The European Convention on Human Rights in Israeli Courts

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References to the European Convention on Human Rights by Israeli courts – the European Convention on Human Rights and the European Court of Human Rights as sources of comparative law – comparative law as technique of legitimation – content analysis of use by domestic courts of European Court of Human Rights jurisprudence – European Court of Human Rights jurisprudence and deference to state

INTRODUCTION

Israel's 37th Government announced in January 2023 proposals for what it termed a 'judicial reform', including the near abolition of judicial review of legislation, the limitation of judicial review of the government, the grant of control to the ruling coalition of appointments to the judiciary, and the weakening of government legal advisers.[1] As a result of the mobilisation of legal academia and other areas of civil society, in 2023 large swathes of the public took part in weekly demonstrations to protest against what they viewed as serious damage to the rule of law and to the democratic character of the regime. A consensus quickly emerged among scholars of comparative constitutional law that

[1]A. Gross, 'The Populist Constitutional Revolution in Israel: Towards A Constitutional Crisis?', *Verfassungsblog*, 19 January 2023, https://verfassungsblog.de/populist-const-rev-israel/. For a detailed description and analysis of these proposals, *see* the Israeli Law Professors' Forum for Democracy, https://www.lawprofsforum.org/en.

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the coalition was taking Israel down the route described by scholars as 'constitutional capture',[2] 'constitutional retrogression',[3] or 'abusive constitutionalism':[4] the use of legislation, including constitutional amendments, to make the regime less democratic, in particular by neutralising the checks and balances provided by an independent judiciary with the power to exercise judicial review.

The parallels with the legal techniques of democratic erosion deployed by rulers elsewhere are so striking that they were routinely mentioned by demonstrators, through slogans such as 'This is Not Poland!' and 'This is not Hungary!' and references to Turkish president Recep Tayyip Erdogan.[5]

It is not only the critics of the government who appealed to comparative law. The proponents and supporters of the 'judicial reform' invariably referred to constitutional mechanisms existing in Western democracies to justify the proposals.[6] They portrayed the existence of a particular mechanism in another democratic country as an indication that such mechanism is legitimate. In this they followed the playbook of would-be autocrats described by Kim Lane Scheppele.[7] For new democracies in Eastern Europe, the adoption of legal measures existing in established democracies is a particularly strong source of legitimacy, producing what she calls the 'Frankenstate': the stitching together of constitutional components from various democracies, components which are reasonable when viewed individually, but erode democracy when taken as a whole.[8] The proponents of 'judicial reform' in Israel similarly seemed to view Western constitutional law as a strong source of legitimacy – as did the government's critics, who countered the government with their own invocations

[2]P. Blokker, *New Democracies in Crisis? A Comparative Constitutional Study of The Czech Republic, Hungary, Poland, Romania and Slovakia* (Routledge 2015); J.W. Müller, 'Rising to the Challenge of Constitutional Capture', *Eurozine, 21 March 2017, https://www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/.*

[3]A.Z. Huq and T. Ginsburg, 'How to Lose a Constitutional Democracy', 65 *UCLA Law Review (2018) p. 78.*

[4]D. Landau, 'Abusive Constitutionalism', 47 *UC Davis Law Review (2013) p. 189.*

[5]S. Walker, 'Hungary and Poland provide model for Israel's assault on judiciary', *The Guardian*, 16 April 2023, https://www.theguardian.com/world/2023/apr/16/hungary-poland-provide-model-israel-assault-judiciary-netanyahu; L. Fishman, 'Is Israel Already Turning Into Authoritarian Erdogan's Turkey?', *Haaretz*, 23 January 2023, https://www.haaretz.com/israel-news/2023-01-23/ty-article-opinion/.premium/is-israel-already-turning-into-erdogans-turkey/00000185-ddc0-d294-adaf-ddeaa6e50000?lts=1690368133915.

[6]*See* for instance the table at https://en.kohelet.org.il/publication/why-judicial-reform-is-essential.

[7]K.L. Scheppele, 'Autocratic Legalism', 85 *Chicago University Law Review* (2018) p. 454 at p. 547-548. *See also* Huq and Ginsburg, *supra* n. 3.

[8]K.L. Scheppele, 'The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work', 26 *Governance* (2013) p. 559

of the many checks and balances to executive and legislative power existing in Western democracies and absent in Israel.[9]

In Israel, the reference to the law of Western countries as a source of legitimacy is not new. Basic Law: Freedom of Occupation, enacted in 1994, includes an 'override clause', which was inserted as part of a political compromise that enabled limiting the import of non-Kosher meat. During the legislation process, section 33 of the Canadian Charter of Rights and Freedoms was invoked to justify the legitimacy of the clause.[10] The same section is being invoked today for the purpose of legitimising proposals to enact a general 'override' clause with respect to all constitutional rights. As has been noted, those invoking the Canadian override clause largely ignore the context in which it was enacted in Canada.[11]

This article shows that in Israel, the invocation of comparative constitutional law from Western democracies to strengthen executive power has a longer history and is not limited to the legislative arena. The article demonstrates that such references have been embedded in the practice of courts for at least three decades. Israeli courts have favoured the European Convention on Human Rights (ECHR) and the European Court on Human Rights (European Court) over other sources and institutions in international human rights law (IHRL) and referred to them often. This article argues that one of the reasons for this preference is that the ECHR and European Court rulings offer justifications for legal rulings favourable to the state, all the while providing the legitimacy of Western norms. As such, it sheds light both on Israeli court practice and on the role of the ECHR in domestic legal systems outside the Council of Europe.

A recent study of the Israeli Supreme Court's references to IHRL in human rights cases found that the ECHR and European Court are respectively the instrument and human rights body most cited by the court.[12] In a broader study that included all cases in all Israeli courts between 1990 and 2019, the authors of the present article found that the ECHR was the second most cited human rights instrument, after the Convention on the Rights of the Child (referenced extensively in family courts), and that the European Court's jurisprudence was the most cited of all international and regional human

[9]*See* for instance https://en.idi.org.il/articles/48993; and the many position papers on comparative constitutional law published by the Israeli Law Professors' Forum for Democracy, *supra* n. 1.

[10]A. Dodek, 'The Canadian Override: Constitutional Model or Bête Noire of Constitutional Politics?', 49 *Israel Law Review* (2016) p. 45 at p. 46-54.

[11]N.R. Davidson and L. Bilsky, 'The Judicial Review of Legality', 72 *Toronto University Law Journal* (2022) p. 403.

