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ARTICLE

Latent Judicial Intervention: The Case of Self-Claiming Palestinian Informers

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Abstract
How do judicial techniques enable courts to have a very effective impact on actual national policy while avoiding making binding decisions? Previous academic studies have focused mostly on the controversial capacity (and willingness) of courts to intervene in a country's policy through statutory interpretation or authoritative decisions. We show that by refraining from sweeping landmark decisions, courts can have a latent but substantial impact on actual national policy through technical and procedural measures. The case study here is the Israeli immigration policy toward a large group of Palestinian litigants (916 petitions) who claim to be neglected security-related collaborators.

Keywords: Judicial Policymaking; Coping Strategy; Collaborators; Israel; Palestine

Introduction

Imad (pseudonym) is a Palestinian from the West Bank whose request for a temporary stay permit in Israel was rejected. In late 2015, he petitioned the Israeli High Court of Justice (hereinafter: HCJ) to review his request, claiming that his life was in danger due to suspicion that he had collaborated with the Israeli security authorities. Imad's petition is not a unique case. It is one of several hundred similar petitions submitted by Palestinians who are self-claiming informers (hereinafter: SCIs) over the last two decades, asking the HCJ to grant them legal status in Israel. Like many similar petitions that eventually ended in deletion or outright rejection, Imad's petition was quickly deleted by the Israeli court following the parties' consent that Imad's case would be reviewed again by the security authorities (HCJ 9030/15 *John Doe v. State of Israel* (2015)).

The final judgment in Imad's case did not stir any genuine public interest. Like hundreds of similar SCI cases, it did not end in a clear victory in his favor nor induce the HCJ to publicly challenge the security authorities' policy toward SCIs. However, a more careful reading of the court's intermediate and procedural decisions, both

during and after adjudicating the cases, reveals a completely different picture: The HCJ's unobtrusive involvement in these cases made a significant practical impact on Israeli policy vis-à-vis SCI petitioners. While the rigid and limited official policy of the Israeli security authorities allows only a few SCIs to receive temporary stay permits in Israel each year, many SCIs can significantly extend their legal stay in Israel by petitioning the HCJ – without incurring any meaningful security or economic risks.

Imad's case is one such example. The court decided that its provisional order, which had already prevented Imad's deportation from Israel for 16 months, would expire only 30 days after the reexamination of his case by the Threatened Persons Committee, the administrative tribunal in charge of examining this kind of application. This grace period of 30 days was designed to allow Imad to file a new HCJ petition if his request was again rejected by the committee. The HCJ also stated that each party was holding to its claims and that the petition would be deleted without imposing any legal expenses. Moreover, since the petition was deleted in a preliminary stage, part of the submission fee, which had already been substantially reduced by the court's registrar, was returned to Imad.

By looking beyond the HCJ's final case ending rulings, this study aims to shed new light on the ability of courts to act as policymakers in practice. More specifically, we seek to examine how courts may have an effective impact on the actual policy of a country, without the need to make any explicit final ruling that challenges the decisions of the executive authorities. In addressing this question, we analyzed 916 petition files submitted by SCIs since the second half of the 1990s and up to 2018. Our findings are thus based on a large number of cases stretching over more than two decades and decided by the highest court of the land sitting as a court of first (and last) instance.[1]

Although our study examines the decisions of Israel's HCJ, it has universal implications. Every legal system has its own peculiarities, but judges all over the world are doing adjudication. In many countries, judges are entrusted with the power to oversee the policies and administrative orders of the executive branch. Deciding on a case by writing a final clear decision is the anticipated outcome of the court's deliberations. In reality, courts may have multiple reasons to bring a legal case to an end without declaring winners and losers.

The thriving academic research on judicial behavior offers a variety of approaches on how to analyze the court's strategic choices and the implications of their decisions. The court's strategic choices are often influenced by the normative framework of a given system, the personal and institutional preferences of judges as well as their interdependence with other key players (Epstein and Weinshall 2021, 1–10). This study seeks to add another piece to the evolving research on the strategic accounts of judicial behavior and to contribute new insights on the significant role of the courts' interim and procedural decisions in influencing the country's actual policy, especially when it comes to sensitive political issues where judges often refrain from making binding decisions. We show that by refraining from sweeping landmark decisions, courts can have a latent but substantial impact on actual national policy through technical and procedural measures.

The study consists of eight parts. Following the introduction, the second part briefly discusses the capacity of courts to act as actual policymakers by applying

[1]There are no appeals on the decisions of the Supreme Court of Israel, whether it sits as a Supreme Court of Appeals or as the High Court of Justice.

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latent judicial techniques. The third part introduces the Coping Strategy as a theoretical framework and focuses on the Ambiguity Tactic, one of its main devices. The fourth part presents the phenomenon of Palestinian collaborators resettling in Israel and introduces the SCIs as a case study. The fifth part discusses the Israeli Supreme Court's role in relation to SCIs over the last two decades. In the sixth part, we present our data collection and research methodology, which is based on content analysis. The seventh part offers a systematic examination of all the HCJ's published intermediate and procedural decisions in SCI cases. Finally, the last part summarizes the main conclusions of our study and offers some suggestions for future research.

Pragmatic judicial policymaking

The controversial capacity and willingness of courts to act as policymakers have long been debated in studies of national, international, and comparative politics (e.g., Stone Sweet 2000; Baum 2003; Carruba, Gabel, and Hankla 2012; Martinsen 2015; Grossmann and Swedlow 2015; Bonjour 2016). Nevertheless, while many studies of judicial policymaking focused mainly on the final judgments of courts in landmark cases (e.g., Manfredi and Maioni 2002; Beard 2006), less attention has been devoted to considering whether courts could also have a significant impact on actual national policy without making any binding decisions.

Interestingly, though, given their strategic considerations, in many cases courts may prefer not to make a clear binding precedent. Instead, they may apply a variety of latent measures aiming to maintain their public legitimacy as well as keep their legal flexibility in future cases. What may amount to a judicial policymaking change may not necessarily result from a single decision, but rather from an accumulation of many decisions by different judges, related to a specific field of policy. As Feeley and Rubin note in their study on state prison reform in the United States, "[court decisions] were not a single text created at a single time, but a set of texts that were continuously developed over the course of two and a half decades" (Feeley and Rubin 1998, 289). Going further, Feely and Rubin tell us that in reforming state prisons, state courts did not start with a plan but responded to problems they perceived. Later cases could draw on the solutions that emerged from the earlier cases in a rather vague incremental process that brings change into a rigid system (ibid., 298).

