European Union Law as Foreign Law

Lior Zemer and Sharon Pardo[*]

ABSTRACT

The importance and significance of comparative sources to the development of Israeli jurisprudence is expressed in local legislation and rulings. The impact of foreign law on the development of Israeli law has been analyzed and vindicated in numerous studies in the local legal literature. These studies typically focus on the two most prominent legal systems—common law (the Anglo-American system) and civil law (the Continental system). The historical reasons for this are clear, emanating from the fact that Israel's legal system is based on these legal regimes and is amended in the spirit of changes made to them. Over the years, however, Israeli law has developed and has become a diverse mosaic which has appropriated doctrines and interpretations on legal issues drawn from various other legal traditions.

One of the most prominent legal systems to emerge in recent years is that of the European Union (EU), currently the largest democratic bloc in the world. Despite its relative novelty, EU law has greatly influenced the development of legal interpretation in Israel. The Article seeks to complete the portrait painted in the study by the research briefly introduced in these authors' previous Article, The Image of European Union Law in Bilateral Relations*, which laid the theoretical and historical foundations of the role played by comparative law in Israeli jurisprudence and outlined the development of Israel-EU relations over the years under discussion. In the Article, the portrait is completed through*

---

* Lior Zemer, Professor, Deputy Dean of the Harry Radzyner Law School at the Interdisciplinary Center Herzliya; Sharon Pardo, Professor, Jean Monnet Chair *ad Personam*, Department of Politics and Government, Ben-Gurion University of the Negev. The authors acknowledge equal contribution. The authors would like to thank Arie Reich, Guy Harpaz, Suzi Navot, Zering, Aharon Barack, Daniella Karuso, Daphne Richmond-Barak, Amichai Magen, Tomer Brody, Yoram Shachar, Moshe Bar Niv, Ido Porat, Matan Szatmary, Anat Lior, Idan Orlizkey, Natalie Shneider, Ido Mor-Haim, Jason Rosenberg, Eden Yagzao, Almog Levy, Mai Arlowsky, Tamar Sacerdoti, Akiva Fund and Yonatan Hezroni. Sagi Lapid and Reut Dahan provided exceptional research assistance. Their contribution to the article stretches far beyond simply gathering information. This research was supported by the Harry Radzyner Law School at the Interdisciplinary Center Herzliya, The Simone Veil Research Centre for Contemporary European Studies at Ben-Gurion University of the Negev and by the Israel Science Foundation (grants numbers 90/13 and 359/17).

an integrated empirical and descriptive analysis of Israeli Supreme Court (ISC) rulings, based on a database of all rulings referencing EU law sources in any manner during the years 1948–2016.

The Article's findings indicate a gradual yet continual diffusion of legal norms emanating from EU law into ISC rulings, as the status and resonance of EU law among Supreme Court justices in Israel demonstrate. The referencing of sources drawn from EU law, as evidenced in the findings, has been made, inter alia, in several principal and precedent-setting rulings which carry far-reaching implications. The EU sources cited in these rulings provide the foundations for interpretive, normative, and theoretical inspiration, and at times serve as a base against which local law is either reinforced or challenged. The Article's findings highlight a perpetual positive trajectory in the number of ISC rulings citing EU legal sources. In addition, they also point to a steep qualitative rise in the size and scope of these citations during the period examined. These findings challenge the perceived absence of EU law from the discussion of comparative law and underscore the role played by EU law in the normative development of the legal systems of third countries which are not members of the EU. The Article's results fortify the claim that a theoretical and interpretative approximation of Israeli jurisprudence to the theories and norms found in the EU legal system is underway and that this is part of a larger process of convergence between Israel and the EU in all spheres of life.

TABLE OF CONTENTS

"We are too heavily influenced by American jurisprudence, which is not very theoretical; It is good to study the legal system developing on the European [continent] as well."[1]

I. INTRODUCTION

Through integrated qualitative and empirical analysis, the Article seeks to complete the theoretical and historical discussion introduced in the first part of this study.[2] The previous Article traced the development of comparative law in Israel, discussing the theories driving this area of study and the rising prominence of comparative law against the backdrop of an increasingly resounding international judicial dialogue. The previous Article surveyed the empirical evidence gathered to date in the local academic literature regarding the employment of comparative law by Israeli justices, which sheds light on the foreign sources referenced by ISC justices over years past. This study finds issue with past studies, which concentrated solely on the two most prominent legal systems—common law (the Anglo-American system) and civil law (the Continental system). Instead, the Article offers a fresh perspective on comparative law in Israel. The object of the Article is not a national legal system, but rather a supranational legal system—that of the EU. The absence of this legal system from the local comparative law literature is absolute, despite the fact that it is a source appearing in an increasing number of ISC rulings, as evidenced in the findings of the Article.

While a large part of past studies sought to examine shifting trends in the volume of references to foreign law in the entire inventory of ISC rulings over the periods examined without paying particular attention to EU law, the Article focuses solely on those rulings which refer to sources in EU law. Consequently, it does not address absolute or relative changes in empirical trends in the overall citation of foreign law, nor does it assess the quality of these citations, but rather indicates a trend of growing interpretive and theoretical approximation—through open judicial dialogue—of Israeli jurisprudence to EU law, as part of a more comprehensive convergence, rooted in historical circumstance and Israel's relations with the EU. Part B of the previous Article analyzed the mosaic of complex political relations between Israel and the EU. This analysis demonstrated that, despite the volatility of the relations between the sides, relations

---

1. Deputy President of the Supreme Court (Ret.) Open conversation with Justice Shlomo Levin (2017), *in* ELICHAI SHILO ET AL., BENEATH THE CLOAK: OPEN CONVERSATIONS WITH SUPREME COURT JUDGES – CONVERSATIONS WITH SUPREME COURT JUSTICES 69 (2017) (Isr.).

2. *See* Sharon Pardo & Lior Zemer, *The Image of European Union Law in Bilateral Relations*, 54 VAND. J. TRANSNAT'L L. 245 (2021).

between the EU and Israel are continually expanding and being enhanced. This analysis serves as the basis for understanding that the continually rising referral to EU law in ISC rulings, as will be laid out in the Article, is not occurring in a vacuum, nor is it disconnected from the other components comprising relations between the sides, but as discussed in the previous Article is rather a part of larger trend of rapprochement between Israel and the EU.

The purpose of the Article is to illustrate the manner in which Israel's Supreme Court justices refer to normative sources in EU law for various purposes. The process of collecting the empirical and descriptive data used in both Articles is rather unique, and as a matter of fact, this is the first database in Israel and abroad that addresses relations between Israel and the EU in the area of jurisprudence. This database will certainly serve researchers in the future in more advanced statistical and empirical analyses of the issues brought to light in the Article. However, since this is the maiden voyage in which the studied phenomenon is examined, the primary objective of the Article is to lay out the regard Israel's Supreme Court justices attribute to EU legal sources, as reflected in their rulings.

The findings of the Article indicate the inculcation of legal norms from the EU jurisprudence into ISC rulings[3] and the steadily rising status of EU law in these rulings since 1980. In its rulings—including principal rulings with wide-reaching implications—the ISC currently cites various sources of EU law, drawing interpretative, normative, and theoretical inspiration from them. In the realm of public law, the most frequent referencing to EU sources is found in constitutional law, while in the realm of private law, intellectual property issues prompted the most frequent citations. The Article also points to a perpetual, steady upward trajectory in the number of rulings overall citing EU legal sources.

Moreover, the Article shows a sharp qualitative rise in the scope and length of the EU-sourced citations during the period under examination. These and other data presented in this as well as the previous Article indicate an interpretive and theoretical approachment of Israeli jurisprudence towards the norms and principles found in the EU legal system.

The Article is structured as follows: Part II reviews the data and methodology used in the empirical research. The manner in which the database has been constructed is described and the role of citation analysis in legal research is discussed, both in terms of the academic literature in general and how it has been adapted and adopted in the

---

3. *See generally* Ian Manners, *Normative Power Europe: A Contradiction in Terms?*, 40 J. COMMON MARKET STUD. 235, 238–45 (2002) (arguing that the EU exercises normative power over outside actors) ("The EU has gone further towards making its external relations informed by, and conditional on, a catalogue of norms . . . than most other actors in world politics.").

Article. Part II focuses on a non-exhaustive collection of ISC rulings which refer to EU jurisprudence. This more traditional, descriptive analysis demonstrates how EU sources have been integrated into the rulings and have gained stature as foreign law in Israeli case law. The cases reviewed were selected from a wide range of legal disciplines and serve as a representative showcase as to the manner in which ISC justices chose to reference EU law sources as well as extract from and rely on them in deciding the issues placed before the court. Some of the rulings in Part III are considered seminal to Israeli jurisprudence. The impact of EU law on Israeli public law is discussed first, and its influence on the various disciplines of private law is examined later. A general sample examination of references to other EU sources, which are neither legislation nor case law, is discussed towards the end of Part III. The conclusion addresses additional trends relating to the status of EU law as foreign law as gleaned from the database constructed in the Article.

II. DATA AND METHODOLOGY

Traditionally, the volume of qualitative studies far outweighs that of quantitative studies in the legal literature. In recent decades, however, there has been a perceptible growth of empirical legal studies. Indeed, over the years legal scholars conducted theoretical studies, which analyzed social norms, discussed philosophical issues, and developed legal theories for the purpose of vetting these norms. However, with the rise of legal realism—the theory that all law derives from prevailing social interests and public policy and the approach that jurisprudence should rely on empirical evidence—empirical research has risen in stature in the discourse surrounding the methodologies employed in the study of law.[4]

The number of empirical legal studies is steadily rising, and some legal scholars are convinced that this development is necessary for establishing law studies as a "real science."[5] Intuitively, it can be

4. *See* Michael Heise, *The Past, Present, and Future of Empirical Legal Scholarship: Judicial Decision Making and the New Empiricism*, U. ILL. L. REV. 819, 822 (2002) ("The legal realism movement provided the first significant and visible forum for the intersection between applied social science and legal scholarship. Concurrent with the development of legal realism, critical events were unfolding outside law schools that, in time, enormously influenced empirical legal research. Prominent among these events was the emergence of social science as discrete fields of study and the development of related methodologies. . . .Whatever influence the Realists may have exerted at that time, looking back it is clear that they are 'distant relatives' to those presently engaged in empirical legal scholarship."); Mark Suchman, *Empirical Legal Studies: Sociology of Law, or Something ELS Entirely?,* AMICI (Am. Soc. Ass'n, D.C.), Summer 2006, at 1, 1–2*; see generally* Theodore Eisenberg, *The Origins, Nature, and Promise of Empirical Legal Studies*, 34 IUNEY MISHPAT [TEL AVIV U. L. REV.] 303 (2011).

