegality" in the eyes of the court, an unlawfulness that is piled upon their already unlawful existence in the state. This first "tier" of

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[200] HCJ 7385/13 Eitan and others v. the Israeli government and others (Sep. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.), at paragraphs 177 – 184 (majority opinion).
[201] HCJ 8665/14 Desta and others v. the Israeli parliament and others (August 11, 2015), Nevo Legal Database (by subscription, in Hebrew) (Isr.), at paragraphs 38 – 51 (Fogelman, J., dissenting). Justice Amit joined the minority opinion on this matter. See *id.* at paragraph 6 (Amit, J., dissenting).
[202] *Id.* at paragraph 7 (Joubran, J., concurring). The use of the singular 'he' is in the original text' - R.R.R.

illegality justifies their unequal treatment in cases whereby they have additionally breached (or have been accused of breaching) the law of the community and have thus validated their image as a dangerous class.

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The immigration detention policy that has emerged from the Supreme Court litigation is hence as follows: Asylum-seekers who have arrived in Israel are immediately taken to a special detention facility, which is by nature very similar to a conventional prison and is managed by the State Correctional Authorities. After a three-month incarceration period, the Border Authority may release them into the community, provided they do not pose a threat to national security, public safety or public health.[203] The amendment stipulates that an "infiltrator's" country of origin may serve as an indication of such a threat[204] - a criterion that applies mainly to Sudanese asylum-seekers, as Sudan is formally considered an enemy of Israel.[205]

Some asylum-seekers then receive a "conditional release visa", which obligates them to periodically report to the Border Authority and renew their permit, while others are transferred to "Holot" for one year. Residents of Holot are allowed to leave the center during the day but are required to report back every evening, sleep at the center and receive permission to leave the center for longer periods or to accept visitors.[206] After one year of residence, they are released into the community. Several populations (minors, women, persons aged over 60, persons suffering from health problems, victims of crimes) are exempt from residence at Holot.[207] The rest of the asylum-seeking population is still too large to reside at the center simultaneously as it only has the capacity to house 3,360 people.[208] The decision which asylum-seekers to send to Holot thus depends on criteria formulated by the Border Authority, which are updated from time to time.[209]

Additionally, released asylum-seekers, who report to the Border Authority periodically, may be detained (in a closed center or in "Holot") due to the fact that the Authority has received information that they have been suspected or convicted of a crime. The same applies for convicted asylum-seekers who have finished serving their prison sentence (and who are usually automatically transferred from

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[203] Additionally, that their deportation has not been prevented by their own fault. See the 2016 amendment, *supra* note 35, at § 30A(d).
[204] *Id.* at § 30A(d)(2).
[205] See *supra* note 142.
[206] The 2014 amendment, *supra* note 170, at § 32H, 32J(A)(5).
[207] *Id.* at § 32D(b).
[208] HCJ 7385/13 Eitan and others v. the Israeli government and others (Sep. 22, 2014), Nevo Legal Database (by subscription, in Hebrew) (Isr.). See paragraph 3 to the verdict of Justice Amit.
[209] See POPULATION, IMMIGRATION AND BORDER AUTHORITY, UPDATED CRITERIA FOR TRANSFER OF INFILTRATORS TO THE HOLOT CENTER, *available at* https://www.gov.il/he/departments/news/criteria_for_relocating_infilitrators_to_holot_facility (Isr.) (last visited Aug. 10, 2017);

prison to a detention facility) and for suspected asylum-seekers who are brought in to the police for questioning. This allows the authorities much flexibility in deciding which asylum-seekers should be allowed to continue their integration into Israeli society and which should be excluded from it.

III. Discussion and conclusions

Israel's current detention policy towards asylum-seekers is highly influenced by the objectives and techniques of power typical of the control society. This policy is focused on the task of population-management, as it explicitly deploys detention powers for relocating parts of the asylum-seeking population and thus "reducing the burden" from certain populations of Israelis. It is likewise governed by the principle of cost-effective risk-management, as it allocates resources (the exercise of detention powers) primarily via the categorization of asylum-seekers according to the perceived risk that they pose to Israeli society. The power to indefinitely detain all asylum-seekers convicted or merely suspected of criminal activity, except in cases of minor offences, and the power to refrain from releasing detained asylum-seekers for security considerations based on their country of origin, are particularly telling examples of the logic governing the control society. This logic is manifest in the Supreme Court's willingness to uphold the directive based on the premise of "double illegality", which views undocumented asylum-seekers as a dangerous class and justifies their unequal treatment in cases that validate this view. The criteria for exercising the detention alternative of residence at Holot are likewise an example of the classification typical of the control society. By exempting women, children, the sick and the elderly, these criteria seem to prioritize the incapacitation of groups statistically more prone to dangerous behavior. Holot has thus become a mechanism for incapacitation of high-risk groups and population distribution.