A related judicial way of pushing reforms by carefully crafted decisions can be found in the term of "acoustic separation" that has been observed in the American legal system (Dan-Cohen 1984). By employing acoustic separation, a court sends out two sets of messages. One set is directed at the general public and provides guidelines for conduct (*conduct rules*). The other set of messages is directed at the officials and provides guidelines for their decisions (*decision rules*) (ibid., 630). In other words, by settling the disputes between the litigating sides in all kinds of ad hoc individual arrangements, without handing down a binding precedent, a court may send the officials (who are aware of the court's non-binding decisions) *decision rules* that pass under the public radar, while at the same time not interfering with the *conduct rules* (in binding decisions) as they are perceived by the public. Practicing such separation in relevant cases, American courts have long recognized the quality of vagueness and the variable application of several doctrines and opinions in various fields of law (Sherwin 1991, 300–314; Sherwin 1997, 2088; Marceau 2013).

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Other examples of latent judicial means can be found in cases with significant political or security sensitivity. In such cases, courts might hesitate to openly confront the executive authorities, but they may strive to protect disadvantaged populations and influence social practices using other techniques that would maintain their unbiased status. For instance, in times of security-related emergency or confrontation, the Israeli Supreme Court tends to intervene in Israel's military policy and defend the individual rights of Palestinians by pushing the litigants to agree to out-of-court settlements instead of imposing clear judicial binding decisions (Dotan 1999; Hofnung and Weinshall-Margel 2010). An earlier example of latent intervention was noted by Robert Cover in slavery cases in the United States, when individual judges turned to "rules of law not themselves designed to further liberty, but having that effect in particular slave cases" (Cover 1975, 209).

Adding another layer to the evolving debate on courts' latent decisions, our study focuses mainly on the court's intermediate and procedural decisions (both during and at the end of adjudicating the cases) over a long period of time. Putting aside the court's final decisions, we argue that courts not only can strive for a desired outcome in individual cases without endangering their status, but, more broadly, by using different latent techniques that are part of the legal options at their disposal they may also have a persistent effect on the actual policy of the executive authorities.

Coping and ambiguity in policymaking

Given the assumption that the court is another political player that does not only determine facts and interpret authoritative legal texts but also makes new public policy (Feeley and Rubin 1998, 1–3), and that the character of policy problems often affects the way policymaking operates, our study adopts Coping Strategy as a theoretical approach. According to coping theory, which is drawn from the field of public policy, coping is one of the main political tools employed by policymakers and other public officials in confronting complicated policy problems that defy a solution. Coping is considered the essence of governance when contending with pressures, conflicting demands, and problems whose solutions are elusive (Sharkansky 1999, 20–21), such as national security issues and other political conflicts (Sharkansky 1997, 34; Sharkansky 2003). It is a general skill or strategy that not only has a human quality, but it is also considered a valuable and pragmatic device. Coping enables policymakers to respond to serious and controversial problems in a purely limited and temporary manner, without the need to establish a strict policy or seek a clear and comprehensive solution (Sharkansky 1999, 20–23).

At the same time, coping has some significant disadvantages worth considering, such as adding stress and frustration to the problems of policymaking, exacerbating existing problems, and even creating new ones. In this light, coping may be seen as an irresponsible course of action and not necessarily an appropriate way of dealing with public problems (ibid., 163–168).

As a strategy for contending with unsolvable problems, coping is associated with a variety of tactics. Our study focuses on the ambiguity tactic, which is considered one of the key tools available to policymakers for coping with difficult public problems (ibid., 6). The ambiguity tactic appears at all stages of policymaking (ibid., 79). It is part of many law-making and legal processes (e.g., Cohn 2001; Huber and Shipan

2002; Kagan 2007) as well as intergovernmental relations and administrative practices (e.g., Dery 2002; Mehozay 2016).

As a policy tool, ambiguity can have both constructive and destructive effects (Barak 2010, 165–166). On the constructive side, the fog of ambiguity is conducive for facilitating agreement and offers policymakers the flexibility needed to deal with an evolving reality, limited resources, and unexpected crises (Sharkansky 1999, 11). Nevertheless, ambiguity may also lead to the irresponsible exploitation of its flexibility and the defiance of accountability. The vaguer the policy, the easier it is for policymakers to act in their own interests or in accordance with their professional understanding, and the more difficult it becomes to hold them accountable for their policy results (Schwartz 2001, 1165).

Our study focuses on a particular type of ambiguity, which occurs when there is a gap between the formal policy and the informal rules of the game as they are formulated and adopted in practice. These blurred boundaries may offer opportunities for individuals to stretch their rights, but without knowing when the authorities may decide to enforce the letter of the law (Sharkansky 1999, 11). We argue that this ambiguity tactic may characterize not only the activities of executive authorities and street-level bureaucrats (Lipsky 2010) but also the activities of courts. Ambiguity can allow a court to systematically deviate from the country's national official policy – without obligating it to act similarly in the future or openly criticize the responsible authorities. At the same time, when a court refrains from issuing a clear decision that sets a precedent for future cases, it avoids public attention and defuses political objections. This is especially the case with sensitive policy issues, such as national security and immigration policies that are discussed in this study, where a court often deliberately refrains from setting new policy in a binding final decision.

Beyond the coping notion, the ambiguity tactic can also be associated with the theoretical idea of law in action. Since it was first coined (Pound 1910), the law in action theory has long emphasized the gap between the letter of the law in the books and its practical implementation (e.g., Baker 2001; Versluis 2007; Karton 2020). As formal rules are ignored by the courts or are not implemented exactly as the law requires, they become less important, and ambiguity prevails (Sharkansky 1999, 15). As a result, we hypothesize that the practical outcome of the courts' interim and procedural decisions may become more significant than the declared policy of the executive authorities and can reflect the situation on the ground more accurately.