5. *See* Thomas Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, U. ILL. L. REV. 875, 900–01 (2003).

claimed that the disciplines of philosophy and literature are examples of disciplines for which empirical methodology is not that relevant, since the resolution of philosophical issues, for example, is accomplished by hypothetical-deductive reasoning.[6] Indeed, as a discipline, law has a philosophical dimension, particularly when legal and normative coherence are grounds for the hypothetical-deductive analysis of issues. However, the legal discipline also consists of a practical dimension.[7]

Over 110 years after Oliver Wendell Holmes described the law as the prediction of punishments or consequences that will be determined by the courts,[8] one of the most prominent justifications for the incorporation of quantitative science in the study of law today is that the examination of legal theories from a social standpoint inevitably includes an element of prediction, which could either lead to the validation of a theory or to its refutation.[9] Scholars seeking to justify

---

According to a study of sixty legal journals in the United States, during the years 1998-2008, 45.8% of the published articles included empirical components. This testifies to the growing desire to strengthen theoretical findings with empirical data. However, only 6% of the studies introduced original empirical work, while the majority cited work conducted by others. For further reference, see Shari Seidman Diamond & Pam Mueller, *Empirical Scholarship in Law Reviews*, 6 ANN. REV. L. & SOC. SCI. 581, 587 (2010). For a discussion on the scope of empirical research on Israeli law, see generally Ariel L. Bendor & Yifat Holtzman-Gazit, מחקר אמפירי של המשפט בישראל – ממצאים ומשמעויות [*Empirical Legal Studies in Israel – Findings and Insights*], 34 IUNEY MISHPAT [TEL AVIV U. L. REV.] 351 (2011)*; see also* Eisenberg, *supra* note 4, at 325 (translated from Hebrew) ("The rapid development of empirical legal research is impressive. I am convinced that the reason for this is the great promise such research holds in several fields.").

6. Ulen, *supra* note 5, at 900 ("Philosophy and literature studies are important examples of disciplines where empirical techniques are not highly relevant or valued. The propositions of philosophers, for example, are largely to be resolved only by appeal to hypothetical-deductive methods."); *see also* John Pfaff, *A Plea for More Aggregation: The Looming Threat to Empirical Legal Scholarship* 12 (Fordham Law Sch. Legal Studies Working Paper Series, Paper No. 144410, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1444410#. Pfaff adds that while theoretical research deals with inspirational evaluation—where there can be several potential correct outcomes—empirical research also deals with deductive negation as well, since the results are goal-oriented and, for the most part, not objective. In other words, the quantitative data obtained is designed to approve or reject an existing preconception. Theoretical research is inapplicable without empirical support; nevertheless, the empirical studies published today are designed to approve theories and not to confront them honestly. Indeed, every research has the potential to refute a theory by presenting the exception to the rule. However, in order to approve or estimate the very existence of a theory, a wider lens is required which takes into account several studies which support a certain outcome. Consequently, Pfaff concludes that the most appropriate analysis should be conducted using a high-quality synthesis of all existing studies of a specific issue.

7. *See* Ulen, *supra* note 5, at 900 (emphasizing logical coherence and effectiveness as "vitally important element[s] of law").

8. Justice Oliver Wendell Holmes, Mass. Supreme Judicial Court, Dedication Speech for the New Hall at Boston University School of Law: The Path of The Law (Jan. 8, 1897), *in* 110 HARV. L. REV. 991, 991 (1997).

9. *See* Kathryn Zeiler, *The Future of Empirical Legal Scholarship: Where Might We Go from Here?*, 66 J. LEGAL EDUC. 78, 81 (2016) ("Empirical validation helps us move

the incorporation and implementation of empirical research in legal literature claim that quantitative research clarifies our understanding of certain legal matters. Empirical research goes far to explain enduring legal questions, which elude traditional theoretical research. Traditional approaches fail to address these queries in an inclusive matter or to provide comprehensive solutions to them.[10] Consequently, empirical research can serve as a tool to a further understanding of the particular implications of the law or the legal system as a whole. Indeed, Holmes's prediction principle covers not only foresight into outcomes, but the examination of the effectiveness and fairness of the legal system as well. A quantitative, empirical approach does not denigrate the value of a qualitative, descriptive analysis of a certain social or legal phenomenon. It can, however, significantly contribute to the strengthening of an argued theory as well as the strengthening of proposed normative solutions. It appears that in the near and not-so-near future, the role of empiricism in legal research is likely to increase. Already today it is clear that the recognition of its importance and contribution is continuously growing through new academic journals focusing on empirical legal research,[11] research conferences, and specific academic associations.[12] Similarly, many law schools offer courses in empirical legal studies.[13] This growth reflects the recognition of the importance of empirical legal research while bearing in mind the considerable risks that can ensue from its misuse.[14]

---

from a conversation in the pages of academic literature to the application of science in the form of evidence-based policy. Theory is useful. Theory backed by a single, methodologically sound empirical study is better."); *see also* Felicity Bell, *Empirical Research in Law*, 25 GRIFFITH L. REV. 262, 263–64 (2016); Denis J. Galligan, *Legal Theory and Empirical Research*, *in* THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH 976, 979–80 (Peter Cane & Herbert M. Kritzer eds., 2010).

10. *See* Michael Heise, *The Importance of Being Empirical*, 26 PEPP. L. REV. 807, 834 (1999); *see also* Zeiler, *supra* note 9, at 80–81. (discussing the value of empirical legal scholarship); Daniel Attenborough, *Empirical Insights into Corporate Contractarian Theory*, 37 LEGAL STUD. 191, 204 (2016) (commenting on the importance of adding an empirical element for a theoretical understanding of legal phenomena) ("[P]ositive doctrinal analysis is in general most enriching for two reasons. First, this type of analysis has a dramatic impact when it calls into question the descriptive accuracy of clear, well-established 'black letter law' or consensus theoretical understanding about that law. Secondly, even when the primary use of empirical data is to describe doctrine or the effect of doctrine on behaviour, there is also an additional goal of using descriptive conclusions to support one or more normative claims about the way the law ought to be.").

11. *See, e.g.*, *About the Journal*, J. EMPIRICAL LEGAL STUD., https://onlinelibrary.wiley.com/journal/17401461 (last visited Mar. 5, 2021) [https://perma.cc/3QBJ-YK7C] (archived Mar. 5, 2021).

12. *See* Eisenberg, *supra* note 4, at 305–08.

13. *See id.* at 305–309.

14. Alongside the advantages the empirical tools bring to the legal discipline, the growth of their use has persuaded some contemporary legal scholars to voice warnings regarding the risks inherent in their misuse, which directly results in compromised findings. Zeiler, *supra* note 9, at 81–90, specifies several reasons for the generation of

A. *The Database*

The Article database is built on the Israeli "Nevo" legal database, from which court rulings that referenced EU law, institutions, bodies, and agencies—as well as their normative sources: treaties, legislation (regulations and directives), and case law—were selected.[15] The Article focuses on the ISC rulings rendered between 1948 and 2016, inclusive. All relevant court rulings were read in depth and categorized. The rulings were classified into either public or private law. Public law was divided into three subcategories: constitutional law, administrative law, and criminal law, each of which includes legal proceedings to which a state or one of its agencies is party. Private law was divided into five subcategories: intellectual property (IP) law; antitrust law; international law; corporate law (including tax law and labor law); and contract law, torts, and family law, which tend to reference foreign law less. Ultimately, the database includes a total of seventy-four cases, which make a total of 153 references to EU legal sources. The decision to focus on the highest court of the Israeli legal system in the current study while disregarding the lower circuits admittedly ignores the possibility that rulings of those lower circuits might include a greater volume of references. It should be emphasized already at this stage that the Article focuses solely on rulings of the highest Israeli court and it does not concern the lower circuits at all.

The ISC's rulings, as presented here, often refer to general European law and EU law as one single legal system, and the court does not always see the distinction between the two. As such, alongside rulings of the Court of Justice of the European Union (CJEU), the ISC's case law also refers to the European Court of Human Rights (ECHR), as well as to the European Human Rights Convention under which the ECHR was founded. Such references are not included in the Article's

---

low-quality empirical research. First, due to the fact that, as opposed to theoretical research, empirical research requires adherence to strict guidelines, there is a substantial difference in quality between empirical studies published in student-reviewed journals and peer-reviewed empirical studies. Second, according to Zeiler, the training of new legal scholars in empirical research principles and methodologies was neglected in the past. *See also* Daphna Haker, מחקר אמפירי של המשפט – הערות-אזהרה אוהדות על המגמה העכשווית [*Empirical Legal Studies – Sympathetic Warning Notes*], 34 IUNEY MISHPAT [TEL AVIV U. L. REV.] 327, 338–44 (2011). Haker expresses her support for the current trend favoring empirical research, but warns of three pitfalls of which legal researchers must be aware and address: the impersonation of truth, shallow research, and on the forfeit of normative principles.

15. Among others, the following key words and their conjugations were searched, in both Hebrew and English, in order to cover the largest range of possible keywords: Europe, European Union, regulations, directive, European Community, European Economic Community, European Coal and Steel Community, Euratom, European Convention, Treaty establishing a Constitution for Europe, Treaty of Paris, Treaty of Rome, Schengen Agreement, Single European Act, Maastricht Treaty, Amsterdam Treaty, Nice Treaty, Treaty of Lisbon, European Court of Justice, Court of Justice of the European Union, European Council, European Commission, European Parliament, etc.

database. Additionally, references to the Council of Europe (CoE), the Strasbourg-based human rights organization, which is not an EU institution, were found in the ISC rulings, alongside references to the European Council, the body that defines the EU's overall political direction and priorities, and sets the EU's policy agenda, which obviously is an EU institution. References to non-EU institutions, such as the CoE, are not included in the Article's database, while references to the European Council are included. The Article maintains a strict distinction between them, since the focus is on EU law as a distinct legal system. Furthermore, in some ISC rulings, the justices reference secondary sources, such as European legal literature which cites EU legislation and case law, but do not include a clear reference in the actual rulings. These sources have also been excluded from the database. Exclusion notwithstanding, however, some of the above references are mentioned throughout Part III, which discusses the Article's findings. In so doing, the Article is able to present a broad and complete picture regarding the use of European law as a whole, while emphasizing that the empirical findings relate solely to sources of EU law.