Despite the undeniably harsh treatment enabled by the Israeli detention policy, it is noteworthy that this policy was never designed to eliminate the perceived threats posed by the dangerous class of asylum-seekers, but, rather, to manage and reduce these threats. The new detention powers have never been used to incarcerate the majority of the asylum-seeking population, even when the first and most severe amendment to the law was valid. In 2013, shortly before the High Court of Justice struck down the 2012 amendment, only approximately 2000 of the 54,000 asylum-seekers residing in Israel at the time were confined at the closed detention centers.[210] In 2017, Holot operates at full capacity but can accommodate only 3,360 residents, and in late 2016, the Immigration Authority began informally

[210] HCJ 7146/12 Adam and others v. the Knesset and others (Sep. 16, 2013), Nevo Legal Database (by subscription, in Hebrew) (Isr.), at paragraph 35 (Arbel, J., majority opinion).

exempting all asylum-seekers originally from the region of Darfur from residence at the center.[211] Thus, the Israeli detention policy is about creating options for acting, not necessarily exercising them. It operates through a constant *threat* of incarceration and revocation of status, aimed at a population of territorially present, yet not formally legal, residents. As such, it allows the state much flexibility in its treatment of asylum-seekers, designed to ensure that only the resources necessary for remaining within the bandwidth of acceptability are exhausted at any given time.

This flexibility is manifest in the techniques of power through which the Israeli detention regime operates. The large population of released asylum-seekers supervised via periodical reporting requirements, the flexible standards for re-detaining released asylum-seekers who have surfaced "above the radar" due to criminal activity and the Border Authority's wide discretion to decide who to send to Holot, all represent the type of decentralized power exercised by control societies. An even more telling example is the gradual "openness" of Holot, a center that started out very similarly to a prison or closed detention facility, and has become partially compatible with the characteristics of an open residence center. This development derived directly from the court's perception of Holot as a device of population-management. Settling for this narrative meant that there was simply no justification for harsher restrictions on freedom of movement or longer residence periods than those needed to ensure the minimal dispersal of the asylum-seeking population.

The fact that "Holot" could and would not prevent the majority of asylum-seekers from settling in Israel is an indication of the dual role that immigration detention plays in the efforts of the nation state to assert its sovereignty in a globalized world. Certainly, detention is a strategy for coping with the apparent decline of state sovereignty and finding new ways to separate "insiders" from "outsiders" in face of the weakening of the traditional border. However, in its attempts to do so, it likewise contributes to the deconstruction of the border and the construction of intermediate categories between "citizen" and "noncitizen".

On the one hand, detention mechanisms undeniably operate as internal devices of social exclusion that stretch the border into the territory of the nation state. In the Israeli case, such mechanisms indeed discourage assimilation and separate asylum-seekers from members of the Israeli political community, if not physically (by means of actual detention), then at least symbolically, by constant threat of physical exclusion. These mechanisms were complimented by the construction of the Egypt-Eilat border fence. During the years of the Supreme Court litigation described above, the government completed the construction of this fence, leading to a rapid decrease in the number of asylum-seekers

[211] This new policy derives from the fact that most asylum-seekers from Darfur have officially filed for asylum and the review of their claims has been prolonged. See Ilan Lior, *The State Will cease to Summon Asylum-Seekers from Darfur to Holot*, HAARETZ (27 Oct. 2016), *available at* https://www.haaretz.co.il/news/education/.premium-1.3104408 (Isr.).

that managed to cross the border each month.[212] This insistence on reinforcing state borders in their traditional sense demonstrates that the territorial border remains instrumental in the efforts of the nation state to control immigration.

Moreover, while the Supreme Court has made several statements regarding the importance of upholding the constitutional rights of asylum-seekers, it has not gone so far as to agree with the petitioners' demand for inclusiveness. It has accepted the state's prerogative to maintain a policy, which views asylum-seekers as illegal "infiltrators" and denies them all rights but the right to reside in Israel. This is particularly apparent in the court's rulings with regard to the special mechanisms for controlling asylum-seekers involved in criminal activity. While it has demanded that the infringement upon asylum-seekers' rights to freedom and due process be minimized, the court has generally accepted the premise of "double illegality". It has authorized the incarceration of asylum-seekers in accordance with rules that apply exclusively to undocumented migrants and entail relaxed procedural safeguards compared to decisions to incarcerate citizens of the state.