[12]B. Medina, 'Domestic Human Rights Adjudication in the Shadow of International Law: The Status of Human Rights Conventions in Israel', 50 *Israel Law Review (2017) p. 331 at p. 350.*

rights bodies.[13] This is a significant finding, especially considering that Israel is not subject to the Court's formal authority. This dominance of the ECHR and European Court can be seen as a sign of their transnational authority and prestige,[14] which the Israeli Supreme Court tries to harness for domestic and/or international audiences, as theories of transnational judicial dialogue would suggest.[15] Indeed, commentators point to the Israeli Supreme Court's lack of profound engagement with these sources when it references them, and see this superficiality as a sign that the references serve a primarily rhetorical function: to support positions the court has already reached, often based on its own case law.[16]

Scholars have offered interpretations of the exact message and intended audiences of these rhetorical moves by the Israeli Supreme Court. Yael Ronen suggests that references to international jurisprudence (including European Court jurisprudence) can legitimate Supreme Court rulings before Israeli public opinion by indicating that the court is not the first to interpret the law in a certain way, and before international audiences, especially when the court ruling is ultimately favourable to the state.[17] Ran Hirschl notes the Supreme Court's voluntary use of references to Western court jurisprudence, including the European Court, and not to Eastern jurisdictions experiencing dilemmas similar to those of Israel in the area of secularism (such as Pakistan, Turkey and Malaysia). He explains this preference for the West as an attempt 'to affirm the state's desire to be included in the liberal-democratic club of nations'.[18] As noted by Hirschl, this use of references recalls the embrace of international law by new democracies to signal

[13]N.R. Davidson, and T. Hostovsky Brandes, 'Israeli Courts and the Paradox of International Human Rights Law', 33 *European Journal of International Law* (2022) p. 1243.

[14]On the European Court's prestige, *see* R. Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law (Oxford University Press 2014) p. 8; A.M. Slaughter, 'Judicial Globalization', 40 Virginia Journal of International Law (2000) p. 1103 at p. 1111. For a discussion of possible explanations for this prestige and legitimacy before international and domestic tribunals around the globe, including its strong institutional framework, voluminous body of case law, compromise between common law and civil law traditions, and similarities with domestic constitutional law, see N.A.J. Croquet, 'The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?', 11 Human Rights Law Review (2011) p. 91 at p. 122-128.*

[15]A.M. Slaughter, 'A Global Community of Courts', 44 *Harvard International Law Journal* (2003) p. 191 (explaining that references to foreign and international jurisprudence can serve to send messages to domestic and international audiences).

[16]Medina, *supra* n. 12, p. 350; Y. Ronen, 'The Use of International Jurisprudence in Domestic Courts: The Israeli Experience', in M. Wind (ed.), *International Law and Domestic Politics* (Cambridge University Press 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2599016.

[17]Ronen, *supra* n. 16, p. 13-14.

[18]Hirschl, *supra* n. 14, p. 41, 53.

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membership in the international community, and similarly plays a role in projecting a certain national identity.[19] Yet, in his account, this attempt by the Israeli Supreme Court to construct a Western Israeli identity through comparative law is not only explainable at the macro level of the political community. With a keen eye for the sociology of legal elites, he also explains the appeal to Western, liberal values as a way for Ashkenazi judges to signal the Supreme Court's higher status in the midst of what they view as a chaotic 'Levantine' social setting.[20]

This article offers a complementary explanation for the comparatively extensive reliance of the Israeli judiciary on the ECHR and European Court jurisprudence, in comparison with other sources of IHRL, especially those formally binding Israel: these sources offer Israeli courts various formulations of rights that justify state coercion, whether by establishing exceptions to rights or limitations clauses, buttressing narrow interpretations of rights, or imposing state obligations to deploy criminal proceedings. Put differently, the article argues that the ECHR and European Court jurisprudence have value for Israeli courts in that they offer justifications for legal rulings favourable to the deployment of state power.

Like Ronen's analysis, this argument emphasises the legitimating role played by references to European Court jurisprudence in relation to state action.[21] However, our argument goes beyond jurisprudence to cover references to the ECHR itself. At the same time, our argument singles out European Convention law (by which we refer to the ECHR, and to the jurisprudence of the European Court and the European Commission of Human Rights). Indeed, we show that it is invoked more often than other sources of IHRL to justify the state.

Our explanation for this special role of European Convention law in Israeli case law is twofold: first, its Western affiliation (in comparison with universal or other regional human rights instruments) gives European Convention law a particularly strong legitimating appeal, whether the reference to European Convention law protects individual rights or legitimates state action; second, the substance of European Convention law provides doctrinal tools to legitimate state action. Thus, like Hirschl, we emphasise the political attractiveness of European Convention law as a Western legal source for Israeli courts, but we show that the appeal lies not only in identity construction, but in the legitimation of state power over individuals.

In addition, we argue that these state-favourable uses of European Convention law should not be viewed as an outright distortion by Israeli courts – an

[19]Hirschl, *supra* n. 14, referring at p. 54 to T. Ginsburg, 'Locking in Democracy: Constitutions, Commitment, and International Law', 38 *Journal of International Law and Politics* (2006) p. 707.

[20]Hirschl, *supra* n. 14, p. 16-17, 52-53.

[21]*See also* Medina, *supra* n. 12, p. 343 (discussing the Supreme Court's referencing to IHRL to justify state action as lawful).

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intentionally 'abusive constitutional borrowing', of the type identified by Rosalind Dixon and David Landau[22] – but may be part of the legacy of the ECHR. While the European Court has in many areas produced expansive interpretations of rights through an evolutive approach to interpretation,[23] commentators have pointed out that, for a number of reasons, it has also developed doctrinal tools, such as the margin of appreciation with respect to qualified rights, that preserve a measure of state discretion.[24] In this article we demonstrate how Israeli courts harness this strong deference to governments (in comparison with other sources of IHRL).

We also move beyond the Supreme Court to analyse the dominance of European Convention law among references to IHRL in all Israeli courts. Our argument is developed through an analysis of a new database we created with our research team of all decisions, in all Israeli courts, referring to IHRL between 1990 and 2019 (totalling 819 decisions). The database indicates that in Israel the ECHR and European Court dominate references to IHRL not only in the Supreme Court but in lower courts as well, including in criminal proceedings. Furthermore, our qualitative content analysis of each decision reveals that in 33.4% of cases in which the State of Israel was a party, and in 50% of criminal cases, judges invoked IHRL to legitimate state action. Strikingly, the IHRL source with the highest proportion of state-favourable invocations is the ECHR. The article complements this systematic mapping and comparison of European Convention law with other IHRL sources with a discussion of sample decisions invoking Article 6 of the ECHR – the article of the ECHR most cited by Israeli courts – so as to justify state action. This detailed analysis allows an exploration of the extent to which Israeli courts engage in creative interpretations of ECHR jurisprudence to justify Israeli state action or, to the contrary, can rely on existing European interpretations. We show that in the randomly chosen cases we analysed, Israeli courts generally present European Convention law accurately, though their superficial engagement with it produces at times less nuanced, and more state-favourable doctrinal outcomes than warranted under the European Court's interpretations. Based on this analysis, we suggest that one of the roles European Convention law plays in domestic legal systems outside the Council of Europe is to buttress legal interpretations of rights that are favourable to the state.