The research presented in the Article is unique relative to earlier studies examining references to foreign law in ISC rulings. The database established by Shachar, Harris, and Gross includes 7,147 Supreme Court rulings, which have subsequently been published in the volumes of select Supreme Court rulings (PADI). These rulings constitute only a random sample of the total number of rulings that were published during the examined period. Similarly, Navot's study does not cover all of the ISC rulings published during the relevant period; it discusses only the rulings that have been published either in the PADI volumes or on a digital database. In contrast, the Article's database includes the entire set of ISC rulings that reference a binding normative source of EU law. The Article's database allows, for the first time, setting a criterion for evaluating the status, scope, and quality of EU law as a foreign source in ISC rulings across the entire existence of the Israeli legal system.

B. *Methodology: Citation Analysis*

The second phase of the research centered on classifying each reference by its character, a process involving legal interpretation. The categorization of citations was carried out by the two principal investigators and a large group of research assistants who reviewed the court rulings and their references to EU law. The employment of a large "set of eyes" helped neutralize or at least mitigate subjective influences. The references were divided into four main categories: (1) references to interpret internal law through comparison, (2) references to strengthen domestic law, (3) references to interpret international law, and (4) references that serve as "window dressing" with no

apparent substantial impact on the ISC ruling. Several references were used in the various legal fields as a means to review earlier procedures or to provide background for the case. In addition, each reference was classified by additional criteria: (1) the type of normative source that was referenced (EU treaty, regulation, directive, case law), (2) the year the ruling was delivered, (3) whether the reference was part of the majority or the dissenting opinion, and (4) the identity of the referring judge. This phase was conducted by the methodology known in the literature as citation analysis.[16]

Citation analysis gauges the relative importance of a source or author primarily by tracking the frequency which he/she/it is cited in other works. References to legal excerpts can be found in almost every court ruling, and, therefore, it is crucial to categorize references with the utmost accuracy.[17] Analyzing the citations found in high court rulings can assist in understanding the sources of the legal system and, consequently, can provide quantitative estimations of influence, which is considered to be less subjective than other research methodologies.[18] Data gathered through this method enables scholars to empirically outline the development of the references to these normative sources over years and identify various trends regarding the scope and nature of citations within a given legal system.

As a methodology, citation analysis suffers from several limitations, which the Article seeks to overcome but must discuss. First, the reference to a normative source in a ruling is not unequivocal proof that it had an impact on the judge's decision or on a court ruling.[19] Traditionally, citation analysis examines the citations quantitatively but does not analyze directly for their qualitative impact on judicial decisions. Weinstock enumerates some fifteen different

---

16. *See* Richard A. Posner, *The Theory and Practice of Citations Analysis, With Special Reference to Law and Economics* 2 (John M. Olin Program in Law and Economics, Working Paper No. 83, 1999); David Zaring, *The Use of Foreign Decisions by Federal Courts: An Empirical Analysis*, 3 J. EMPIRICAL LEGAL STUD. 297, 302–03 (2006). Zaring also used this method in his research, which sought to analyze the scope of referring to foreign law in the federal circuits of the US legal system. Our methodology is similar to that employed by Zaring, *mutatis mutandis*.

17. *See* Filippo Galgani, Paul Compton & Achim Hoffman, *LEXA: Building Knowledge Bases for Automatic Legal Citation Classification*, 42 EXPERT SYSTEMS WITH APPLICATIONS 6391, 6405 (2015); *see also* Olga Shulayeva, Advaith Siddharthan & Adam Wyner, *Recognizing Cited Facts and Principles in Legal Judgements*, 25 ARTIFICIAL INTELLIGENCE L. 107, 108 (2017).

18. *See* Russell Smyth, *Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court*, 17 U. TAS. L. REV. 164, 169 (1998); *see also* Erin H. Kao, Chuan-Hao Hsu, Yunlin Lu & Hung-Gay Fung, *Ranking of Finance Journals: A Stochastic Dominance Analysis*, 42 MANAGERIAL FIN. 312, 313 (2016); Karen Schultz, *Backdoor Use of Philosophers in Judicial Decision-Making? Antipodean Reflections*, 25 GRIFFITH L. REV. 441, 447–449 (2016).

19. *See* Matthias Van Der Haegen, *Building a Legal Citation Network: The Influence of the Court of Cassation on the Lower Judiciary*, 13 UTRECHT L. REV. 65, 67 (2017); *see also* Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 27 J. LEGAL STUD. 495, 513 (2000).

reasons why a judge could cite a certain reference, which, in itself, testifies to the complexity of deducing qualitative conclusions from essential quantitative citation analysis.[20] The Article overcomes this limitation through two mechanisms. The first, as mentioned above, reduces the subjectivity of the interpretation of the court rulings by assigning the readings to a large group of researchers. The second reduces the range of possible motives a justice might have to refer to a normative EU legal source. An additional challenge inherent in citation analysis methodology in legal research stems from the use of standard procedural citations by the appellate court of references made by trial courts. Occasionally, the Supreme Court, in its capacity as an appellate court, refers to the same normative sources as the judges of the trial court, even if the reference has no meaningful impact on the ruling. Such procedural citations, which can lead to a miscalculation of the number of references, affect the Article, which focuses exclusively on the ISC, which is authorized to decide various appeals—civil, criminal, and administrative—as well as petitions for a third round of appeals.[21]

While the possibility of double counting does exist to a certain extent, the review of earlier proceedings, which includes references to EU law, does not necessarily generate a repetition of data warranting omission. Therefore, the Article used discretion in suspect cases.

The justice delivering the ruling uses his/her discretion as to which sections to cite; accordingly, an *a priori* determination that every repetitive reference serves strictly as a procedural reminder of earlier proceedings rather than as a reference to EU law intentionally included as such by the justice is neither possible nor warranted. While this concern exists, the number of references falling into this category is trivial. Even so, however, they have been classified in a separate category to neutralize their impact and any potential deviation which may ensue. For the same reasons, and as part of the desire for total coverage of all ISC references to EU law, the Article is compelled to include citations of a general nature or that were referenced in passing in the database as well. It is also important to note that, on occasion, judges referenced secondary sources such as European legal literature, which cites European legislation or case law, without indicating a detailed citation within the ruling or referred to European law in general. In these cases, the identification of the specific sources leading to the court's ruling has been challenging. In such cases, local legal precedents that were based on EU law were indeed established but without adequate normative details in the actual ruling. These cases

---

20. Melvin Weinstock, *Citation Indexes*, *in* 5 ENCYLOPEDIA OF LIBRARY AND INFORMATION SCIENCES 16 (Allen Kent & Harold Lancour, eds., 1971), *reprinted in* 1 EUGENE GARFIELD, ESSAYS OF AN INFORMATION SCIENTIST 188, 190–91 (1971).

21. *See, e.g.*, HCJ 3113/03 A.M. Shops, Inc. v. City of Jerusalem ¶ 12 (2002) (Isr.) (opinion of Cheshin, J.).

involving sources with nebulous proof of origin were also classified in a separate category.

The collection and filtering of data includes a descriptive analysis of all the court rulings examined in the Article, as will be elaborated in the following Part. Consequently, the Article is based on a combination of empirical methodology and a descriptive analysis of the ISC citations of EU law. The use of citation analysis is crucial, particularly when analyzing ISC rulings, for the understanding of the factors that come into play in the decision-making process of the highest circuit of a given legal system. Despite the potential shortcomings of this methodology, it creates a reliable account of the frequency by which ISC judges refer to EU legal sources and sheds light on the importance these sources play on evolving Israeli jurisprudence. It is highly probable that, ultimately, the justices' decisions did not rely solely or even primarily on EU sources, but the findings can give some indication as to the standing of EU law in the eyes of ISC justices as an inspirational, normative source affecting the Israeli legal system. Moreover, citation analysis enables recognizing what type of information is viewed as valuable by the justices, which legal justifications they chose to adopt and/or adapt, and in which type of legal proceedings—private or public, constitutional, IP, antitrust, etc.—they find EU law most beneficial. This methodology serves as the foundation for an in-depth analysis of the status of EU law in Israeli jurisprudence.

The Article's findings, as presented below, can serve as a springboard for further research based on the synthesis of empirical and qualitative analysis. At the same time, and in addition to the objectives discussed above, the Article seeks to deepen existing knowledge concerning EU law as a foreign law in third countries (i.e., non-EU countries) and about the EU's role as an actor in the international arena.

III. FINDINGS

This Part presents the findings of the Article's empirical investigation into the role played by EU law in ISC rulings. The review of the selected rulings seeks to depict and analyze the nature in which the ISC justices chose to address, learn, deduce, and otherwise refer to EU legal sources when ruling on matters brought before them. Some of the rulings covered in the Article are considered part of the foundations of Israeli law, and, therefore, the fact that these rulings cite European law sources is of even greater importance.

As a preliminary note, readers should be aware that the institution currently named the Court of Justice of the European Union (CJEU) has undergone title changes throughout the years, from the Court of Justice (CJ) to the European Court of Justice (ECJ) to its current name of the CJEU. Accordingly, to maintain accuracy and

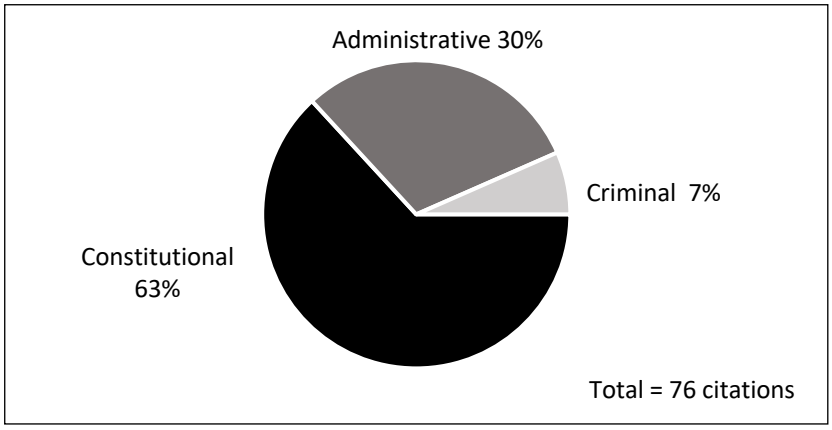
consistency with the citations, the titles of the CJEU will be cited for each issue as cited by the ISC justices in their respective rulings.