Case study: Self-claiming informers

The use of human intelligence sources and recruitment of Arab informers (collaborators) dates back to the early days of Zionist settlement in the Land of Israel/Palestine as part of the struggle against the British Mandate and the Palestinian national movement (e.g., Dekel 1953, 137–177; Gelber 1992, 528–547; Sa'di 2003; Cohen 2004). However, the scope and intensity of information gathering, and specifically the use of informers, grew dramatically after the 1967 war, in which Israel conquered and later occupied the West Bank of Jordan, the Gaza Strip, the Golan Heights, and the Sinai Peninsula (Cohen 2012, 469). In the newly conquered territories, the recruitment of local collaborators was deemed an essential security need for the operation of military forces, as well as for the protection of Israeli citizens on both sides of the borders. Since 1948, the practice has been that informers were

financially rewarded for their service but were allowed to relocate to Israel only in exceptional life-threatening cases involving high-level collaborators. This policy was adopted for both moral and utilitarian reasons – to reassure the recruited informers that they will not be abandoned by the State of Israel if their identity is revealed (Hofnung 2017, 66–68).

The number of informers who relocated and integrated into Israel grew considerably in the 1980s as Israel began to recognize that it could not permanently stabilize its borders in the territories seized in the 1967 war. Any withdrawal from these territories would give rise to dilemmas regarding the fate of informers who had enabled the occupying institutions to operate: Should they be abandoned, or should they be offered shelter in places where their lives would not be under severe risk? Israel chose the latter as its policy, which implies the immediate relocation of exposed informers and support for their rehabilitation in Israel (ibid., 62–63).

A significant turning point in the official Israeli policy toward Palestinian collaborators came in 1994. Following the signing of the Oslo Accords between Israel and the Palestinian Liberation Organization (PLO), the Israeli government decided to establish a new agency, the Security Aid Administration (hereinafter: SAA) (Israeli Government, Decision No. B/118, January 13 (1994)). Despite the signed agreements to allow former Palestinian informers to remain unharmed in their place of residence after transferring control in the Gaza Strip and the West Bank to the Palestinian Authority (Agreement on the Gaza Strip and Jericho Area, § 20(4), May 4 (1994); Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, § 16(2), September 28 (1995)), there was widespread concern for the lives of many Palestinians who had collaborated with the Israeli authorities (Peri 1999, 259–261).[2]

The SAA was immediately assigned to manage the relocation and rehabilitation of about 1,500 high-level Palestinian collaborators and their families in Israel.[3] The new relocation scheme called for an individually tailored rehabilitation program for each Palestinian collaborator and his immediate family members, including financial assistance and vocational training, and help in finding housing arrangements and in acquiring legal status in Israel (Hofnung 2017, 68–69; Teplow 2019, 23–25).

At the same time, the SAA categorically refused to take care of Palestinians who were only suspected of being collaborators or those who had agreed to serve as informers but did not meet the SAA's strict (and confidential) criteria of supplying valuable information. As a result, many Palestinians who claimed to be in serious danger as suspected collaborators with Israel found themselves without any protection or suitable support.

The increasing flow of Palestinian applicants to the SAA (and the ensuing surge in HCJ petitions), along with concerns for the lives of the many self-claiming Palestinian

[2] According to the Associated Press, between December 1987 and November 1993, 771 Palestinians were killed due to suspicion of collaboration with Israel. The IDF Spokesperson's Office cites a higher number of 942 Palestinians killed for suspected collaboration during the same period. See: Be'er and Abdel-Jawad 1994, 9. According to the daily *Haaretz*'s report (Nir 1996), after transferring control to the Palestinian Authority, the Palestinian security agencies increased their harassment of residents suspected of collaborating with Israel, and the killing of alleged collaborators continued.

[3] According to the daily *Haaretz*'s report (Rabin 1995), in its first year the SAA's list included 1,502 families – approximately 6,000 Palestinians. Yaakov Peri (1999, 260), the head of the Israel Security Agency (ISA) during the establishment of the SAA in 1994, cites a slightly lower number of 1,400 Palestinian collaborators who were relocated by the SAA in its early days.

informers rejected by the SAA, led Israel to offer new emergency and temporary relief for SCIs in 1998. This was followed in 1999 by the establishment of an administrative advisory tribunal known as the Threatened Persons Committee (Treatment Procedure for Threatened Persons (2015), § 2 (hereinafter: Treatment Procedure 2015); see also: HCJ 3870/12 *John Doe v. Minister of the Interior* (2012) at 1).

The initial decision to institute the Threatened Persons Committee was not accompanied by any formal legislation or applicable administrative regulations (HCJ 9482/11 *John Doe v. Minister of the Interior* (2013) at 10–11). Consequently, the committee's conduct has been gradually determined through the direct and indirect involvement of the HCJ over the years (Hadad and Hofnung 2023). In 2015, in response to a court petition asking to disclose the policy toward SCIs, Israel finally published its official policy in a detailed military manual of regulations, which, surprisingly enough, is based on the principles set up by the HCJ in its rulings over the years (Treatment Procedure 2015, § 1(d)).[4]

According to the official policy that gradually evolved, a Palestinian from the West Bank or Gaza Strip who claims that his life is in serious danger due to suspicion of collaboration with Israel, is required to contact one of the Israeli district coordination offices (DCOs). There, a military officer ("threat reviewing officer") conducts a preliminary investigation to advise the DCO commander whether to grant the Palestinian a temporary permit to stay in Israel pending the convening of the Threatened Persons Committee (Treatment Procedure 2015, § 6(a)).

The Threatened Persons Committee is slated to meet regularly, at least once a month (ibid., § 6(b)(1)). It may recommend accepting the Palestinian applicant's request and grant him a temporary permit to stay in Israel (with or without preconditions),[5] or it may recommend rejecting the request. If a temporary permit to stay in Israel was previously granted, the committee may recommend that it be canceled or not extended (ibid., § 6(b)(12), § 6(d)(1), § 6(d)(3)).

The temporary permit to stay in Israel is usually granted for a short period of 3–6 months (Teplow 2019, 4). Thereafter, the Threatened Persons Committee reexamines the SCI's request and issues recommendations as described above. In the case of rejection, the SCI can resubmit his application if there are any new arguments or relevant facts that might convince the committee to reconsider its earlier decision (Treatment Procedure 2015, § 6(b)(4)). In any case, "threatened person" status grants the SCI only a temporary permit to stay in Israel and does not include any further social rights or financial benefits (ibid., § 2(g)).