The first section briefly presents the database and our methodology. The second section compares our findings regarding European Convention law with

[22]R. Dixon and. D.E. Landau, *Abusive Constitutional Borrowing: Legal Globalization and the Subversion of Liberal Democracy* (Oxford University Press 2021).

[23]M. Sjöholm, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems* (Brill Nijhoff 2018) p. 134.

[24]*See infra* n. 50 and accompanying text.

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other sources of IHRL, arguing that European Convention law is put to more state-favourable uses than other sources. The third section delves into Article 6 cases to illustrate how Israeli courts rely on existing conservative interpretations of European Convention law. The conclusion reflects on the implications of our analysis for understanding contemporary invocations of Western constitutional law to justify the removal of restraints on executive power in Israel, as well as for evaluating the meanings of European Convention law as a source of comparative law.

Database and methodology

We explored the uses of IHRL in Israeli courts through the content analysis of decisions, a method apt for descriptive and analytical projects documenting what judges actually do.[25] For these purposes, we identified 28 international and regional human rights treaties, 16 international and regional human rights declarations, and 19 human rights institutions and defined them as IHRL.[26] In the first, quantitative stage, three research assistants, all law students, searched the Nevo legal database for decisions referring to IHRL. The database includes all publicly available decisions of Israeli courts delivered between 1 January 1990 and 31 December 2019.[27] A total of 819 decisions referencing at least one IHRL source were found (0.02% of all Israeli court decisions for that period).[28] Once the database was formed, two of the research assistants each coded half of the decisions for content that did not require interpretation: date, court, name of judge(s) referring to IHRL, instrument or institution mentioned, and article or decision mentioned.

The second stage consisted of qualitative content analysis, which aimed to uncover the uses to which courts put IHRL; in particular whether such uses were rights favourable. The questions relevant to the present study were the following:

[25]M.A. Hall and R.F. Wright, 'Systematic Content Analysis of Judicial Opinions', 96 *California Law Review* (2008) p. 63 at p. 88-89.

[26]For a more detailed description of the database and methodology, *see* Davidson and Hostovsky Brandes, *supra* n. 13, p. 1246-1251.

[27]It should be noted that many decisions of military tribunals and family courts are not published: H. Viterbo, *Problematizing Law, Rights, and Childhood in Israel/Palestine* (Cambridge University Press 2021) p. 39.

[28]This figure is based on data provided to us by Nevo, the leading legal database in Israel, after deducting decisions of various governmental bodies such as the Patent Registrar.

Q1: Was IHRL referred to by the majority or by the minority judges, or by the judge in a single-judge bench?

This question offered one indicator of whether the references to IHRL formed part of the reasoning that was determinative of the outcome of the trial (in the majority judgment, or by the judge in a single-judge bench) or was more marginal (in a minority judgment).

Q2: Was IHRL invoked only as part of the parties' arguments? And Q3: was IHRL invoked in association with a previous decision or an external source (for instance as part of a quote from an academic article)?

Because the Nevo database does not publish party briefs for all rulings, we did not search briefs and therefore cannot trace for each decision in our database whether a party or a judge was the first to introduce a reference to IHRL in the course of legal proceedings. However, we could observe whether the court in its ruling discussed IHRL only as part of the parties' arguments, or in association with a previous decision or external source. These questions, like Q1, offered indicators of the weight of the reference to IHRL in judicial reasoning.

Q4: What normative status was IHRL assigned in the decision?

Israeli courts do not always clearly indicate what status they assign to IHRL or to any other international law source, hence this question required in some cases subtle interpretation on the part of the coders.

Q5: For the benefit of which party was IHRL invoked?

Here, we interpreted how the reference to IHRL was invoked by the courts, and more specifically whether the judges used it in a manner that supported the protection of individual rights (distinguishing among the rights of various types of actors) or the justification of state action. We expected to find this practice in Israel based on previous analyses of Supreme Court rulings referring to IHRL,[29] and the extensive literature documenting Israeli officials' deployment of the human rights discourse to justify violence towards Palestinians.[30] It should be noted that we did not purport to trace the link between a particular reference to IHRL and the outcome of a case. In many cases, the precise role of IHRL as a matter of legal doctrine is extremely difficult to extract from the decisions. Instead, Q5 asks how each reference to IHRL was used regardless of the judge's ultimate ruling in the case (for instance, whether the reference appears in the judgment as part of a list of considerations in favour of a possible outcome of the litigation, regardless of the actual outcome in the case).

[29]Medina, *supra* n. 12.

[30]N. Perugini and N. Gordon, *The Human Right to Dominate* (Oxford University Press 2015) p. 71-100; S. Ben Natan, 'Self-Proclaimed Human Rights Heroes: The Professional Project of Israeli Military Judges', 46 *Law and Social Inquiry* (2021) p. 755 at p. 755-759; Viterbo, *supra* n. 27, p. 74-79.

To gain a deeper understanding of the phenomenon of IHRL being invoked to justify state action, and to distinguish between rights-favourable and more troubling uses of IHRL within that category of cases, decisions within the category were subsequently coded to indicate the more specific ways in which state action was legitimated. Four categories emerged, ground up, from the decisions:

(i) legitimation of state action that is itself favourable to individual rights;
(ii) recognition of limitations or exception to rights;
(iii) narrow interpretation of rights;
(iv) justifications for criminal proceedings.

Q6: Was the state of Israel a party to the case?

This question allows an assessment of the findings resulting from Q5, since it permits the exclusion from the analysis of cases where the state of Israel is not a party. IHRL can be invoked in cases in which the state is not involved, such as private law litigation, labour litigation between employee and employer, or discrimination litigation between individuals and private service providers.

Q7: In relation to what right(s) was IHRL invoked?

This question aimed to allow us to disaggregate findings by right. For these purposes, we did not attempt to objectively determine which right was being discussed in the decision, but to interpret how the judges themselves presented the discussion. Thirty rights emerged in a grounded manner from the decisions.