On the other hand, however, the policy that has emerged from the litigation also illuminates the complex impact that the control society has on membership in the political community. First, the reality in which formal border check-posts are delocalized and no longer possess the exclusive power to determine whom remains "outside" the community and who is allowed "inside", necessarily blurs the line between these two notions. The case of asylum-seekers, whose physical expulsion from the community is legally impossible, complicates the picture even further. Asylum-seekers, the strangers who "come today and stay tomorrow", constitute an intermediate category between "outsider" and "insider" that, while not an integral part of the community, settles within it for an unknown time.[213] Immigration detention's internal mechanisms of social exclusion cannot fully change the fact of their territorial presence. This is especially true given the logic of risk-management underlying the control society, which prevents these mechanisms from operating at full capacity. In the Israeli case, the categorization of the asylum-seeking population into groups of risk has caused most of this population to be released, resulting in a large group of strangers that are not only territorially present, but a visible part of the community as well. Part of this population has been integrated into the Israeli work force, as the state generally refrains from prosecuting those who illegally employ asylum-seekers.[214] Children of asylum-seekers, some of whom have been born in Israel and are native Hebrew speakers, have been integrated into the education system.

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[212] See *supra* note 2.
[213] Simmel, *supra* note 16; BAUMAN, *supra* note 22.
[214] See HCJ 6312/10 Kav La'Oved v. the Government (Jan. 16, 2011), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

This leads to a second point, being that the categorization through which control operates likewise has the potential to construct intermediate groups of neither “outsiders” nor “insiders”. If the norm in control societies is constantly modulated, this allows for a particularly refined spectrum of dangerousness. Such a spectrum consists of a rich variety of groups, whose precise classification (normal/abnormal; outsiders/insiders) is forever open to negotiation. In Israel, certain groups of asylum-seekers, currently considered to entail a relatively low level of risk, explicitly enjoy more rights associated with membership than others – particularly the right to continue their assimilation into Israeli society. We also see a striking difference in the attitude of the Supreme Court towards asylum-seekers considered law-abiding and those who are not. With regard to the former, the court has insisted that immigration detention be differentiated from criminal imprisonment, with some Justices going so far as to demand that the state consider their individual autonomy, right to education and right to family. With regard to the latter, conversely, the court has generally applied the premise of "double illegality” and has allowed their unequal treatment compared with citizens whom have breached the law.

As a product of the control society, immigration detention thus partakes in the dismantling of the concept of "full" or "normal" citizenship, as it contributes to the fragmentation of membership into various categories. Despite the exclusive attitude it entails towards immigrants, it nevertheless holds the potential of simultaneously including the excluded, by classification of certain groups as low-risk, exemption from detention in certain cases, and allowing the continued territorial presence of large migrant communities.

Conclusion

Israel’s policy towards asylum-seekers demonstrates that the territorial border has yet to become obsolete in the efforts of nation states to assert their sovereignty. While globalization processes that have taken place since the mid-20th century have caused a decline in the power of this institution to serve as the physical threshold of the political community and effectively define its territory, the Israeli case indicates an attempt to return to the border in its traditional sense. Not only has the Israeli government invested many resources in constructing a physical barrier at the territorial margins of the state, but its initial detention policy (a three-year mandatory detention period in a closed center) also attempted to compliment the border by enabling full physical exclusion within the territory. Such a severe detention policy, if applied to the majority of the migrant population in question, certainly has the potential to create a type of internal border that separates migrants from members of the political community.

However, the Israeli case also proves reality more complex. For, as the state's detention policy was negotiated via Supreme Court litigation, it became increasingly clear that this policy could not truly exclude the majority of the asylum-seeking population from Israeli society. A combination of legal considerations (restrictions on immigration detention posed by international law; domestic legislation concerning human rights) and practical considerations (a shortage in space in the detention centers) dictated that the Israeli detention policy abide by a logic of cost-effective risk-management. This logic, which is a fundamental component of the control society, prevents immigration detention from fully replacing the territorial border in distinguishing "insiders" from "outsiders" to the nation state. Therefore, the notion that detention serves the same objectives as the border undervalues the extent to which the connection between territories and institutions has been severed in the age of globalization.