A. *The Influence of EU Law on Israeli Public Law*

The various branches of public law that were examined in the study include constitutional law, administrative law, and criminal law. Normative EU legal sources in public law are prominent, as can be expected for a system standing at the helm of a supranational confederacy in-the-making. Israeli justices appear to find inspiration and validation in the manner in which similar matters—which arise between the citizens of a state and its authorities—are expressed in EU case law as well as in EU primary and secondary legislation.

During the period under examination, the ISC cited EU legal sources seventy-six times throughout thirty-two of its public law rulings and decisions. Twenty-two percent of the citations were briefly referenced ("window dressing"), 61 percent were used for the purpose of interpreting local law and comparative law, 13 percent were used to strengthen the local law, 2.63 percent were referenced to enhance the background of the matter being adjudicated, and one citation was used for the purpose of interpreting international law.

Figure 1: Distribution of Citations in Public Law Cases



The distribution of the EU sources cited shows that almost half of the citations referenced in public law rulings are directives (49 percent), 34 percent are rulings of the European court and its circuit courts, 9 percent are EU treaties, and 8 percent are regulations. When divided into the various subcategories of public law, most of the citations referenced constitutional law—a sum of forty-eight citations which constitute approximately 63 percent of total citations. In the branch of administrative law—twenty-three citations were

referenced—approximately 30 percent, and the remaining 7 percent were referenced in the field of criminal law.

Table 1: Distribution of Public Law Citations by Inferred Purpose

Public law; N=76		
Purpose	**No. of citations**	**Percentage**
Passing reference	17	21.36%
Background	2	2.63%
Strengthening of local law	10	13.18%
Interpretation of international law	1	1.31%
Interpretation/comparison of local law	46	61.52%

Table 2: Distribution of EU Normative Sources, by Source Type

Total Citations; N=76		
Normative source	**No. of citations**	**Percentage**
Case law	26	34.21%
Directive	37	48.68%
Regulation	6	7.89%
Treaty	7	9.22%

Whereas the CJEU (known at the time as the CJ) was established during the early 1950s and was indeed a key landmark institution in the establishment of the European Communities,[22] it was not until 1980 that the ISC cited an EU normative legal source. In the *Kawasma v. Minister of Defense* case,[23] the plaintiffs—Jordanian citizens— were expelled from their homes on the West Bank and sent to Lebanon under the provisions of the Defense (Emergency) Regulations of 1945 without having the opportunity to redress the consulting committee. Eventually, when plaintiffs were allowed to address the consulting

22. For a historical review of the CJEU's establishment, see generally Morten Rasmussen, *The Origins of a Legal Revolution–The Early History of the European Court of Justice*, 14 J. EUR. INTEGRATION HIST. 77 (2008); G. Federico Mancini, *The Making of a Constitution for Europe*, 26 COMMON MKT. L. REV. 595 (1989); SABINE SAURUGGER & FABIEN TERPAN, THE COURT OF JUSTICE OF THE EUROPEAN UNION AND THE POLITICS OF LAW 10–42 (2017). For a fundamental and comprehensive discussion of EU law, see generally PAUL CRAIG & GRÁINNE DE BÚRCA, EU LAW: TEXT, CASES, AND MATERIALS (6th ed. 2015); EUROPEAN UNION LAW (Catherine Barnard & Steve Peers eds., 2d ed. 2017).

23. HCJ 698/80 Kawasma v. Minister of Defense, 35(1) PD 617 (1980) (Isr.) [hereinafter *Kawasma* Case].

committee, it decided to uphold the decree. One of the controversial issues dividing the three justices hearing the case concerned the nature of Article 49 of the Geneva Convention IV, raising the question: Does the prohibition of forcible transfers as stipulated in the Article reflect treaty law, or is it informal, an element of the customary "Law of Nations"? In the majority opinion, President Justice Landoy and Justice Issac Cohen established that Article 49 is a tenet of international treaty law and nothing more.[24] Justice Haim Cohen dissented, arguing the position that Article 49 represents customary law. Among the secondary sources Justice Cohen referenced to support his opinion, he cited, for the first time at the ISC, an EU source—the ECJ ruling in the case of *Van Duyn v. Home Office*.[25] *Van Duyn* was a case concerning the freedom of movement of workers between EC member states. The plaintiff claimed that the British government violated the treaty by denying her entrance into the UK on account of her membership in the Church of Scientology, which was not against the law in the UK.[26] The ECJ ruled that the Free Movement of Workers Directive[27] and, in practice, every directive of the EC applies directly to the member states. Justice Cohen stated that, in the *Van Duyn* case, "the ECJ ruled that a key principle of international law is that a state is prohibited from denying its citizens the right to enter or to reside in it."[28] Justice Cohen used the conclusion from the *Van Duyn* case to argue that, just as a state cannot deport its own citizens, it is obligated to accept citizens back into its territory. Justice Cohen's referral to the *Van Duyn* case, alongside his interpretation of Article 49 of the Geneva Convention IV, led to his conclusion that the article is a tenet of customary law,[29] as reflected in the Law of the Nations, which forbids countries to deport their own citizens. Justice Cohen's referral to the *Van Duyn* case reinforced his conclusion that the plaintiffs' petition should be granted and the decrees to deport them should be nullified. The role of this referral was to interpret international law, and it allowed Justice Cohen to claim support for his minority opinion in customary law as interpreted in EU case law.

---

24. *Id.* (opinions of Landoy, J. & Cohen, J.)

25. *Id.* (dissenting opinion of Cohen, J.) (citing Case 41/74, Van Duyn v. Home Office, 1974 E.C.R. 1337 [hereinafter *Van Duyn* Case]).

26. *See Van Duyn* Case, 1974 E.C.R. 1340; *see also* K. R. Simmonds, Van Duyn v. The Home Office*: The Direct Effectiveness of Directives*, 24 INT'L & COMP. L. Q. 419, 425–37 (1975); Alan Dashwood, *From* Van Duyn *to* Mangold *via Marshall: Reducing Direct Effect to Absurdity?* 9 CAMBRIDGE Y.B. EUR. LEGAL STUD. 81, 85 (2007); Panagiotis Stasinopoulos, *From* Van Duyn *to* Josemans*: How the Tide Might Affect EU's Freedoms*, 17 EUR. PUB. L. 277, 283–86 (2011).

27. *See generally* Council Directive 64/221/EEC of 25 February 1964 on the Co-Ordination of Special Measures Concerning the Movement and Residence of Foreign Nationals Which are Justified on Grounds of Public Policy, Public Security or Public Health, 1964–1965 O.J. SPEC. ED. 117.

28. *Kawasma* Case, at 642 (opinion of Cohen, J.).

29. *Id.* ¶¶ 3, 6 (opinion Cohen, J.).

It took ten more years for the ISC to cite another EU normative source. The court did so in the *Nevo v. National Labor Court* case, which deals with an issue of constitutional law.[30] As will be discussed below, over the years the time gap between the ISC citations of EU law became shorter, a fact that gives witness to the development of the use of comparative law in general and specifically of the use of EU normative sources in ISC case law.

In the *Nevo* case, the ISC discussed the question of whether differential retirement ages for men and women constitute discrimination. Justice Bach cited a constitutive ruling of the ECJ in the matter of *Marshall v. Southampton and South-West Hampshire Area Health Authority*,[31] pointing out that the ECJ ruling is an "exemplary instructive example" in international case law supporting the principle that differential retirement ages based on gender indeed constitutes discrimination.[32] This is the first time that an Israeli judge referred to the quality and merit of EU law in order to justify referring to these foreign normative sources and their legitimacy in the ruling process. Accordingly, Justice Bach elaborates as to the factual background of the *Marshall* case, extensively citing EU directives discussed in the ECJ deliberations, which ultimately ruled that men and women should be treated equally in the workplace.[33] In this case, the references to EU case law and directives served the purpose of helping the justices interpret internal law and vet Israeli legislation against EU legislation. In the same case, Justice Bach briefly referenced another key ECJ ruling, *Defrenne v. Belgium*,[34] which discusses the concept of equal pay for equal work. The ISC also mentions another precedent which would limit the application of the conceptual verdict. However, this precedent is dismissed by the court since it deviates from the main focus of the matter under litigation.[35]

An important court ruling that has become a fundamental building block of constitutional law in Israel is the *United Mizrahi Bank Ltd. v. Migdal Cooperative Village* case.[36] This case dealt with The Family Agricultural Sector (Arrangements) (Amendment) Law of 1993, which, according to the plaintiffs, infringed on the provisions of Israel's 1992 Basic Law: Human Dignity and Liberty. Thus, the 1993

---

30. *See* HCJ 104/87 Nevo v. National Labour Court, 44(4) PD 749 (1990) (Isr.).

31. *See id.* at 758 (opinion of Bach, J.) (citing Case 152/84, Marshall v. Southampton & South-West Hampshire Area Health Auth. 1986 E.C.R. 723).

32. *See id.*

33. *See id.* at 758–60 (citing, *e.g.*, Council Directive 76/207 of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions, 1976 O.J. (L 39) 40).

34. *See id.* at 765–67 (citing Case 80/70, Defrenne v. Belgium, 1974 E.C.R. 445).

35. *See id.* at 767–69.