Although the decision-making process within the Threatened Persons Committee is classified (ibid., § 6(e)(2)), the formal criteria for granting "threatened person" status appear to be very strict, allowing only a very small group of SCIs to stay in Israel (Teplow 2019, 26). According to a media report in 2015, the Threatened Persons

[4]The publication of the official regulation was made after an administrative petition based on the Freedom of Information Law (1998) was submitted to the Tel Aviv District Court. See: ATM (Tel Aviv) 51147-05-14 *Gisha–Legal Center for Freedom of Movement v. Coordinator of Government Activities in the Territories* (2014). In the spring of 2021, after the submission of this article for publication, the Israeli Ministry of Defense and the IDF published an updated Treatment Procedure.

[5]In cases involving SCIs with a criminal record, one of the practices that has been adopted with the HCJ's approval is to condition the issuance of temporary stay permits on the signing of an affidavit in which the Palestinian applicant takes it upon himself not to engage in any criminal activities during his stay in Israel (e.g., HCJ 7149/04 *Omar v. Minister of the Interior* (2006)).

Table 1. Number of Applications to the Threatened Persons Committee (2014–2018)

Year	Number of Applications	Number of Approvals
2014	139	3 (2.1%)
2015	222	9 (4.0%)
2016	635	1 (0.1%)
2017	1,131	5 (0.4%)
2018	1,633	3 (0.1%)

*The information for 2014–2015 is based on published data (Breiner 2016). The information for 2016–2018 is based on official data provided to the authors by the Coordinator of Government Activities in the Territories unit in 2020.

Committee had processed approximately 1,500 applications since its inception and had recommended granting temporary stay permits in only 280 of these cases (Melman 2015). In subsequent years since 2015, the number of applications significantly increased, but the number of approvals plummeted. According to official information we received from the Coordinator of Government Activities in the Territories unit, 3,399 Palestinians applied to the Threatened Persons Committee in the years 2016–2018, and only nine of these applications were approved (Table 1).

Despite more than 20 years of a constant increase in the number of individuals seeking "threatened person" status,[6] Israel's policy toward SCIs and the patterns of their resettlement have rarely received adequate public attention. Since the mid-1990s, only a few reports on human rights have sought to draw public attention to the lives of Palestinian collaborators in Israel or their cruel fate in their own communities (e.g., Be'er and Abdel-Jawad 1994; Widmer 2001; Human Rights Watch 2001; Amnesty International 2015).

Academic research on Palestinian collaborators is also still in its infancy. The existing literature on this sensitive subject comes from various perspectives, including autobiographies of former Palestinian collaborators (e.g., Yousef 2010; Elon 2019); memoirs of former intelligence officers describing their operational connections with Arab collaborators (e.g., Peri 1999; Nimrodi 2003, 92–139); other accounts from legal and human rights perspectives (e.g., Haj-Yahia, Kaufman, and Abu Nijaila 1999; Cohen and Dudai 2005; Dudai and Cohen 2007; Levenkron 2012; Livnat 2018; Teplow 2019); historical and political studies (e.g., Hofnung 2017); and judicial policymaking (e.g., Hofnung 2019; Hadad and Hofnung 2023). However, it is more difficult to find studies that examine Israel's policy vis-à-vis SCIs that reflect their actual relocation into Israel over the last decades. The petitions of SCIs to the High Court of Justice provide rich raw empirical data that has been neglected until recent years.

The Israeli Supreme Court and self-claiming informers

The Israeli Supreme Court acts in two main capacities. In its first capacity, it functions as a supreme appellate court, dealing with cases challenging the outcome of decisions

[6]The number of petitions to the HCJ between the years 1996 and 2018 clearly indicates a continuous increase in the number of Palestinians seeking to obtain this status (Figure 2). Moreover, official information indicates that in recent years the number of applications to the Threatened Persons Committee has increased (Table 1), and that the number of SCI petitions to the HCJ has more than doubled (HCJ 4108/17 *John Doe v. Coordinator of Government Activities in the Territories* (2019) at 4).

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rendered by lower courts. In its second capacity, it serves as a High Court of Justice (HCJ), where it has original and final jurisdiction in petitions brought against the country's organs in matters that fall outside the jurisdiction of other courts. It is within this latter capacity that litigation between public petitioners, Israeli citizens, Palestinian individuals, and policymakers takes place. This is especially the norm with petitions concerning national security, where the respondents are cabinet ministers, agencies entrusted with security-related powers, or the Israeli army (Davidov and Reichman 2010, 922; Hofnung and Weinshall-Margel 2010, 670).

The simplified procedure applied by the HCJ has turned that judicial instance into a relatively accessible and attractive institution for various petitioners (Dotan 2014, 26–31), including former informers and others claiming to be under threat of death because they are rumored to be Palestinian informers. For two decades (1996–2018), the HCJ has been asked to hear over 900 SCI petitions to receive formal legal status in Israel. By hearing and deciding these large caseloads, the HCJ has been deeply involved not only in the formal policy design process, but also in the implementation of the policy in practice.

Initially, the treatment of SCIs was not settled in any legislation but handled by military executive measures. As such, it fell under the jurisdiction of the HCJ and placed the court in a very delicate position. [7] On the one hand, there were scores of Palestinians seeking refuge in the country by claiming that they were recruited and worked on behalf of the State of Israel. On the other hand, a sweeping court's precedent-setting decision may have opened the gate for immigration to Israel of hundreds of Palestinians and their family members, thus placing the HCJ open to a political accusation of siding with the country's enemies. Coping with such a dilemma required the court to solve the case of each Palestinian petitioner using means that would not risk its status.

All in all, for more than two decades the HCJ has been the main tribunal authorized to examine Israel's policy toward SCIs and its application in practice. Only in April 2018, cases concerning the legal status of Palestinian informers in Israel were transferred by parliamentary legislation to a district court sitting as an administrative affairs court (Order of Courts for Administrative Affairs (Amendment of the First and Second Additions to the Law) (2018), § 1(3)(c)). This recent institutional legal change was designed to control and reduce the ever-growing number of petitions to the HCJ and to expand the jurisdiction of Israel's administrative affairs courts. As a result, the transfer of jurisdiction from the HCJ to a lower court provides us with a valuable opportunity and perspective to reflect on the impact of the HCJ's caseload on the immigration of SCIs to Israel during its 22 years of dealing with the subject.[8]

Methodology

Data collection

We used an original dataset gathered for this study. The research database comprises 916 unrestricted open court files from 1996 to 2018 regarding Palestinians who

[7] For a detailed discussion on the political counter-reactions to the rulings of the Israeli Supreme Court in the recent decade and the limits of power of each authority, see, for example, Saban 2017.