Q8: Were additional sources of foreign law and/or Hebrew law referenced?

We only took into account references by the judge(s) who had referenced IHRL.

The research questions were formulated tentatively, and revised and finalised through six pilot rounds, the first three of which comprised five cases each, while the last three comprised between 50 and 100 cases. In the first three pilot rounds, the authors and two research assistants individually coded the decisions for all questions. The entire research team reviewed the results together until agreement was reached as to proper coding, and a coding sheet with instructions was produced. In the last three rounds, the two research assistants (hereinafter referred to as the coders) coded the decisions in accordance with the instructions and their results were tested for intercoder reliability with regard to each question. To test intercoder reliability, Krippendorf's *alpha* test was applied.[31] After reliability was achieved, all 819 decisions were coded, including the 215 decisions which had formed part of the pilots, and

[31]This test reflects the level of agreement beyond what is expected by chance: Hall and Wright, *supra* n. 25, p. 113. We considered as reliable any result over 0.6. If sufficient reliability was not reached, the question was revised and reexamined in the following pilot. Questions for which the coders could not reach reliability after three rounds were taken out of the study and are not reported here, except the coding of Q7 on the rights to life, to property, freedom of thought, and privacy.

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which were recoded in accordance with the updated coding instructions. The coding of the four subcategories of justification of state action (Q5) took place at a subsequent stage. The research team did not conduct intercoder reliability tests for that stage, as the coding process was more collaborative.[32]

The findings constitute the general database for analysing the manner in which Israeli courts refer to and apply IHRL. This general database, which is in the Hebrew language, is publicly available.[33] For the purposes of the present article, the authors extracted from the general database all decisions referring to European Convention law (275 decisions – hereafter, the ECHR database). We examined the findings for each research question on its own as well the relationship between the findings in different categories using the descriptive statistics functions in the statistical software, SPSS Statistics. We did this for each database, and then compared the results between the two, in order to identify patterns specific to European Convention law, if any.

In the next sections we discuss these findings. Of course, this type of analysis does not grasp the role IHRL may play in setting novel, important precedents, usually laid down by the Supreme Court. Content analysis techniques offer a thinner understanding of decisions than the conventional legal methods of interpreting a ruling in light of existing doctrine.[34] However, as pointed out by Hall and Wright, 'content analysis can augment conventional analysis by identifying previously unnoticed patterns that warrant deeper study, or sometimes by correcting misimpressions based on ad hoc surveys of atypical cases'.[35] In the next section we map the place and roles of European Convention law in Israeli case law based on the comparison of the findings in the two databases. In the third section below we delve more deeply into the ways Israeli courts use European Convention law by analysing illustrative decisions.

Mapping the place and roles of European Convention law in Israeli case law

Our findings confirm the dominance of European Convention law among sources of IHRL in Israeli case law. However, they also reveal that Israeli courts invoke

[32]Due to the fact that the categories were elicited inductively from the cases, the coders interpreted a third of the relevant cases (191 cases in total) jointly, without a pre-determined set of categories, until they reached agreement as to the identified categories and their content. With respect to the remaining two thirds, they frequently consulted with each other and with the authors on the correct coding.

[33]See https://zenodo.org/records/10622939.

[34]Hall and Wright, *supra* n. 25.

[35]Ibid., p. 87.

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European Convention law more frequently than other sources of IHRL to justify state action. After briefly presenting statistics that provide context for our analysis, we discuss each of these findings in turn.

As indicated above, our search of all Israeli court decisions between 1990 and 2019 yielded 819 decisions, of which 275 contain at least one reference to European Convention law. Out of the 275 decisions, there are 191 references to the ECHR (69.5% of the ECHR database), 166 to European Court of Human Rights (60.4% of the ECHR database), and 10 to the European Commission of Human Rights (3.6% of the ECHR database). The number of references to IHRL and to European Convention law increases over time, the great majority of cases being published after 2000.[36] However, it is difficult to draw conclusions from this increase, as the Nevo database, while it is the most comprehensive database in Israel, may have been less comprehensive in the 1990s than in the 2000s. References to European Convention law, as to IHRL more generally, are roughly equally divided among four categories of courts: magistrates' courts, district courts, the Supreme Court sitting as High Court of Justice (as first instance in public law petitions) and the Supreme Court sitting as court of appeals or in other capacities.[37] While the Supreme Court in its various capacities has the largest share of referencing to European Convention law, over time the lower courts take a larger share of the citations, as they do with citations to IHRL generally.[38]

Unsurprisingly, given the substance of the ECHR, the references to European Convention law appear primarily in cases addressing civil and political rights: the right to freedom (20% of the ECHR database, 13.4% of the general dabatase), the right to privacy (9.8%/3.9%), the right to property (9.5%/5.1%), and due process rights (36.4%/14.9%). The most cited articles of the ECHR are Article 6 (65 cases mention it) and Article 8 (31 cases mention it).

Overall, the references to European Convention law form part of judges' reasoning. In only 5.5% of cases do the references appear in the decision solely in the presentation of the parties' arguments (as specified in the decision). In only 6.9% of the cases was it mentioned by a judge in the minority, the remaining references being produced by single judges (44.4% of cases) and judges sitting in the majority in a split bench (52.4%). While 70% of the decisions citing IHRL invoke it as binding custom and/or as applicable through the presumption of compatibility of Israeli law with Israel's international obligations, European Convention law is overwhelmingly referenced as comparative law, in 97.5% of the

[36]In the ECHR database, 5.8% of decisions are in 1990-1999, 38.9% in 2000-2009, and 55.3% in 2010-2019. These figures are similar to those in the general database.

[37]Magistrates' courts: 22.5%, District courts: 28.4%, HCJ: 24%, other Supreme Court: 25.1% of ECHR database.

[38]While in 1990-1999 magistrates' courts comprise 12.5% of the citations and district courts 18.8%, by 2010-2019 they comprise 28.3% and 27.6% respectively.

ECHR database. Unsurprisingly, then, 70.2% of references to European Convention law are accompanied by references to other comparative law sources (typically, US, English, Canadian and German law).

While Israeli courts categorise European Convention law as comparative, and thus as a persuasive rather than binding source of law, from a numerical perspective they give it preeminence among IHRL sources, citing it in 33.6% of cases in which they cite IHRL. As indicated above, the ECHR is the second most cited human rights instrument, after the Convention on the Rights of the Child (referenced extensively in family courts), and the European Court's jurisprudence was the most cited of all international and regional human rights bodies: the ECHR is cited in 23.2% and the European Court in 21% of cases referencing IHRL. European Convention law also dominates the references to IHRL within the 145 criminal cases in our general database. The most cited sources in those cases are the Universal Declaration on Human Rights (11.7%), the International Covenant on Civil and Political Rights (9.7%), the Convention on the Rights of the Child (37.9%), the ECHR (34.5%), and the European Court (33.1%).