36. *See* CivA 6821/93 United Mizrahi Bank Ltd. v. Migdal Coop. Vill., 49(4) PM 221 (1995) (Isr.) [hereinafter *Mizrahi Bank* Case].

law should have been null and void. The ISC ruling, which many see as the clarion call of the "constitutional revolution,"[37] discussed the limits of judicial review. These limits were evidenced in the court's power to void legislation that violates rights specified in the Basic Law: Human Dignity and Liberty, under the premise that a basic law holds higher normative standing. In his opinion, former President Justice Shamgar discusses the authority of the Knesset to legislate provisions limiting its future authority to legislate,[38] and he concludes that such authority indeed exists.[39] Justice Shamgar seeks to draw lessons from the UK's journey to full EC membership: "[A] constitutional system from which we have drawn greatly—English law—imposed restrictions on the legislative powers of the legislator. These restrictions emerged as part of the United Kingdom's accession to the European Community."[40]

Former President Justice Shamgar cites two additional ECJ rulings, one of which is the *Factortame Ltd. v. Secretary of State for Transport (No. 2)* case, in order to illustrate the fact that the classic approach, which holds that a parliament cannot bind itself, has lost its high ground. Justice Shamgar comes to his conclusion based on the developments surrounding the UK accession to the EC. Neither of these citations were discussed at length by Shamgar and, therefore, were classified in the Article as passing references. Later in his opinion, Justice Shamgar discusses the absence of a superiority provision in both the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation.[41] Following a brief review of Austrian and German law, Shamgar references in passing one of the seminal court rulings of EU law, the case of *Costa v. ENEL*, as well as provisions from the treaty establishing the European Economic Community.[42] Hence, the four citations provided by former President

37. *See, e.g.*, Pardo & Zemer, *supra* note 2, at 34–35 nn. 138–44.

38. *Mizrahi Bank* Case, at 288 (Opinion of Shamgar, J.).

39. *Id.*

40. *Id.* at 291 (translated by authors) (referring to sections 2(4) and 3(1) of the European Communities Act, 1972).

41. *Id.* at 299.

42. *See id.* at 299 (citing Case 6/64 *Costa v. Enel*, 1964 E.C.R. 585, 590; The Treaty of Rome, art. 177(b), 25 March 1957, 294 U.N.T.S. 30). The Basic Law: Freedom of Occupation therefore deals with the validity of laws that violate the provisions of the Basic Law, as in the Treaty of Rome and *Costa v. Enel*. *See also* Anna Katharina Mangold, Costa v. ENEL *(1964): On the Importance of Contemporary Legal History*, *in* INTER- TRANS – SUPRA? LEGAL RELATIONS AND POWER STRUCTURES IN HISTORY 220, 224–230 (Eliana Augusti, Norman Domeier, Fritz Georg von Graevenitz & Markus J. Prutsch eds., 2011); J.H. Reestman & M. Claes, *For History's Sake: On* Costa v. ENEL*, André Donner and the Eternal Secret of the Court of Justice's Deliberations*, 10 EUR. CONST. L. REV. 191, 191 (2014); Meinhard Hilf, *Costa v ENEL Case*, *in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 824, 824–833 (Rüdiger Wolfrum ed., 2012). As discussed below, a similar conclusion emerges from the provisions of sections eight, ten, and eleven of the Basic Law: Human Dignity and Liberty. On the importance of the *Costa* ruling in EU law, *see* Bruno de Witte, *Direct Effect, Primacy, and the Nature*

Justice Shamgar are all passing references. The manner in which these citations are used speaks more to the fact of their use, and to the fact that comparative law in general serves as a basis for court rulings, and less to the importance and resonance of EC law (as it was known at the time) in the ISC ruling. This changes with the development of ISC rulings, as the Court later opts to use EU normative sources in a deeper and more critical manner, while specifically noting its ascendance within comparative law and drawing interpretive inspiration from it.

Another ISC ruling in which EU law is cited several times is the *Noach v. Attorney General* case.[43] In this case, the petitioner asked the ISC to determine that the force-feeding of geese for the production of goose liver (*foie gras*) is illegal. In addition, the petitioner asked that the ISC issue an order annulling the Cruelty to Animals Regulations (Protection of Animals), (Force-Feeding of Geese) of 2001 and declare them in contravention of the 1994 Cruelty to Animals Law (Protection of Animals). In his dissenting opinion, Justice Grunis argued that the existing practice of force-feeding of geese is not illegal and that the case should be dismissed. In his opinion, Justice Grunis dedicates an entire chapter, for the first time in ISC history, entitled "The Legal Status in Europe."[44] The chapter includes references to no fewer than five normative sources of EU law.[45] It addresses the status of common law in the EU in relation to animal cruelty, and Justice Grunis cites these sources for the purpose of interpreting local laws and to add comparative prospective to his discussion. He mentions that, in 1976, the European Council adopted a treaty protecting farm animals,[46] and that this treaty was amended in 1992.[47] Justice Grunis also mentions that EU member states ratified the treaty, and he quotes Articles 3 and 6 of the treaty in his dissenting opinion.[48] Justice Grunis notes that the ECJ ruled that the provisions of the treaty provide guidance but are not binding.[49] He also refers to "another European document that should be mentioned"—a 1998 EU directive—that was enacted to

---

of the Legal Order, *in* THE EVOLUTION OF EU LAW 323, 328–329 (Paul Craig & Gráinne de Búrca eds., 2d ed. 2011).

43. *See* HCJ 9232/01 "Noach"–The Israeli Ass'n of the Orgs. for the Protection of Animals v. Attorney General, 57(6) PD 212 (2003) (Isr.) [hereinafter *Noach* Case].

44. *Id.* at 226–29 (Grunis, J., dissenting).

45. *See id.*

46. *See id.* at 226 (citing European Convention for the Protection of Animals Kept for Farming Purposes, 1978 O.J. (L 323) 14).

47. *See id.* The law intended to prevent abuse of animals. As such, its precedence is essential for the existence of any reform.

48. *See id.* at 226–27.

49. *See id.* at 227 (citing Case C-1/96 The Queen v. Minister of Agric., Fisheries & Food *ex parte* Compassion in World Farming Ltd., 1998 E.C.R. I-1281, I-1293) ("It is clear from the very wording of those provisions that they are indicative only and are limited to providing for the elaboration of recommendations to the Contracting Parties with a view to application of the principles which they set out.")

implement the treaty provisions.[50] The articles of the directive referenced by Justice Grunis include specific provisions regarding the treatment of animals. However, Grunis mentions that the treaty and the directive do not include specific provisions regarding the force-feeding of geese.[51] Justice Grunis's final citation is to two other directives concerning rules of raising calves. Grunis emphasizes that the directives both include transitional provisions and specify a date on which these provisions come into effect.[52] He uses this last citation to illustrate the importance of including transitional provisions in laws that alter practices that have been around for long periods of time.[53] The *Noach* ruling can be seen as a benchmark decision, and as a reversal of the ISC's cold attitude towards EU law, in that, for the first time, an entire chapter is dedicated to EU law and its position on the matter before the ISC.[54] This comprehensive citation assisted Justice Grunis, *inter alia*, in concluding that the provisions are constitutional and do not contradict world practice, and, consequently, the case should be dismissed: "[I]n Europe, despite an awareness of the problematic nature of force-feeding geese, the various [legal] arrangements . . . do not prohibit the practice. . . . Not only was the practice not banned, but the current situation was also allowed to continue unchanged."[55]

---

50. *See id.* at 227 (citing Council Directive 98/58/EC of July 20, 1998, Concerning the Protection of Animals Kept for Farming Purposes, 1998 O.J. (L 221) 23).

51. *See id.* at 227–28.

52. *See id.* at 241 (citing Council Directive 91/629/EEC of Nov. 19, 1991, Laying Down Minimum Standards for the Protection of Calves, arts. 3, 11, 1991 O.J (L 340) 28; Council Directive 97/2/EC of Jan. 20, 1997, Amending Directive 91/629/EEC Laying Down Minimum Standards for the Protection of Calves, art. 2, 1997 O.J. (L 25) 24).

53. *See id.* at 241 ("Why were transitional provisions established in both England and the European Union? It seems that the answer is simple. The new orders were meant to change long-standing arrangements, according to which farmers worked for years. It would be wrong for orders regarding the size of calf stalls to be put into effect immediately. The farmers must be given enough time to reorganize, especially since the changes require new investments. As a result, the price of the veal could rise."); *see also* Mariann Sullivan & David J. Wolfson, *What's Good for the Goose… The Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 L. & CONTEMP. PROBS. 139, 169 (2007) ("It is one of the first instances of a court applying an anti-cruelty law to a common farming practice, and one of the few examples of the judiciary discussing the issue with seriousness and intelligence.").

54. This is the place to note that Justice Grunis referred, *inter alia*, to the recommendations of the Report of the Scientific Committee on Animal Health and Animal Welfare: Aspects of the Production of Foie Gras in Ducks and Geese (1998) and the Standing Committee of the European Convention for the Protection of Animals (Kept for Farming Provisions: Recommendation Concerning Domestic Geese and Their Crossbreeds (1999)). *See Noach* Case, at 221, 226–29 (Grunis, J., dissenting). These secondary sources derive from EU law as a whole, including legal sources of the Council of Europe. These institutions are not part of the EU and therefore, are not counted in our database, even though they can assist in understanding the comprehensive theoretical infrastructure that Justice Grunis employed in his opinion as a basis for his reasoning.

55. *Id.* at 229.

Before signing off on his verdict and after reviewing former Justice Shtrasberg-Cohen's opinion, Justice Grunis stated that:

> [I]t seems that while our legal analyses do not greatly differ, there is a considerable gap between the remedies that we believe should be granted. In my opinion, my colleague's conclusion that the regulations are fatally flawed seems too extreme. As I noted, the arrangement in the regulations follows the European arrangement. Furthermore, we have found no country where force feeding, having been practiced, has been prohibited.[56]

Former Justice Shtrasberg-Cohen, who wrote the majority opinion in the *Noach* case, broadly addressed the European sources presented by Justice Grunis, and remarkably noted:

> [R]egarding farm animals, it seems to me that the Israeli approach is more similar to the European and New Zealand provisions than to American-Canadian legislation. The former does not overlook the need to provide for the protection and welfare of farm animals. Rather, it provides for clear rules regarding the raising of farm animals for food production. It also provides a flexibility that allows the legislature to tailor the rules and make changes, according to available scientific expertise and changing social ideas.[57]

Additionally, former Justice Shtrasberg-Cohen also references the directive referenced by Justice Grunis[58] as well as the treaty cited in his opinion.[59] As was the case for Grunis, Justice Shtrasberg-Cohen's citations were also made for the purpose of interpreting Israeli law and comparing Israeli to EU law. Interestingly, both the majority and the dissenting opinions in this case used the same normative source, which indicates that EU law played a significant role in the reasoning behind the ruling. The importance bestowed to EU law in this instance can also be attributed to the fact that the Israeli legislation in the field of force-feeding geese was fairly new, while the European legislation was already well established and had developed throughout the years in a manner which attested to its quality.