[8] Although petitions have been transferred from the HCJ to the district court level, the Supreme Court still has the final say since it can hear appeals coming from lower courts. The administrative courts are also bound to follow the precedents handed down by the Supreme Court sitting as the HCJ.

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petitioned the HCJ for legal status in Israel because they were suspected of having collaborated with the Israeli security agencies. The relevant court files (intermediate decisions and final judgments) were gathered by screening several public databases, particularly the Judicial Authority's website, which includes the published decisions of the Israeli Supreme Court since October 1997.[9]

Data coding and analysis

Equipped with the ambiguity tactic as an interpretive framework, we conducted a systematic examination of all the HCJ's published intermediate and procedural decisions in SCI cases. This examination used content analysis, which has broad application in the study of judicial opinions (Hall and Wright 2008). This method is typically used in pattern content research, as in this study, where a formal theory can help us identify relevant patterns in the text data (Potter and Levine-Donnerstein 1999, 262) and test our legal data in a new context (Elo and Kyngas 2008, 111). Furthermore, the use of content analysis enables us to systematically review multiple legal cases in an attempt to locate repeated indicators or seemingly unrelated points that cannot otherwise be discovered or connected.

More specifically, our coding sheet includes three main categories. The first category gathers general information on each of the court's files, such as the number of the case, the legal database from which the case was retrieved, the opening year of the case, and its result. In addition, the coding sheet points to repeat players and the petitioner's attorney in each case. The second category refers to the court's intermediate and procedural decisions, such as fee payments, gag orders, preliminary injunctions, preliminary responses of the parties, and extension requests. The third category refers to the court's decisions while or immediately after determining the result of the case, such as cost impositions, deportation of petitioners following the rejection or deletion of their petitions, and extensions of petitioners' legal stay beyond the date of their judgments (see: Appendix A in the online Supplementary Material).

The analysis of this research was conducted in two main stages. In the first stage, we used our coding scheme to analyze all the legal cases in our data. Then, based on this systematic analysis, we used interpretive analysis to explain how the repeated intermediate and procedural decisions helped the HCJ to unobtrusively sidestep the country's official policy and facilitate a more flexible policy in practice toward SCI petitioners.

The HCJ's practical policy toward self-claiming informers

On the surface, an overview of the HCJ's final rulings in SCI cases over the last two decades reveals a very narrow and one-dimensional picture that is not very useful for understanding the court's actual influence in these cases. For more than two decades, all of the SCI petitions brought before the HCJ were deleted, rejected outright, or

[9]For the Judicial Authority of the State of Israel, see: https://supreme.court.gov.il/Pages/HomePage.aspx. In a few cases, relevant court files were also found in other commercial legal databases, including Nevo, Takdin, and Dinim. In several cases of "repeat players," the SCI's initial petition was classified by the HCJ as containing confidential information that cannot be published. However, in a later petition by the same person, the court itself provided an account of its previous decisions regarding this petitioner. In addition, in a small number of cases, court decisions were also provided to us by the attorneys of the litigating parties.

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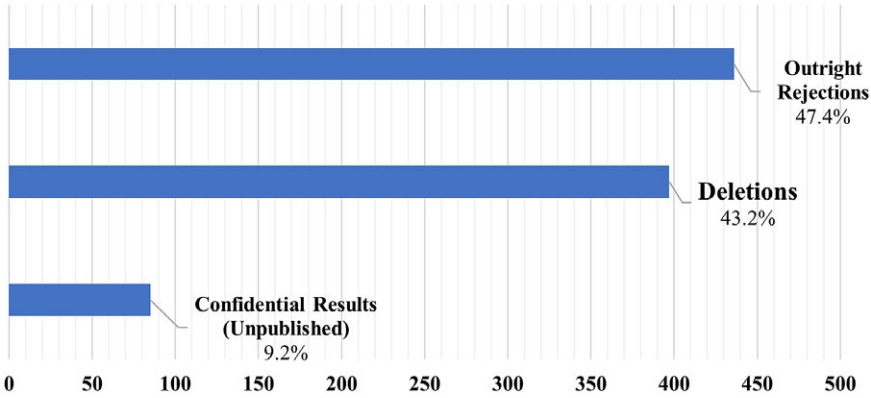

Figure 1. Classification of the Legal Results (1996–2018).
*In two court cases, separate decisions were handed to different petitioners.

became moot. We could not find even a single final judgment granting a full victory to a self-claiming Palestinian informer (Figure 1).

Based on this statistical information alone, a learned observer could easily assume that the official policy toward SCIs is stable and inflexible, and that a court petition can do nothing to change the practical results. However, a more careful examination of the legal data surprisingly reveals a completely different picture. Indeed, the data indicates that the number of petitions increased significantly during the years 1996–2018 (Figure 2), which seems extremely illogical considering the very low likelihood of winning a final HCJ ruling in favor of an SCI petitioner. This anomaly demands a further explanation.

We argue that the explanation for this intriguing phenomenon lies not in the final rulings of the HCJ, but rather in its intermediate and procedural decisions. These decisions enabled the court to become a central link in the chain of treatment and to change the practical results of the national policy toward hundreds of SCI petitioners in an unobtrusive and non-binding way. Our findings clearly show that the HCJ's lenient procedures and generous extensions encourage SCIs to apply in droves to the

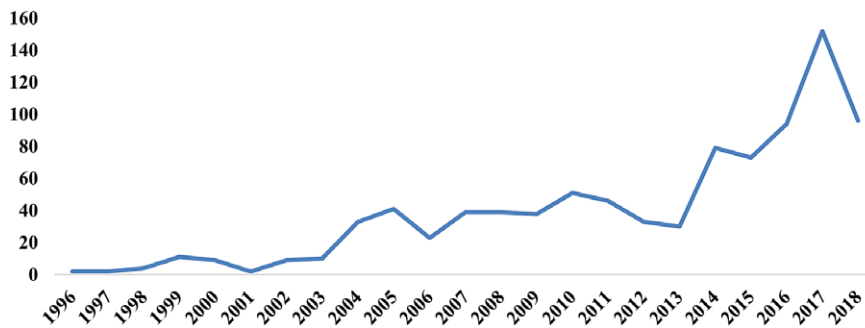

Figure 2. Petitions of Self-Claiming Palestinian Informers (1996–2018).
*The apparent decline in 2018 can be explained by the change in the law transferring the handling of SCI cases to a district court sitting as administrative affairs court, as of April 2018. Our data refer only to cases brought before the HCJ. In fact, in the first 100 days of 2018, there was a record-breaking pace of petitions by SCIs to the HCJ. Had that pace kept on, it would likely have reached 300 petitions in 2018 alone.