We also found that European Convention law is the source most associated with state legitimation. As indicated above, the coders interpreted each reference to IHRL, coding whether overall in the decision, regardless of which party prevailed legally, the judges invoked IHRL in a manner that justified protecting individual rights, legitimating state action, or protecting the rights of a range of legal persons. We found that in 75.7% of the cases in the general database (and 67.5% of those in which the State of Israel was a party), IHRL was invoked by judges in the majority to protect an individual. However, alongside these progressive uses, it is notable that in 32.8% of cases in which the State of Israel was a party (22.7% of cases overall), judges in the majority invoked IHRL to legitimate state action. These numbers were significantly higher for European Convention law: 32.7% of all cases in the ECHR database, and 38.7% of those cases to which the State of Israel was a party, were coded as state-favourable invocations. In fact, among all sources in the general database, the ECHR had the highest percentage of state-favourable invocations: 36.6% of cases referring to the ECHR were coded as invoking IHRL to justify state action. As with the general database, over time there is a reduction in the percentage of state-favourable invocations of European Convention law (from 37.5% of decisions in 1990-1999 to 28.3% in 2010-2019).

The state-favourable use of European Convention law is found across most rights. Notably, a significant percentage of the rights most invoked in the ECHR database serve to justify the state, as can be seen in Table 1 below:

Thus, the rights that are invoked the most in connection with European Convention law are also used significantly more to legitimate the state when

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Table 1. Percentage of State-Favourable Invocations per Right

Right	Percentage of ECHR database/of general database	Percentage of invocations that are favourable to the state in ECHR database/in general database
Freedom	20/13.4	41.8/3.6
Privacy	9.8/3.9	22.2/7.4
Property	9.5/5.1	30.8/7.7
Due process	36.4/14.9	29/2

invoked in connection with European Convention law in comparison with other sources of IHRL.

As indicated in the first section above, the coders identified among the decisions four categories of state-favourable uses of IHRL:

(i) Legitimation of state action that was ultimately favourable to individual rights. For example, in *Betzedek, American-Israel Center for the Promotion of Justice in Israel* v *Police Inspector-General*, the High Court of Justice rejected a petition by a Jewish organisation to hold a demonstration with 700 participants in front of the house of a woman who was claimed to be involved in Christian missionary activities. In ruling that the woman's right to privacy prevailed over free speech in this case, Justice Cheshin invoked the European Court's interpretation of Article 8(1) of the ECHR, which he characterised as protecting individuals not only from physical breaches of privacy but also other forms of interference such as noise.[39]

(ii) Interpretations of IHRL that allowed for limitations or exceptions to rights. For example, when the Supreme Court sitting as Court of Appeals in criminal matters upheld the constitutionality of a provision of the penal law that assigns legal culpability to joint perpetrators of a crime for certain additional crimes perpetrated by any one of them, it invoked the limitations on the right to liberty expressly recognised in Article 5 of the ECHR.[40] Similarly, to support its holding that racist statements by one leading member of a list of candidates to municipal elections could be attributed to the entire list in order to disqualify it from running, the Supreme Court sitting as Court of Appeals in civil matters referred to a similar decision of the European Commission of Human Rights.[41]

(iii) Narrow interpretation of rights. For example, in *Zada* v *Israel*, in determining that the burden of proof required for pretrial detention is only reasonable cause

[39]High Court of Justice (Israel) 2080/05 *Betzedek, American-Israel Center for the Promotion of Justice in Israel* v *Inspector General of the Police*, p. 7 (2007).

[40]4424/98 *Silgado* v *Israel*, 56(5) PD p. 549, at p. 555.

[41]6709/98 *The Attorney General* v *Moledet* referring to *Glimmerveen and Hagenbeek* v *The Netherlands* (1982) 4 EHRR 260.

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to believe that the arrestee has committed the crime, the Supreme Court sitting as criminal court of appeal, discussing the right to liberty, referred to Article 5(1)(c) of the ECHR, which requires 'reasonable suspicion' as a prerequisite to the lawful detention of a person.[42] Justice Strasberg-Cohen reviewed US law, Canadian law and the ECHR to determine that: 'Comparative law demonstrates that our legal system regarding detention until the end of proceeding does not fall short – from the perspective of concern for basic human rights – from the legal systems of other enlightened and democratic countries'.[43]

(iv) Justifications for criminal proceedings. For example, in rejecting the appeal of a Guinean individual against his criminal conviction for entering Israel illegally, the District Court referred to the case law of the European Court, confirming the state's well-established right under international law to control the entry of foreigners into its territory, and to Protocol 4 to the ECHR, which grants to nationals only the right to enter the country.[44]

As in the general database, only a small minority (here, 10%) of the decisions invoking European Convention law to legitimate state action did so in a way that was ultimately favourable to individual rights vis-à-vis the state. The bulk of the decisions justifying the state either served to limit rights (42%), interpret rights narrowly (35%), or justify criminal proceedings (12%). It should be noted that Israeli courts' state-justifying uses of European Convention law differ from those of IHRL generally, as evidenced in Table 2 below.

Thus, a significantly larger share of references to European Convention law than to IHRL generally serves to recognise limitations or exceptions to rights, or buttress narrow interpretations thereof. In fact, references to the ECHR are present in 63% of all rulings recognising exceptions to rights (78.6% in criminal cases) and in 51.8% of rulings invoking IHRL to buttress a narrow interpretation of rights (56.3% in criminal cases).

This section has provided evidence that, overall, Israeli courts do not only give European Convention law a preeminent position among sources of IHRL; they also make more state-favourable uses of European Convention law than of other sources. These findings open the question of why European Convention law is put to such uses in Israeli courts. While we cannot provide a definitive answer within the boundaries of this research project, in the remainder of the article we offer possible explanations.

First, our findings are consonant with claims in the literature that the Western character of European Convention law makes it attractive to Israeli courts.[45]

[42]8087/95 *Zada* v *Israel*, 50(2) PD p. 133, at p. 171.
[43]Ibid., at p. 167.
[44]71494/06 *Israel* v *Bobo Bari Alosini*, at p. 23 (2007).
[45]Hirschl, *supra* n. 14.