In the case of *Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Interior*,[60] which is one of the most significant precedents in the field of constitutional law in Israel, the ISC was petitioned to declare the 2003 Citizenship and Entry into Israel Law

---

56. *Id.* at 248.

57. *Id.* at 262–63 (majority opinion of Strasberg-Cohen, J.).

58. *See id.* at 261 (citing Council Directive 98/58/EC of July 20, 1998, Concerning the Protection of Animals Kept for Farming Purposes, 1998 O.J. (L 221) 23).

59. *See id.* at 265 (citing European Convention for the Protection of Animals Kept for Farming Purposes, Mar. 10, 1976, E.T.S. No. 087).

60. HCJ 7052/03 Adalah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of the Interior 62(2) PD 202 (2006) (Isr.), *translated in Adalah Legal Center for Arab Minority Rights in Israel v. Minister of Interior,* VERSA: A PROJECT OF CARDOZO LAW, https://versa.cardozo.yu.edu/opinions/adalah-legal-center-arab-minority-rights-israel-v-minister-interior (last visited Feb. 20, 2021) [https://perma.cc/5CWT-RN8Q] (archived Feb. 21. 2021) [hereinafter *Adalah Case*].

(Temporary Provision) unconstitutional on the grounds that it violated the rights to equality and family life. The case was discussed by an expanded panel of eleven justices, and the ruling serves as an example of the broad use of various normative sources by the ISC, which include EU legal sources. In his minority opinion, President Justice Barak wrote, "the right to family reunification is also recognized as a component of the right to family life in international law and in the constitutional law of many countries."[61] Justice Barak references several rulings, which determined that immigration regulations that harm the relationship between spouses or between parents and their children potentially violate rights under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[62] The ECJ *Carpenter v. Secretary of State* case is one of the rulings cited by Barak.[63] This citation, which was mentioned but not elaborated, was used for the purpose of interpreting local provisions; it also provided a comparative perspective as to the status of recognition of the right of family unification in European law and, specifically, in EU law. President Justice Barak also cites the 1999 Treaty of Amsterdam[64] and mentions that, as a result of the treaty, issues of immigration were also transferred to the competence of the EC. Barak continues to note that the Council of the EU issued a directive[65] that binds all EU member states (except for Denmark, the UK, and Ireland) and is based on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.[66] The directive provides that family reunification is a necessary way of making family life possible.[67] President Justice Barak remarks that the directive "grants

61. *Id.* ¶ 36 (opinion of Barak, J.).

62. *See id.* (citing European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, E.T.S. No. 5. This convention is not part of EU law). The Adalah judgment made extensive use of normative ECHR sources. These normative sources are not a part of EU law and are discussed here, along with the use of the normative sources of EU law, *inter alia*, as an illustration of the broad reference made to European law as a whole.

63. *See id.* (citing Case C-60/00, Carpenter v. Sec'y of State, 2002 E.C.R. I-6279).

64. *See id.* (citing Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1).

65. *See id.* (citing Directive 2004/38/EC, of the European Parliament (EP) and of the Council of 29 April 2004 on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States Amending Regulation (EEC) No 1612/68 and Repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, 2004 O.J. (L158), 77).

66. *Id.*

67. As noted, the European Convention for the Protection of Human Rights and Fundamental Freedoms is not a normative source of EU law, and the use of this reference is presented here as an illustration of the in-depth use of European legal sources as a whole. In addition, within the context of invoking the convention, President Justice Barak mentions three ECHR rulings in which it was determined that immigration decisions affecting the relationship between spouses or the relationship between parent

a broad right to the reunification of families for all citizens of the [EU], whether the foreign spouse is a citizen of a member state in the Union or not."[68]

Two other justices on the panel deliberating the *Adalah* case also referenced normative sources of EU law. Vice President Cheshin mentioned, as a side note, that:

> [I]ncidentally, following the rule in international law, the [EU] enacted a directive in 2004, in which some of the states of the Union took upon themselves the obligation to enact internal—qualified—arrangements according to which the foreign spouses of residents would be allowed to immigrate into the state. Before the directive existed, the spouses had no such right other than under the internal law of each individual state.[69]

This citation, which did not reference any specific directive, but clearly refers to the directive that is discussed throughout the ruling, was categorized in the Article as a passing reference. Justice Naor refers to Rubenstein and Orgad[70] and their conclusions regarding the 2004 directive:

> Rubinstein and Orgad discuss in their article the work of Arturo John, which was devoted to a survey of this issue in international and European law. They pointed out that "the author gives examples of how any international document that *prima facie* grants this possibility immediately qualifies it or provides conditions and restrictions that empty it of content. It is the prerogative of states and within the framework of their sovereignty. It is an ideal and humanitarian aspiration more than a legal duty." . . . With regard to the European directive of 2004, which is mentioned in the opinion of the president, it is stated that it admittedly increased the possibility of immigrating to the [EU] for the purposes of marriage, but at the same time it allowed "broad discretion for states to determine conditions and restrictions around this possibility."[71]

It can be seen that the manner in which Justice Naor, who concurred with the majority, compares EU law to Israeli law is contrary to the interpretation and accompanying conclusions of President Justice Barak with relation to that normative source. The references to European law are prominent in the court ruling and were made with the aim of interpreting local law, while comparing Israeli and European laws. Despite these references, the petition was rejected,

---

and child may violate rights under Article 8 of the Convention: Berrehab v. Netherlands, App. No. 10730/84,11 Eur. H.R. Rep. 322 (1988); Moustaquim v. France, App. No. 12313/86, 13 Eur. H.R. Rep. 82 (1991); Ciliz v. Netherlands, App. No. 29192/95, 33 Eur. Ct. H.R.. 623 (2000). *See Adalah Case*, ¶ 36 (opinion of Barak, J.). These are not counted as references in this study.

68. *Id.* ¶ 37 (opinion of Barak, J.).

69. *Id.* ¶ 53 (opinion of Cheshin, J.).

70. Amnon Rubinstein & Liav Orgad, זכויות אדם, ביטחון המדינה ורוב יהודי המקר של הגירה לצורכי נישואין [Human rights, state security and a majority of Jews–the case of immigration for marriage] 48 HAPRAKLIT 315 (2006).

71. *Adalah Case*, ¶ 5 (opinion of Noar, J.) (citing Rubinstein & Orgad, supra note 70 at 315).

and it was stated that if the law violates the right to family life, the infringement is reasonable. It seems that despite the importance accredited to the right to family life in both Israeli law and European law, the divergent geopolitical, social, and security realities tipped the scale in this case.

Like the *Adalah* case, the *Gal-On v. Attorney General* case[72] also dealt with the question of the legality of the amended 2003 Citizenship and Entry into Israel Law (Temporary Provision). The ruling extensively cites sources of European law in general, as well as normative sources originating in EU law. In this ruling, all references to EU law were made in the majority opinions. In his opinion, Justice Melcer discussed the principle of "preventive caution" and, while examining the suitability of the principle to the test of proportionality, he referred to an ECJ ruling that considers a broad platform for the comparative interpretation of domestic law, writing:

> It now remains for us, therefore, to examine the compatibility of the precautionary principle with the test of proportionality. The leading European decision on this subject is Pfizer Animal Health SA v. Council of the European Union . . . of the [ECJ], which in effect combined the precautionary principle with the criterion of proportionality and ruled, in our terms, that in cases in which the conditions for the application of the precautionary principle are met, one cannot say that the acts of the authority did not fulfill the requirements of proportionality, for in such situations, preference is accorded to the considerations of the regulatory authority, since *it bears responsibility* if the catastrophe eventuates, and it *will be required to justify its actions, or its omissions*.[73]

Justice Melcer then moves on to discuss the criterion of "proportionality *senso strictu*" and notes that:

> [I]n my humble opinion, when the added benefit that the Law under scrutiny wishes to provide is the prevention of anticipated damage, and particularly in situations in which the precautionary principle is apt, the relevant legislation will successfully pass this sub-test. As the court noted in the Pfizer case in this matter: "a cost/benefit analysis is a particular expression of the principle of proportionality in cases involving risk management." [74]

---

72. HCJ 466/07 Gal-On v. Attorney General, 65(2) PD 44 (2012) (Isr.), *translated in Gal-On v. Attorney General (Summary),* VERSA: A PROJECT OF CARDOZO LAW, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Gal-On%20v.%20Attorney%20General.pdf (last visited Feb 20, 2021) [https://perma.cc/9A8R-MGAC] (archived Feb. 21, 2021) [hereinafter *Gal-On* Case].

73. *Id.* ¶ 20 (opinion of Melcer, J.).

74. *Id.* ¶ 21 (opinion of Melcer, J.). The inclusion of ¶ 20 of Justice Barak's opinion utilizes a translation by the Cardozo Israeli Supreme Court Project. *see Gal-On v. Attorney General (Summary),* VERSA: A PROJECT OF CARDOZO LAW, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Gal-On%20v.%20Attorney%20General.pdf (last visited Feb 20, 2021) (paragraph 21 is translated by the authors).