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court: The HCJ's intermediate and procedural decisions have removed many of the common obstacles for filing a petition, while enabling the court to assume some of the roles of the official authorities or to significantly change the practical outcomes of their declared policy. In the next section, we present and discuss some of the prominent judicial techniques we identified in our data, in accordance with the two aforementioned judicial approaches.

Lenient procedures

Like several other common-law supreme courts or European-style constitutional courts, the HCJ operates under rules that give it substantial discretion to select which cases will be fully decided (Epstein and Weinshall 2021, 12) and which will be pushed to settle their dispute in a non-binding procedural decision. Exercising its discretion, the HCJ may often operate strategically not only to open its doors for selected petitions, but also to facilitate certain petitioners to come through its gates more easily using lenient procedures. In our case, we identified several judicial techniques designed to remove potential obstacles and to make it easier for SCIs to petition the Israeli High Court of Justice.

The first common judicial technique we identified was the HCJ's willingness to grant SCIs gag orders to reduce their risk of exposure. Indeed, the personal identity of the SCI was not exposed in the court's final judgment in at least 82% of the cases. We also found no cases in which the HCJ refused to grant the SCI's request for a gag order or similar motions, such as a request for closed-door hearings or for prohibiting publication of the names of other persons involved.

Another interesting technique relates to the SCIs' fear of immediate deportation if their petitions are rejected outright or deleted by the court. Unlike the official procedure, which since at least 2008 requires the SCI applicant first to appear before a threat reviewing officer in one of the DCOs and can result in the SCI's immediate deportation in case of rejection (Treatment Procedure 2015, § 6(a)), the HCJ does not require the SCI petitioner to personally appear in court. Moreover, except for cases in which the SCI petitioner is already detained by the Israeli police or in which the petition is submitted by a sentenced prisoner who is about to be released, the HCJ has rarely addressed the issue of deportation in its judgments or called upon the Israeli security authorities to take any urgent action in this matter.

Other common lenient procedures relate to the SCI's economic considerations. One of these techniques is the court's prerogative to grant the SCI a fee exemption. According to Article 2(a) of the Court Regulations (Fees) Act (2007), anyone who wishes to turn to any Israeli court is required to pay a fee. The decision to waive payment of the HCJ fee in advance is at the discretion of the Supreme Court registrar, and such decisions are often hard to track in legal databases. Nevertheless, we found that SCIs received a full or partial fee exemption or reimbursement in 78% of the 285 cases in our data that included a reference to the fee issue.

Fee exemption is regularly granted when the petitioner meets certain financial criteria (Court Regulations (Fees) Act (2007), § 14). However, even when the SCI's request was significantly lacking and when the Supreme Court registrar could not completely understand the SCI's economic situation, the registrar still decided in many cases to significantly reduce the fee (e.g., interim decisions in HCJ 8375/14 *John Doe v. Ministry of Interior* (December 10, 2014); HCJ 2409/15 *John Doe v. State of Israel* (April 14, 2015); HCJ 8307/17 *John Doe v. Ministry of Defense* (November 5, 2017)).

In other cases, part of the fee was quickly returned to the SCI following his request to delete the petition at an early stage of the legal process, after the SCI had fully exploited the preliminary legal process and before receiving an (expected) deletion or rejection in the final judgment (for the court's criticism on this repeated practice, see, for example, HCJ 2225/17 *John Doe v. Coordinator of Government Activities in the Territories* (2018) at 1; HCJ 6116/17 *John Doe v. Coordinator of Government Activities in the Territories* (2018) at 2).

Finally, the cases in which the court refused to grant the SCI a fee exemption were often handled by lawyers who frequently submitted SCI petitions and were familiar with the clear rules for granting exemptions. When these lawyers tried to take advantage of the court's flexibility on this issue by repeatedly filing missing or generic fee exemption requests, their motions were denied (e.g., interim decisions in HCJ 7567/17 *John Doe* v. *State of Israel* (October 2, 2017); HCJ 1925/18 *John Doe v. Coordinator of Government Activities in the Territories* (March 15, 2018); HCJ 2553/18 *John Doe v. Ministry of Defense* (April 8, 2018)).

Another effective economic technique concerns the HCJ's willingness to refrain from imposing costs on the losing party in accordance with the Loser Pays Rule.[10] This technique reduces the SCI's risk of incurring heavy expenses following the expected failure of his petition.[11] In 93% of the 803 published cases in our data,[12] the HCJ did not impose any costs on the petitioners, even when their cases created an unjustified burden on the legal system.[13] When the court did decide to impose certain costs, it was intended mainly as a punitive measure against SCIs who, in the court's view, were abusing the judicial proceeding or blatantly ignoring the court's previous provisions (e.g., HCJ 2604/10 *Jane Doe v. Minister of the Interior* (2010) at 4; HCJ 7803/14 *John Doe v. Ministry of Interior* (2014) at 3–4; HCJ 7514/17 *John Doe v. Ministry of Defense* (2018) at 4).

An additional prominent technique relates to the HCJ's willingness to review repeated petitions of returning litigants, despite the clear public interest in eventually resolving each case of litigation (Salzman 1991, 3–20). We can conclude from the HCJ's recurring observation that the principle of *res judicata* does not apply to the Threatened Persons Committee's decisions nor to the judicial decisions in previous HCJ petitions on this matter (e.g., HCJ 10089/06 *John Doe* v. *Minister of the Interior* (2007) at 3; HCJ 3250/08 *John Doe v. State of Israel* (2008) at 3; HCJ 778/08 *Nigma v. State of Israel* (2008) at 3). If the SCI has new relevant facts or arguments, he can reapply to the committee (and later to the HCJ) (Treatment Procedure 2015, § 6(b)(4)) over and over again, creating a "vicious circle" in which the SCI can remain in the

[10]The Loser Pays Rule (aka the English Rule), which was adopted in the Israeli legal system, establishes that, except in special circumstances, the winning party is entitled to receive reimbursement of expenses from the losing party. See: Har-Zahav 1991, 108–113.

[11]One of the main goals of the Loser Pays Rule is to provide a disincentive for submitting applications with a low chance of success. See: Clement and Kapeliouk 2010, 200–201.