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Table 2. Types of State-Favourable Invocations in each Database

Type of state-favourable use	Percentage of ECHR database	Percentage of general database
Legitimation of state action that is itself favourable to individual rights	3.6	4.2
Recognition of limitations or exceptions to rights	14.9	6.6
Narrow interpretation of rights	12.4	6.8
Justifications for criminal proceedings	4.4	6.1

Indeed, as noted above, contrary to other sources of IHRL, European Convention law is overwhelmingly referenced as comparative law, and 70.2% of references to it are accompanied by references to other comparative, Western law sources. This suggests that European Convention law is construed by Israeli courts as a distinctly Western rather than an international source. This finding also supports claims that European Convention law's perceived similarity with domestic constitutional systems explains its transnational prestige.[46] Justice Strasberg-Cohen's comments in the case of *Zada*, in which she refers to US, Canadian, UK and ECHR law as the laws of 'enlightened democracies' reinforces this claim.[47]

Second, in the next section, through an analysis of cases invoking Article 6 of the ECHR, we show that Israeli courts justified the state by relying on good faith interpretations of European Convention law, without outright distortions on their part. This analysis suggests that European Convention law is attractive to Israeli courts not only due to its Western imprimatur, but also because of its comparatively conservative substance.

Israeli courts, European Court conservatism, and Article 6 of the ECHR

The European Court of Human Rights is known for expanding state obligations and applying the ECHR to new contexts, through interpretative techniques such as the 'living instrument' doctrine and the 'practical and effective doctrine'.[48] Yet, as the institution with the strongest enforcement mechanism among regional and

[46]Croquet, *supra* n. 14, p. 124-125.

[47]*Zada*, *supra* n. 42, p. 39-43.

[48]A. Mowbray, 'The Creativity of the European Court of Human Rights', 5 *Human Rights Law Review* (2005) p. 57.

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international IHRL bodies,[49] it is particularly vulnerable to state criticism that it infringes on state sovereignty. It has thus developed tools such as the margin of appreciation doctrine, deriving from the principle of subsidiarity, to preserve the discretion of domestic authorities.[50] This doctrine is not only the product of concerns for the court's legitimacy; it also reflects the idea that the European Court's 'function is not to decree uniformity wherever there are national differences, but to ensure that minimum, fundamental values are respected'.[51] As a result of this cautious approach in the development of minimum common standards, in a number of areas European Court jurisprudence is less protective of rights than the jurisprudence of other IHRL bodies.[52] We suggest that this

[49]D.J. Harris et al., *Harris O'Boyle & Warbrick Law of the European Convention on Human Rights* (Oxford University Press 2014) p. 6-7; S. Stein, 'In Search of "Red Lines" in the Jurisprudence of the ECtHR on Fair Trial Rights', 50 *Israel Law Review* (2017) p. 177 at p. 178-179.

[50]H. Lovat and S. Yuval, 'The European Court of Human Rights', in S. Yuval, *Assessing the Effectiveness of International Courts* (Oxford University Press 2014) p. 253 at p. 266; Stein, *supra* n. 49. On the court's restraint in its first decade of operation and new forms of restraint in the past two decades, *see* M.R. Madsen, 'The Narrowing of the European Court of Human Rights? Legal Diplomacy, Situational Self-Restraint, and the New Vision for the Court', 2 *European Convention on Human Rights Law Review* (2021) p. 180.

[51]D. McGoldrick, 'A Defence of the Margin of Appreciation and an Argument for its Application by the Human Rights Committee', 65 *International & Comparative Law Quarterly* (2016) p. 21 at p. 36-37.

[52]*See* for instance the very broad conception of jurisdiction developed in 2017 by the American Court of Human Rights, requiring only a causal link between events in the state's territory and the human rights violation to the victim, wherever situated, in cases of transboundary environmental harm, in Advisory Opinion on the Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), OC- 23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017). This approach was adopted by the Committee on the Rights of the Child. United Nations Committee on the Rights of the Child, 'Decision Adopted by the Committee on the Rights of the Child Under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure in Respect of Communication No. 104/2019' (22 September 2021, distr. general 11 November 2021) crc/c/88/d/104/2019 (Chiara Sacchi and Others v Argentina), para. 10.5. The Human Rights Committee, in its General Comment 36 interpreting the right to life under the International Covenant on Civil and Political Rights, adopted a similar approach with requirements of 'direct and reasonably foreseeable impact on the right to life of individuals outside their territory'. U.N. Human Rights Comm., General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life, ¶ 22, U.N. Doc CCPR/C/GC/36 (30 October 2018). In contrast, the European Court's jurisprudence has insisted on some form of territorial or personal control, or some other form of power, in order for states' obligations to apply extra-territorially. *See* L. Raible, 'The Extraterritoriality of the ECHR: Why *Jaloud* and *Pisari* Should be Read as Game Changers', 2 *European Human Rights Law Review* (2016) p. 161, referring to *Al-Skeini* v *United Kingdom* (2011) 53 EHRR 18 at p. 132-138, *Jaloud* v *Netherlands* (2015) 60 EHRR 29 at p. 152 and ECtHR 21 April 2015, No. 42139/12, *Pisari* v *Moldova and Russia* para. 33.

comparative conservatism may be one of the reasons Israeli courts invoke European Convention law more than any other IHRL source when citing international sources favourable to the state.

As noted in the previous section, in Israel the ECHR is frequently invoked in criminal trials and, in particular, with respect to the right to a fair trial. As the literature notes, the right to a fair trial, entrenched in Article 6 of the ECHR, has generated a large volume of jurisprudence by the European Court. The Court has stated that due to the prominence of the right in democratic states, 'there can no justification for interpreting Article 6(1) of the convention restrictively'.[53] However, as due process rights involve country-specific questions of evidence and procedure, the European Court has left considerable leeway to states in the management of trials.

As seen above, due process rights are by far the category of rights most cited by Israeli courts in connection with European Convention law, and close to 30% of those citations serve to justify actions by the state of Israel. In this regard, Israeli courts invoke the ECHR itself, as well as interpretations of the Convention by the European Court and by national courts. Examination of the references to Article 6 justifying state action reveals that when Israeli courts refer to these cases, they are generally presented accurately, undermining the possible argument that Israeli courts' invocations of European Convention law to legitimate state action constitute what Dixon and Landau have called 'abusive constitutional borrowing': 'the appropriation of liberal democratic constitutional designs, concepts, and doctrines in order to advance authoritarian projects'.[54] However, some of the references are superficial and/or selective, thereby lacking nuance, and producing doctrinal outcomes even more favourable to the state than if guided by a detailed reading of the law.