Justice Melcer's citation in this ruling merges the precautionary principle with the test of proportionality. Justice Melcer held that when the conditions for implementing the "precautionary principle" are met, there is no reason to argue that the acts of the authorities do not meet the requirements of proportionality. Proportionality is particularly regarded since, in these situations, there is a preference in the considerations of the regulatory authority. This body is the responsible agent and the one that will eventually have to justify its actions or failure to act. The test of proportionality constitutes a basic test of constitutional law in Israel, and it is reinforced with the use of European law.[75] Hence, this reference to EU law in this case was aimed at strengthening the domestic legal tests through comparison to their application in European law. Justice Naor refers to European literature according to which the right to family life includes, *inter alia*, the rights to marry, choose a name, share decisions about the future of the child, and the right that a child will not be placed for adoption without the consent or knowledge of the parent.[76] In an interesting and noteworthy manner, Justice Naor seeks to examine the developments and the changes that have taken place in European law as a whole and specifically in EU law since she wrote her opinion in the *Adalah* case:

> In my previous ruling [the *Adalah* case] I demonstrated at length, and for that matter in opposition to President Barak's position, that in democratic countries, there is no recognition of a citizen's or resident's constitutional right to bring a foreign spouse to his country. I mentioned a ruling of the European Court of

---

75. On the historical origins of the test of proportionality in European Community law, see AHARON BARAK, מידתיות במשפט [PROPORTIONALITY IN LAW] 234–35 (2010) (Isr.); Anne Peters, *Proportionality as a Global Constitutional Principle*, *in* HANDBOOK ON GLOBAL CONSTITUTIONALISM 248, 252 (Anthony F. Lang, Jr. & Antje Wiener eds., 2017); Tor-Inge Harbo, *The Function of the Proportionality Principle in EU Law*, 16 EUR. L.J. 158, 158 (2010); Catherine Haguenau-Moizard & Yoan Sanchez, *The Principle of Proportionality in European Law*, *in* THE JUDGE AND THE PROPORTIONATE USE OF DISCRETION: A COMPARATIVE ADMINISTRATIVE LAW STUDY 142 (Sofia Ranchordás & Boudewijn de Waard eds., 2015); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT'L L. 72, 139–44 (2008) (providing an in-depth review of the test of proportionality); see also Moshe Cohen-Elia, מידתיות ותרבות ההצדקה אצל אהרן ברק [*Proportionality and the Justification Culture of Aharon Barak*], 15 LAW & BUS. L. REV. 317, 318 (2012) (Isr.) (discussing the constitutional culture in which proportionality is an inherent element); Moshe Cohen-Eliya & Iddo Porat, *Proportionality and the Culture of Justification*, 59 AM. J. COMPAR. L. 463, 463 (2011). For a critical approach, see generally Gila Stopler, עליית המידתיות, ירידת ההסתברות והשלכותיה הבלתי-צפויות של המהפכה החוקתית על המשפט החוקתי הישראלי [*The Rise of Proportionality, The Decline of Probability and the Unexpected Consequences of the Constitutional Revolution for Israeli Constitutional Law*], 19 LAW & GOV'T 187 (2018) (Isr.). Stopler points out the shortcomings of the legal proportionality test and offers a solution in the form of combining probability tests in their "old" form within the tests for proportionality, particularly, the third proportionality test, which seeks to balance the injury to the right with the benefit to the public interest emanating from the given limitation.

76. *See Gal-On* Case (opinion of Naor, J.).

> Human Rights, which discussed Article 8 of the European Convention on Human Rights. As you may recall, Article 8 speaks of the right to family life.
>
> > After our ruling was made the European Court of Justice (ECJ) ruled that the right to family life should not be construed as obliging the state to allow family unification on its territory. In the words of the Court: "This right [from Article 8] is not to be interpreted as necessarily obliging a member state to authorize family reunification in its territory. . . . The European Court of Justice also refers to the ruling of the European Court of Human Rights and reiterates that when dealing with matters of immigration, the right to family life should not be regarded as imposing a general obligation on the state to allow family unification in its territory: "Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples regarding the country of their matrimonial residence and to authorize family unification in its territory."[77]

This correspondence with the CJEU, which was conducted in order to strengthen local law, indicates a dialogue and cross-germination between these courts, including subsequent developments and relevant CJEU rulings on issues surfacing in Israeli law. Justice Hendel also refers to the ruling that Justice Naor referenced in her opinion, noting that "there is no constitutional right vested in each citizen to bring a foreigner into the borders of his state, even if he is married to that person."[78] This reference was made without any specific discussion of the actual ruling, and, therefore, Justice Hendel's citation was classified as a passing reference. Each of the three references to EU law was made for a different purpose—to strengthen domestic law, to interpret local law and to compare laws, and as a passing reference.

In the *Eitan–Israeli Immigration Policy Center v. The Israeli Government* case,[79] two petitions were filed, consolidated into a single hearing, challenging Amendment No. 4 to the 2013 Prevention of Infiltration (Offenses and Jurisdiction) Law, which entitles the state to hold illegal immigrants in custody for a period of one year in the "Holot" detention center. In the ruling, Justice Vogelman cites several European sources in the majority opinion. Due to the fact that Justice Vogelman interweaves normative sources that are part of EU law with sources that are not, the following is a descriptive review of the variety and circumstances in which the citations were used. At the beginning of his opinion, Justice Vogelman refers, *inter alia*, to a 2013 policy annex published by the EU relating to asylum, borders, and

---

77. *Id.* (opinion of Naor, J.) (translated by authors). The case referred to by Justice Naor is Case C-540/03, Eur. Parliament v. Council of the Eur. Union, 2006 E.C.R. I-5769.

78. *Gal-On Case*, ¶ 1 (opinion of Hendel, J.).

79. File No. 7385/13, 8425/13 High Court of Justice (Jerusalem), Eitan–Israeli Immigration Policy Center v. The Israeli Government, Nevo Legal Database (Sept. 22, 2014) (Isr.) [hereinafter *Eitan* Case].

immigration.[80] He does so for the purpose of illustrating that "in many countries, the mere submission of an application for the refugee status leads to the application of a unique system of laws, separate from that which applies to illegal immigrants who do not have a claim to special refugee protection, but cannot be deported for technical reasons." Justice Vogelman explains that this is done "against the backdrop of the recognition of the extraordinary circumstances of those who left their country, not out of choice or preference, but out of necessity and coercion."[81] Justice Vogelman later refers to the EU Directive on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals,[82] according to which it is prohibited to hold illegal immigrants in detention if a deportation proceeding in their case is not in effect at the time or expected to take place within a reasonable period of time.[83] To emphasize this approach, Justice Vogelman refers to two rulings—one of the ECHR[84] and the other of the CJEU[85]—in order to strengthen the provisions of the directive. Vogelman later refers again to the directive and notes that some of the countries mentioned in the ruling shaped their internal legislation to conform with the directive,[86] according to which, if there are no less harmful means, an illegal immigrant can be held in custody for a period of up to six months. This period may be extended for up to an additional twelve months (eighteen months in total) if the detainee is not cooperating with his deportation or when there is a delay in obtaining the documents required for the deportation. It was also stipulated that the CJEU held that the period of custody could be extended past six months only if an effective removal procedure is in progress at the time. Towards the conclusion of his remarks, Justice Vogelman referred to the European "Absorption Directive," which states that the conditions of detaining refugees must include maintenance of their mental health.[87] All four references to EU legal sources in this ruling were cited with the aim of interpreting domestic law and comparing domestic law to European law. Vogelman undertook a broad and in-depth reference to European law as a whole

---

80. *See id.* (opinion of Vogelman, J.) (citing EUR. UNION AGENCY FOR FUNDAMENTAL RTS., HANDBOOK ON EUROPEAN LAW RELATING TO ASYLUM BORDERS, AND IMMIGRATION 41–57, 135–57 (2013)).

81. *Id.* ¶ 34 (opinion of Vogelman, J.).

82. Directive 2008/115/EC, of the European Parliament and of the Council of 16 December 2008 on Common Standards and Procedures in Member States for Returning Illegally Staying Third-Country Nationals, art. 15(1), 2008 O.J. (L 348) 98.

83. *See id.* arts. 15(1)–15(2).

84. Chahal v. United Kingdom, App. No. 22414/93, 23 Eur. H.R. Rep. 413 (1996).

85. Case C-357/09 PPU, Kadzoev, 2009 E.C.R. I-11189.

86. *Eitan* Case, ¶ 77 (opinion of Vogelman, J.).

87. *See id.* (citing Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 on Laying Down Standards for the Reception of Applicants for International Protection (recast), art. 17(2), 2013 O.J. (L 180)).

in order to determine the proper policy towards refugees Israel should, or least could, adopt.

In the *Kav LaOved v. Minister of Welfare* case,[88] the ISC deliberated a petition demanding that the Minister of Health and the Minister of Social Affairs be required to enact regulations for foreign workers with strong ties to Israel. These regulations would secure the foreign workers' rights under the National Health Insurance Law of 1994 as mandated in the National Health Insurance (Consolidated Version) Law of 1995. In the section of her ruling that concerns comparative law (entitled "Looking Overseas"), Justice Arbel refers to an EU directive from 2003 that applies to third-country citizens who are long-term residents in one of the EU member states.[89] Justice Arbel notes that, according to the EU directive, "[l]ong-term residency is defined as a legal and continuous stay of five years or more in a member state."[90] Justice Arbel specifically referenced Article 5 of the directive, which deals with additional conditions required for obtaining long-term residency status, as well as Article 11, which provides "equal treatment of long-term residents and residents of the European Union, including social benefits, including medical treatment."[91] This reference to the EU directive assisted Justice Arbel in interpreting local law by enabling her to make a comparison between Israeli law and EU law, a comparison which eventually led, among other things, to a ruling in favor of the petitioners.

In the *Desta v. Knesset*[92] case, the constitutionality of Article 30A and Chapter D of the Prevention of Infiltration (Offenses and Jurisdiction) Law, 1954, was examined following amendments made to the law. These amendments were introduced in order to prevent illegal immigration and to ensure the removal of illegal immigrants from Israel.[93] The amendments establish that illegal immigrants who

---

88. HCJ 1105/06 Kav LaOved v. Minister of Welfare, Nevo Legal Database (Jun. 22, 2014) (Isr.) [hereinafter *Kav LaOved v. Minister of Welfare*].

89. *See id.* (citing Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-Country Nationals Who Are Long-Term Residents, 2004 O.J. (L 16), *amended by* Council Directive 2011/51/EC of the European Parliament and of the Council of 11 May 2011 Amending Council Directive 2003/109EC to Extend Its Scope to Beneficiaries of International Protection, 2011 O.J. (L 132), 1).

90. *Id.* at 49 (opinion of Arbel, J.).

91. *Id.* ¶ 75 (opinion of Arbel, J.).

92. HCJ 8665/14 Desta v. Knesset, Nevo Legal Database (Aug. 11, 2015) (Isr.), *translated in Desta v. Knesset,* VERSA: A PROJECT OF CARDOZO LAW, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Desta%20v.%20Knesset.pdf (last visited Feb. 21, 2021) [https://perma.cc/G7FC-MVBL] (archived Feb. 21, 2021) [hereinafter *Desta* Case].

93. *See id.* ¶ 12 (opinion of Naor, J.) (citing Proposal of the Law for the Prevention of Infiltration and Ensuring the Departure of the Infiltrators and Foreign Workers from Israel (Amendments to the Law and Temporary Order), 5775 – 2014, SH No. 904 (Isr.)) (on file with the author).

entered into Israel can be detained in custody for a period of three months and, if in a detention center, for up to twenty months.