[12]The aforementioned number of cases does not include unpublished judgments, nor confidential cases in which we knew the results of the case as they were summarized by the HCJ in later rulings on petitions submitted by the same petitioner (outright rejection or deletion). Those later HCJ's summaries did not address the issue of expenses in the earlier unpublished cases.

[13]The HCJ's strong tendency not to impose costs on individual petitioners, especially in the case of individual Arab petitioners, has also been identified in other court cases over the past several decades. See: Dotan 2014, 30–31.

country for years as long as he has an open legal proceeding. This elusive principle has been used by many returning SCI petitioners who wish to extend their stay in Israel and do so by repeatedly filing petitions.[14]

One salient example of this recurring technique can be found in HCJ 5553/14 *John Doe v. Immigration Authority* (2014). In this case, an SCI had stayed illegally in Israel for various periods of time since the 1970s. He applied to the Threatened Persons Committee to be recognized as a "threatened person" in 2006, and then submitted a petition to the HCJ the following year (HCJ 67/07 *John Doe v. Israel's Prime Minister* (2009)). The petition was suspended pending the decision of the Threatened Persons Committee. After the SCI's application was rejected by the committee in 2008, he agreed to delete his HCJ petition in 2009. In 2010, the same SCI applied for the second time to the Threatened Persons Committee and was rejected once again in 2011. He then filed another petition to the HCJ, but it, too, was rejected in 2013 (HCJ 9482/11 *John Doe v. Minister of the Interior* (2013)). In 2012 and 2014, the SCI applied to the Israeli Refugee Status Determination Unit and was also rejected by that tribunal. He then filed a third HCJ petition in 2014, this time against the decision of the Refugee Status Determination Unit, only to be rejected once again (HCJ 5553/14 *John Doe v. Immigration Authority* (2014)).

Despite his repeated petitions on the same matter, the HCJ's gates always remained open to examining the SCI's new claims. Even in its latest ruling, the HCJ noted that if the SCI has new evidence regarding the danger to his life, he may apply again to the Threatened Persons Committee (ibid., at 4). We can assume that after more than 40 years in Israel, the SCI, who fears for his life in the West Bank, will continue to reside safely in Israel, free to repeatedly appeal to the Threatened Persons Committee and the HCJ.

Generous extensions

The strategic behavior of the court is also reflected in its tendency to avoid binding decisions, especially when it comes to sensitive political cases that may challenge the legitimacy of the court rulings and their implementation (Hall 2014). Accordingly, courts may adopt rather vague strategies to mask the full implication of their decisions (e.g., Staton and Vanberg 2008; Black et al. 2016). In our case, we identified several judicial techniques that enable the HCJ to significantly extend the SCI's period of stay in Israel, thereby dramatically changing the intended outcomes of the Israeli official policy, without making any clear binding decision that could provoke a political rebuke.

A noticeable technique we observed was the HCJ's willingness to grant SCIs different kinds of temporary restraining orders to prevent their expulsion from Israel for an extended period of time (Figure 3). The main types of such injunctions were interim and provisional orders,[15] which are granted at the beginning of a legal proceeding. These orders, issued at the petitioner's request, freeze the current

[14]Despite the difficulties in recognizing the personal identity of SCI individual petitioners, at least 25% of the HCJ cases in our database were identified as petitions of repeat players. In this statistic, we also count the first petitions of persons who later become repeat players.

[15]The difference between the two types of orders is that while an interim order can be given only after the court has received the responses of both parties, a provisional order can be given immediately, based solely on the petitioner's request. See: Civil Procedure Rules (2018), § 97(a).

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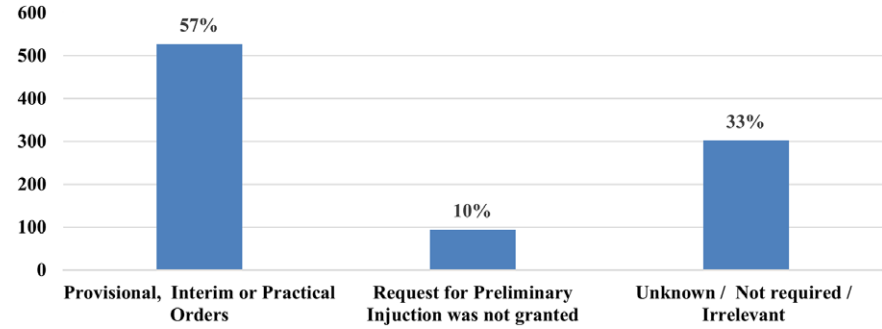

Figure 3. Temporary Restraining Orders.
*Cases with multiple types of injunctions were counted only once – except in a few cases, where only some of the petitioners received injunctions, or where a granted injunction was revoked during the legal process. These exceptional cases were counted twice.

situation pending deliberation of the petition (Procedure Rules of the High Court of Justice (1984), § 19). In many cases, these injunctions are granted for extended periods to allow the HCJ to thoroughly examine the SCI's claims in the preliminary stage of the legal process. Moreover, when so requested, the HCJ routinely agrees to extend the respondents' (Israel's authorities) response time, even repeatedly, thereby significantly prolonging the preliminary process.

Other less formal temporary restraining orders involve cases in which the HCJ assumes that the authorities will not expel the SCI during the examination of his petition. In other cases, the HCJ orders the authorities to update the court in advance or explicitly allows the SCI to request a temporary injunction if any administrative authority decides to expel him while his petition is still under adjudication; or cases in which the court accepts the promises of the Israeli authorities not to expel the SCI for another period of time (e.g., interim decisions in HCJ 3138/03 *Adnan v. Minister of the Interior* (April 1, 2003); HCJ 7847/07 *John Doe v. Minister of the Interior* (October 22, 2007); HCJ 555/12 *John Doe v. State of Israel* (March 1, 2012); HCJ 4181/17 *John Doe v. Israel's Prime Minister* (May 22, 2017)).

Another way in which the HCJ extends the SCI's stay in Israel is via ancillary decisions that immediately follow the court's final decision to delete or reject a petition. Such ancillary decisions include, for example, affirming the litigants' consent to extend the SCI's stay or instructing the authorities not to expel the petitioner for a specified period of time. These types of remedies at the end of the legal process, which have been detected in more than a third of the judgments in our data, allow SCIs to temporarily remain in Israel for a variety of reasons, not all of which are recognized in the formal procedure.