For example, in the case of *Marcino* v *the Military Prosecutor*,[55] a military appeals court examined whether a defendant's decision to refrain from testifying at her trial could serve as the corroborative evidence required to convict an accused based on her admission. The defence argued that drawing adverse inferences from the silence of the accused violated the presumption of innocence and the right to remain silent. The defence invoked Article 6 of the ECHR, among other sources, to support these claims. The court, however, cited Article 6(1) and 6(2), and turned to the European Court's ruling in *(John) Murray* v *The United Kingdom*, in which a similar question had been examined. The court noted that in *Murray*, the European Court rejected the claim, determining that:

[53]Harris, *supra* n. 49, p. 371.
[54]Dixon and Landau, *supra* n. 22, p. 3.
[55]A 126/02 *Marcino* v *The Military Prosecutor* (2004).

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> [i]t cannot be said therefore that an accused's decision to remain silent throughout criminal proceedings should necessarily have no implications when the trial court seeks to evaluate the evidence against him ... Nor can it be said ... that the drawing of reasonable inferences from the applicant's behavior had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence ...[56]

The military appeals court determined that the European Court ruling did not support the defence's contention but to the contrary allowed the defendant's silence to serve as corroborative evidence against her.

It should be noted that while the court cited *Murray* correctly both in wording and in result, it also cited it partially. Unlike the International Covenant on Civil and Political Rights and the American Convention on Human Rights, the ECHR does not prohibit compelling a defendant to be a witness against himself.[57] While the European Court read into Article 6(1) a freedom from self-incrimination, under its jurisprudence this right is far from absolute.[58] In *Murray*, the European Court applied the principle, determined in previous cases, that while *compulsion* violated freedom from self-incrimination, in each case it should be determined whether the 'very essence' of the right not to incriminate oneself was violated.[59] Indeed, in *Murray* it was decided that the 'very essence' of the right was not violated, and the result in *Murray* supports the conclusion in *Marcino*. However, the Israeli court neither engaged with the tests elaborated by the European Court to determine a violation of the 'very essence' of the right, nor applied them to the facts. Instead, it simply relied on the conclusion in *Murray* to present European Convention law in a less nuanced, more state-favourable manner. As noted by other scholars with respect to the Supreme Court's discussions of IHRL generally, the engagement of the Israeli court with the decision was thus rather superficial. In this case, this superficial engagement produced a doctrinal outcome more deferential to the state than those produced by the European Court and by other national courts.

The European Court's ruling served a similar function of justifying the state in the case of *'Imri Chaim'* v *Visel*.[60] In *Visel*, the Supreme Court addressed the claim that Article 38 of the Arbitration Law, which provided that the appeal of a court's ruling regarding an arbitration award required permission, violated Article 17 of Basic Law: The Judiciary, a constitutional norm, which entrenches the right to an

[56]Ibid., at 22.

[57]T.M. Antkowiak and A. Gonza, *The American Convention on Human Rights: Essential Rights* (Oxford University Press 2020) p. 176-177.

[58]Harris, *supra* n. 49, at p. 422-423.

[59]Ibid, at p. 423.

[60]9041/05 *Imri Chaim* v *Visel* (2006).

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appeal. To support the position that the right to appeal was not absolute, the court invoked the European Court's interpretation of Article 6(1) in *Miloslavsky* v *the UK*, explaining that in that case, the court determined that member states have no duty to establish an appeals court and to provide the possibility of appeal of decisions of first instance courts. Here, again, the invocation is consistent with the European Court's approach, which generally does not recognise a right to appeal outside of criminal cases.[61] On this issue European Convention law is similar to the publications of the Human Rights Committee, which has held that Article 14(5) of the International Covenant on Civil and Political Rights only provides a right to appeal for criminal cases.[62]

The Supreme Court case of *Issacharov* v *the Military Prosecutor*[63] is considered in Israel a landmark regarding the consequences of the breach of the duty to give notice of the right to consult an attorney. While the defendant's appeal was ultimately granted and the case was decided in his favour, the court stressed that the fact that a piece of evidence was obtained in violation of the law will not *necessarily* result in disqualification of such evidence, and that the weight that should be accorded to such violation changes from case to case, taking into consideration the nature of the illegality involved obtaining the evidence, the influence of the departure from the law on the evidence, and general social implications of disqualifying it. The Supreme Court invoked the ECHR to stress that a violation of a treaty right in the process of obtaining evidence does not necessarily lead to the disqualification of such evidence. The court referred to the literature to determine that the European Court's approach is to examine in each case whether admitting the evidence would violate overall the right to a fair trial under Article 6.[64] Thus, while in the particular case the Court determined that the overall considerations justified disqualification of the evidence, the reference to the European Court's ruling supported the rejection of a rule of automatic disqualification when evidence is obtained illegally. This characterisation of the European Court's approach is accurate.[65] As suggested in cases in 2006 and clarified by the Grand Chamber in 2010, only where evidence is obtained by torture will it automatically be disqualified; the case-by-case approach applies where evidence was obtained by inhuman or degrading treatment contrary to

[61]Harris, *supra* n. 49, p. 459. Art. 2, Seventh Protocol to the ECHR, provides a right of appeal in criminal cases. In the Inter-American human rights system, the right to appeal is also limited to criminal cases: Antkowiak and Gonza, *supra* n. 57, at p. 208-210.

[62]P.M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press 2020) at p. 418-419.

[63]98/5121, *Issacharov* v *the Military Prosecutor*, 61(1) PD p. 461.

[64]Ibid., at p. 75.

[65]Harris, *supra* n. 49, p. 418-420.

Article 3 of the ECHR.[66] In this respect European Convention law is less protective of individual rights than the International Covenant on Civil and Political Rights, which binds Israel. Since at least 2001, the Human Rights Committee has held that evidence obtained in violation of Article 7 of the International Covenant on Civil and Political Rights, prohibiting both torture and cruel, inhuman, and degrading treatment, must be inadmissible.[67]

As indicated above, Israeli courts refer to the ECHR predominantly as comparative law. In some instances ECHR articles are brought up through comparative reviews of the practice and law of the ECHR as implemented by member states. For example, in *State of Israel* v *Shetreet*,[68] a magistrate court discussed the implications of the fact that charges for possession of cannabis were filed against an accused over five years after the act. The court referred to the UK case of *Forr*, in which the accused invoked Article 6 of the ECHR to argue that delay in filing charges violated his due process rights and that the proceedings should therefore be discontinued. The Israeli court emphasised that the UK Supreme Court rejected the argument that breach of the requirement to file charges within a reasonable time should automatically lead to discontinuance of the proceedings. Other remedies, such as reduction of punishment or compensation, were available. A similar question and almost identical reference were made, by the same judge, in *State of Israel* v *Fausi*.[69] Despite the existence of vast jurisprudence of the European Court discussing the right to have a trial held within a reasonable time,[70] the court turned to a national implementation of the article as the source of comparison. However, the English ruling appears to reflect European case law. Indeed, the European Court has ruled that in cases of unreasonable length of judicial proceedings, Article 13 of the Convention, on the right to a domestic remedy, 'requires a domestic remedy which would prevent the alleged violation or its continuation (i.e. *expedite the determination of the applicant's legal proceedings*), or provide adequate redress for any violation that had already occurred'[71] (emphasis added). The Human Rights Committee's approach under the International Covenant on Civil and Political Rights is similar. In cases of unreasonable length of judicial proceedings, it has ordered states generally to provide an adequate remedy, though in one case it ordered the respondent state to

[66]Ibid, at p. 420, referring to *Gafgen* v *Germany*, para. 178 GC.

