

When the state is ‘under attack’ by unwanted migratory flows: The disputed legality of Israeli asylum policy and the role of the courts

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Over the past thirty years asylum has become one of the main issues in the politics of industrialized democracies albeit its changing context (Gibney, 2004). Perhaps more than any other category of migrants, asylum seekers strengthen the tension between the commitment of democratic nation-states to humanitarian principles and universal rights on the one hand, and the interests of national communities based on ties of common descent and ethnicity on the other hand (Raijman and Kemp, 2011; Guild, 2002; Statham, 2003). States tend to solve this tension by deploying a number of mechanisms: offering asylum seekers minimal forms of protection (inferior legal statuses); by framing the asylum seeker flows as an ‘emergency’ requiring drastic measures; and through endeavors to balance ‘costs’ (to national resources) and ‘responsibilities’ (humanitarianism).

The aim of this paper is to examine Israel’s policy towards African asylum seekers arriving to the country in the past decade and the role the Israeli courts play in the asylum policy arena. African asylum seekers began entering Israel clandestinely through its border with Egypt largely since 2007. The peak influx was in 2010-2011 when more than 14,000 African asylum seekers entered Israel in each of those years (Population and Immigration Authority, 2012; Natan, 2012). With this massive asylum migration, Israel for the first time joined the group of states forced into becoming host countries to asylum seekers. As of 2016, roughly 41,000 asylum seekers reside in Israel, comprising 0.5 percent of the population. Most of them (92 percent) originate from Eritrea and Sudan (Population and Immigration Authority, 2016). The UNHCR (United Nations High Commissioner for Refugees) declared these two countries as sites of severe human rights violations where stands acute risk for human life and liberty (Natan, 2012). Accordingly, asylum seekers from these countries meet *non-refoulement*¹ conditions of the 1951 Convention Relating to the Status of Refugees and are not be sent back to their home countries (Tall, 2012).

¹ The most important legal duty imposed on states in relation to the right to seek asylum is the duty of *non-refoulement*. Article 33 of the Refugee Convention prohibits the return of persons to a country where they have a well-founded fear

Though Israel was one of the main initiators of the United Nation's Convention Relating to the Status of Refugees of 1951, due to the large population of Jewish asylum seekers across Europe after World War II and the Holocaust, to date, it has not formulated a clear and systematic policy regarding the manner in which asylum seekers should be ministered and treated in the country (Herzog, 2009; Paz, 2011; Kritzman and Kemp, 2008; Natan, 2012; Livnat, 2011). Some scholars claim that several policy practices are in fact in violation of the 1951 Refugee Convention (Yaron et al, 2013).

I examine Israel's policy towards asylum seekers and its disputed legality in relation to three issues: The TGP (Temporary Group Protection) legal status offered to asylum seekers; the 'Hot-return' policy; and the right to work. I argue that the three examples construct asylum seekers' 'liminal legality' (Menjivar, 2006) as well as constitute a form of 'legal violence' (Menjivar and Abrego, 2012) of the state towards this group. Ultimately they show Israel's will to be considered no more than a 'temporary asylum host state' (Kritzman and Kemp, 2008).

In addition I gauge the role played by the courts in construction of asylum policy in Israel. The judicial arena is found to be an active site for deliberations between state and non-state actors especially regarding issues of detention (e.g. the amendment to the Anti-Infiltration bill) and deportation. While the Israeli courts emerge as arbitrators of asylum seekers' human rights, they also at times do not forbid the state to restrict asylum migration. Some scholars claim that the courts in Israel also contribute to 'symbolic harm' to asylum seekers (Livnat, 2011). Yet it is clear that without the courts and the civil society sector mobilizing asylum seekers rights, the asylum seekers in Israel would remain completely 'voiceless' and unprotected. I discuss these findings in my talk.

of being persecuted for reasons of race, religion, nationality, political opinion, or membership of a particular social group.

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