For example, some of these decisions were intended to allow the SCI to apply again to the Threatened Persons Committee; to apply for a temporary permit to stay until the committee's decision is made; or even to provide additional time to consider whether to apply again to the HCJ if the Threatened Persons Committee rejects the SCI's application (e.g., HCJ 7251/04 *John Doe v. Israel's Prime Minister* (2006) at 1; HCJ 5588/09 *John Doe v. Ministry of Public Security* (2009) at 3; HCJ 9357/16 *John Doe v. The Threatened Persons Committee* (2017) at 1).

In other cases, the HCJ has extended the SCI's stay to allow him to file a new petition; to try to arrange his immigration to another destination; or even to try to

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regulate his status in Israel in other ways (e.g., HCJ 3944/09 *John Doe v. Israel Police* (2012) at 2; HCJ 6720/14 *John Doe v. Israel's Prime Minister* (2015) at 1; HCJ 51/17 *John Doe v. Coordinator of Government Activities in the Territories* (2018) at 2). The HCJ has also extended the SCI's stay in Israel for less well-defined reasons, such as to allow the SCI and his family to prepare themselves before leaving the country or even without presenting any detailed reason (e.g., HCJ 4534/17 *Kadim v. The Threatened Persons Committee* (2018) at 2; HCJ 7194/17 *John Doe v. Israel's Prime Minister* (2019) at 2).

While the HCJ has substantially influenced the duration of stay for many SCIs in Israel, it has often exerted this practical influence in latent ways, without explicit expression in final decisions. In fact, when asked to clearly state an actual procedure, the HCJ refused to do so. A notable example of this can be found in HCJ 6114/14 *John Doe v. Coordinator of Government Activities in the Territories* (2015), in which the HCJ was asked to order the promulgation of a new official procedure that would enable SCIs to stay in Israel while appealing a threat reviewing officer's rejection of their application for a temporary permit in Israel. The HCJ rejected this demand, arguing that such an arrangement would lead to a problematic situation in which many SCIs would receive permission to stay in Israel for extended periods of time pending a final judicial decision on their claims. The HCJ concluded that it could not accept this scenario, ignoring the fact that this is indeed the actual situation for hundreds of Palestinian petitioners, as reflected in many of the HCJ's decisions in our data.

Conclusion

Previous academic studies have focused mainly on the possible capacity of courts to intervene in countries' national official policy by making statutory interpretations and writing authoritative decisions. Taking a new path, this study examined the latent impact of the court on actual national policy. Substantiating our hypothesis, we show how the combined use of various intermediate and procedural decisions in repeated legal cases has enabled the court to significantly change national policy in practice without making any binding decisions. The case analyzed was Israel's immigration policy vis-à-vis Palestinian SCIs, which has received repeated legal attention from the Israeli HCJ over the past two decades. Our research findings indicate that intermediate and procedural decisions may play an important role in the court's practical policymaking process. By using different judicial techniques that reduce the SCI's security and economic risks when petitioning the court, and at the same time significantly extend the duration of his stay in the country, the HCJ gradually assumed a major part in the treatment of SCIs. Without saying so clearly, the HCJ's repeated decisions not only softened the country's official policy, but also granted the Palestinian SCIs new types of remedies that are completely unavailable under the formal procedure.

Israel is not the only country in which courts can affect national policy by latent judicial intervention. In other countries, courts may also use intermediate and procedural decisions, as well as other kinds of latent means, to hide or limit public attention to cases that may otherwise cause significant resentment. Although it may be somewhat difficult to identify such repetitive practices over a long period of time, we can assume that the Israeli judges did not invent a new wheel. What enabled us to carry out this research is the sheer volume of cases handled by the HCJ (about 10,000

cases per year) and the fact that almost all proceedings, with the exception of a small number of security-related confidential cases, are reported online.

It is important to note that we do not claim that the HCJ clearly intended to embrace a new comprehensive administrative policy. We also do not argue that every specific type of decision made in the SCI cases reflects a broad judicial course of action that is necessarily relevant to other classes of legal cases. Rather, we contend that in certain legal cases different interim and procedural decisions could also be used for latent policymaking. In line with the ambiguity tactic, we show that the accumulation of hundreds of separate such kinds of decisions may eventually have an overall impact on a country's actual policy even when the court examines each case on its own merits.

Since these practical changes of policy were not clearly expressed in the court's final judgments, the HCJ could enjoy the benefits of its ambiguity tactic. It could continue to widely use the same judicial interim practices for many years, changing the practical results of the national policy for hundreds of SCIs, but without declaring a binding policy that could provoke public criticism and strong opposition from policymakers. Moreover, by employing its judicial techniques, the HCJ could not only maintain its broad discretion and flexibility in each case, but also easily take action against "free riders" or avaricious lawyers who tried to take advantage of the legal process for their own interests (e.g., HCJ 7803/14 *John Doe v. Ministry of Interior* (2014); HCJ 7514/17 *John Doe v. Ministry of Defense* (2018); HCJ 8654/17 *John Doe v. Ministry of Interior* (2018)).

From a political perspective, the HCJ's ambiguous tactics also enjoyed the tacit approval of the security authorities and political leadership, who could rely on the court's rulings to justify their formal policy regardless of its severe problems, while keeping the SCI issue off the public agenda. Moreover, it helped the security authorities to maintain a flexible and stable system, and to postpone the need to provide better solutions for the SCI population.

Nevertheless, the HCJ's latent concept also has negative consequences. For more than two decades, the HCJ's practical policy allowed a growing number of Palestinians to stay in Israel for long periods of time, without being given official status in the country nor the granting of civil rights, all going under the public radar. In fact, as a practical result of the HCJ's involvement in the national immigration policy, SCIs have become an absentee population in Israel, and no one has a clear, comprehensive picture of their conditions or the implications of their presence in the country.

In conclusion, our study shows that courts can have a profound impact even when it comes to sensitive and complex security and political issues, such as Israel's immigration policy vis-à-vis SCIs (self-claimed informers), by using different kinds of intermediate and procedural decisions. Although the magnitude of such latent intervention by the highest court of the land might not be prevalent in all countries, its appearance can also be observed in other judicial settings. By opening a new line of inquiry for other scholars of courts, we hope our study will serve as an initial steppingstone for local and comparative studies in addressing the subject of latent judicial intervention in national policy.

Supplementary Materials. To view supplementary material for this article, please visit https://doi.org/10.1086/717419

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