[67]'The Committee considers that it is important for the prevention of violations under article 7 that the law must exclude the admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment': *Sahadeo* v *Guyana*, CCPR/C/73/D/728/1996, 1 November 2001, at para. 9.3. *See* Taylor, *supra* n. 62, at p. 415.

[68]7519/04 *Israel* v *Shetreet* (2005).

[69]5126/06 *The State of Israel* v *Bnei Fausi Sumsum inc.* (2007).

[70]Harris, *supra* n. 49, p. 439-446.

[71]Ibid., at p. 778 (references omitted).

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ensure the complainants are 'tried promptly with all the guarantees set forth in Article 14 or, if this is not possible, released'.[72]

In *State of Israel* v *John Doe*,[73] the defendant argued that his medical condition following a stroke required discontinuation of criminal proceedings against him. Continuation of the proceedings, he argued, would constitute an abuse of justice. The magistrate court explained that since no Israeli precedent was provided, comparative law was required for perspective. It then turned to examine three UK cases in which defendants argued that due to their disabilities, holding criminal proceedings against them would constitute an abuse of justice that amounted to a violation of Article 6(1) of the ECHR. In all three cases examined, the argument had been denied. The Israeli court rejected the claim, drawing on two tests outlined by the UK courts, the *effective participation* test (itself developed by the European Court)[74] and the *procedural adaptation* test in order to adapt the procedure in Israel to ensure the defendant's effective participation.

Similar arguments were brought before a district court in *State of Israel* v *John Doe*,[75] in which, likewise, the defendant requested a stay of the proceedings due to his medical condition. The court determined that discontinuation of the proceedings should be awarded only in exceptional situations, and that other measures should be considered in such situations to ensure a fair trial before proceedings are discontinued. Here, too, the court engaged in a comparative examination and referred to UK case law implementing Article 6(1) to support the conclusion that accommodation, rather than discontinuation of the proceedings, is the right remedy. This approach is in line with the European Court's approach to Article 6(1): while for some aspects of the right to a fair trial, such as the right to proceedings within a reasonable time and the right to participate effectively in hearings, the Court does not refer to states' margin of appreciation, neither has it held discontinuance of proceedings to be an automatic or preferred remedy in the case of violations.[76] Notably, the Israeli court preferred resorting to UK law over New York law, explaining that such preference is in accordance with the 'similarities between the legal systems', despite the fact that UK law in this case draws on European law.

Thus, in each case analysed in this section, Israeli courts presented accurately, if sometimes superficially, European Convention law. In addition, in some of these cases, European Convention law was less protective of individual rights than the IHRL norms directly applicable and binding on the State of Israel, namely the

[72] *Cagas, Butin and Astillero* v *the Philippines*, CCPR/C/73/D/788/1997, 23 October 2001, at para. 9.

[73] 13311-12-12 (2015) *The State of Israel* v *John Doe*.

[74] Harris, *supra* n. 49, at p. 412-413.

[75] 63871-06-16 *Israel* v *John Doe* (2018).

[76] *See supra* n. 71.

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International Covenant on Civil and Political Rights and the Human Rights Committee's interpretations thereof.

Conclusion

This article has confirmed and mapped in detail the dominance of European Convention Law in the case law of Israeli courts between 1990 and 2019, in comparison with the many other sources of IHRL that actually bind Israel. It has shown that the ECHR is the second most cited human rights instrument (after the Convention on the Rights of the Child, referenced extensively in family courts), and that the European Court's jurisprudence is the most cited of all international and regional human rights bodies. While in approximately two thirds of cases invoking European Convention law, the reference supports the protection of individual rights, the ECHR has the highest percentage of state-favourable invocations of all IHRL sources.

Based on the quantitative and qualitative analysis of our novel database and a discussion of illustrative rulings, this article has offered a novel explanation for the special place of European Convention law among IHRL sources cited by Israeli courts. European Convention Law is not only an attractive source of comparative law because of its prestige and Western affiliation; its doctrinal substance also makes it attractive for justifying the deployment of state power.

This study shows that contemporary invocations in Israel of comparative constitutional law from Western democracies to strengthen executive power have a predecessor. It may thus be suggested that argumentative practices in favour of democratic backsliding in Israel benefit from a strong degree of continuity with practices of legal reasoning in this legal community. However, we have also argued that the state-favourable uses of European Convention law do not amount to 'abusive constitutional borrowing', but rather reflect the European Court's comparatively strong deference to governments (in comparison with other sources of IHRL). In this, Israeli courts differed from their contemporary critics, who invoke comparative constitutional law in a manipulative manner.

The study also sheds light on the meaning of European Convention law outside the Council of Europe. Scholars have noted the difficulties of taking European Court decisions into account for understanding the development of international customary law, given the specificities of the Strasbourg regime.[77] This study suggests that referring to European Convention law as comparative law is no less complex. European Court and Commission jurisprudence provide a wealth of precedents and interpretations highly protective of individual rights. At

[77] *See* C.I. Keitner, '*Jones* v. *United Kingdom*', 108 *American Journal of International Law* (2014) p. 302 at p. 307.

the same time, the fact that European Convention law provides only a minimum standard and is produced with heightened regard for the discretion of states, in comparison with other IHRL bodies, means that in some areas its substance may be more conservative than might be gathered from the system's reputation as 'the most effective human rights regime in the world'.[78]

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Data availability. The data that support the findings of this study are openly available in Zenodo at https://zenodo.org/records/10622939.

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[78]H. Keller and A.S. Sweet (eds.), *A Europe of Rights: the Impact of the ECHR on National Legal Systems* (Oxford University Press 2008) p. 4.