Within the framework of the ruling, EU sources were cited by three different justices five times in total.[94] The ISC upheld the constitutionality of Article 30A of the law, which permits holding infiltrators in custody for a period of up to three months subject to the court's interpretation of the law. According to the court, there must be an intrinsic connection between holding that person in custody and the implementation of a process of his identification or the exhaustion of avenues for his removal from Israel. The ISC also upheld the constitutionality of Chapter D of the law, concerning the authority to order that illegal immigrants stay in detention centers, except for those articles that establish a twenty-month maximum for staying in a detention center. These articles were annulled following the court's finding that the said period does not meet the proportionality test. In her ruling, President Justice Naor refers to the European Directive 2003/9/EC on the absorption of asylum seekers.[95] She focuses on the prevention of the concentration of asylum seekers in city centers while reducing the burden imposed on cities with a significant concentration of undocumented foreigners.

As part of her review of practices employed in various countries, Justice Naor presents the approach taken in the directive, according to which asylum seekers are granted freedom of movement in the territory of their country of residence. At the same time, however, state authorities are entitled to set geographical areas in which they will live and sometimes even specific places of residence. In light of its importance, President Justice Naor chose to cite Article 7 of the directive in its entirety. At the same time, Justice Naor limits the states' authority to place restrictions by limiting these restrictions to those meeting public interests or promoting the effective handling of asylum requests.[96] Justice Naor further refers to a recent revision of the directive concerning individuals who submitted a request for some sort of international protection. Later in her ruling, Justice Naor discusses exceptional circumstances for which measures can be taken to limit the freedom of movement and sometimes even the very freedom of asylum seekers.[97] In this context, she refers to EU Directive 2001/55/EC, which addresses temporary protection in the event of a

94. This is in addition to sources referenced in European law in general.

95. *Desta* Case, (opinion of Naor, J.) (citing Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards For the Reception of Asylum Seekers, 2003 O.J. (L 31) 18).

96. *See id.* (citing Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards For the Reception of Applicants For International Protection, 2013 O.J. (L 180) 96).

97. *See id.* ¶ 112–13 (opinion of Naor, J.).

mass influx of displaced persons.[98] These references to the sources of EU law by President Justice Naor were used to interpret local law and to compare Israeli law with EU law. Justice Hendel was of the minority opinion, arguing that the petition should be rejected in its entirety given that the provisions of the Prevention of Infiltration Law pass the first test of constitutionality. With regards to the trend in comparative law to reduce the period of custody in detention centers, Justice Hendel refers to the EU Directive of 2003 and the updated version addressed previously by President Justice Naor,[99] and even quotes Articles 7(1) and 7(2) concerning freedom of movement.[100]

The purpose of these references in Hendel's dissenting opinion is to clarify that the directive does not place a time limit on these provisions. Regarding the state's obligation to deal with asylum requests in a timely manner, and to abstain from taking actions which appear to obstruct the possibility of receiving asylum, Justice Melcer refers, by way of passing reference, to Directive 2013/32/EU. The directive speaks specifically of the extension and withdrawal of international protection.[101] This ISC ruling is yet another example of the use of European law to develop domestic law, particularly on politically and culturally charged issues such as immigration, which have developed significantly in recent years in EU law in light of demographic and political changes occurring in Europe.

In the *Zik Dinur Ltd. v. Minister of Industry, Trade & Labor* case, a petition was filed against the decisions of the Ministry of Industry, Trade, and Labor to inspect the compliance of imported fireworks to Israeli standards at the time of their entry to Israel.[102] In this case, the ISC, in its capacity as the High Court of Justice, rejected the petition by stating that the decision to check the compliance to the Israeli standard is "proportionate and reasonable."[103] In this case, the petitioner was the party to invoke EU law, claiming that the failure of the authority to collect information regarding the situation in Europe

---

98. *See id.* ¶ 72 (opinion of Naor, J.) (citing Council Directive 2001/55/EC of 20 July 2001 on Minimum Standards for Giving Temporary Protection in the Event of a Mass Influx of Displaced Persons and on Measures Promoting a Balance of Efforts Between Member States in Receiving Such Persons and Bearing the Consequences Thereof, 2001 O.J. (L 212) 12).

99. *See id.* ¶ 6 (opinion of Hendel, J.) (citing Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards For the Reception of Asylum Seekers, 2003 O.J. (L 31) 18; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 Laying Down Standards For the Reception of Applicants For International Protection, 2013 O.J. (L 180) 96).

100. *See id.* ¶ 6 (opinion of Hendel, J.).

101. Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on Common Procedures for Granting and Withdrawing International Protection, art. 31, 2013 O.J. (L 180) 60.

102. HCJ 8467/10 Zik Dinur Ltd. v. Minister of Industry, Trade & Labor (Nov. 29, 2011), Nevo Legal Database (Isr.).

103. *Id.* at 31.

in this matter is fundamentally flawed.[104] The petitioner argued that the European standard, which serves as the basis for the standard used in Israel, is satisfied by conducting random sample tests in the manufacturing countries.[105] Justice Vogelman addresses this claim, writing:

> Indeed, in my opinion, considering the data we discussed including the adoption of the European standard, there was room for the Ministry of Industry, Trade and Labor to conduct a closer examination of the situation prevailing in Europe prior to making its decision . . . it seems as though a thorough examination of the subject was made only after the proceedings before us were initiated. However, as discussed in these deliberations, the Ministry of Industry, Trade and Labor was prepared even at this late stage to examine the practice that exists in Europe, and on the basis of its findings – to reexamine the model that applies in Israel.[106]

This statement reflects, in the best way, the importance and place of EU law, as reflected in Justice Vogelman's opinion. The statement does not include an explicit reference to a specific normative source. It is rather a general statement regarding the petitioners' claims regarding the meaning of reliance on foreign regulatory standards. According to the petitioners, EU member states are satisfied with the implementation of the sample tests in the manufacturing countries, so when the European standard applied to fireworks is adopted wholesale in Israel, the inspection procedures accepted in Europe should be accepted in Israel as well. Regarding these claims, Justice Vogelman states:

> It is appropriate to note here that the existing arrangements in Europe regarding the import of goods are largely influenced by the guiding principle in the [EC] regarding the elimination of trade barriers between countries and the establishment of a single market (see Directive 2007/23 / EC on the placing on the market of pyrotechnic articles, OJ 154, 14.6.2007). Therefore, the [EC] sets out in its directives, general requirements for various types of products, such as safety and supervision requirements, which are threshold conditions for the entry of products into the EU member states. These directives set guidelines for the adoption and determination of individual regulation in each member state. The Directive dealing with the import of pyrotechnic products and fireworks, which is relevant to our case, outlines a two-stage procedure for inspecting imported fireworks: a first stage, consisting mainly of prototype testing as well as sample batch testing of the imported commodity intended to ensure that it conforms to the standard; and a second stage, in which EU member states commit themselves to taking all necessary steps to ensure that only products that meet the threshold requirements are marketed in their respective territory. This compels them to conduct further tests in their territory to ensure that the products marketed are not hazardous to the safety and health of consumers.[107]

---

104. *See id.* at 7–8.
105. *See id.* at 15 (opinion of Vogelman, J).
106. *Id.* (translated by the authors).
107. *Id.* ¶ 22 (opinion of Vogelman, J) (translated by the authors).

It is clear that Justice Vogelman interprets domestic law by comparing Israeli law to EU law and by comparing Israel, having adopted the EU standard, to an EU member state on which the directive governing this standard is binding. In so doing, he bases his ruling on the EU directive, concluding that the actions of the ministry are not necessarily inconsistent with the relevant directive.[108] This last argument, among other arguments, supported his rejection of the petition.

Justice Vogelman's affinity for European law as an interpretative source was also expressed in the *Asafu v. Ministry of the Interior* case,[109] in which the question of reasonability was discussed with reference to Israel's temporary stay of removal policy. The appellant resided in Israel, in accordance with this policy adopted by the Ministry of the Interior towards citizens of Eritrea, and sought to arrange legal status for his spouse, an Ethiopian citizen, who remained in Israel illegally. Justice Vogelman devotes a whole chapter to examining the issue of "temporary protection" in the EU.[110] After Justice Vogelman notes that the mechanism of "temporary protection" was examined in European countries in the 1990s, he states that "on the basis of lessons learned from the way countries dealt with the crisis in the Balkans, the [EU] adopted in July 2001 a directive dealing with the issue of temporary protection (2001/55/EC)."[111] In his decision, Justice Vogelman analyzes, in detail, the definition of the directive's "temporary protection" and even elaborates on the preamble to the directive and its various provisions.[112] Justice Vogelman explains:

> The Directive states that the temporary protection mechanism must be consistent with the obligations of the states in relation to the refugees and compliant with international law, while providing temporary protection does not prejudge the question of recognizing a person as a refugee under the provisions of the Refugee Convention.[113]

Vogelman notes, however, that as of the date the judgment was rendered, the provisions of the 2001 directive and the implementing national legislation had not yet become effective, since the EU Council had still not declared a situation warranting the use of a temporary protection mechanism.[114] Justice Vogelman discussed the right to

---

108. *See id.* (citing Directive 2007/23/EC of the European Parliament and of the Council of 23 May 2007 on the Placing on the Market of Pyrotechnic Articles, 2007 O.J. (L 154) 1).

109. HCJ 8908/11 Asafu v. Ministry of the Interior (Jul. 17, 2012), Nevo Legal Database (Isr.).

110. *See id.* ¶ 26 (opinion of Vogelman, J) (translated by the authors).

111. *Id.*

112. *Id.* ¶¶ 20–27 (opinion of Vogelman, J.).

113. *Id.* ¶ 26 (opinion of Vogelman, J.) (translated by the authors).

114. *See id.*

family unification within the framework of temporary protection, and he is of the opinion that:

> [I]n the [EU], Article 15 of the 2001 Directive dealing with the issue of temporary protection deals with family unification, which should be respected within the temporary protection mechanism. However, Article 15(1) emphasizes that it applies only to family members who were in the country of origin and were separated as a result of the circumstances surrounding the mass displacement . . . This is also clarified in the explanatory notes to the proposal of the Directive, where it was explicitly stated that the proposed Directive does not grant the beneficiary of "temporary protection" the right to establish a new family, but only covers a situation of a family which existed in the country of origin. This is due to the nature of the temporary protection, which is by definition only a temporary solution . . . Section 5 of the 2003 Directive on the right to family unification (2003/86 / EC) deals with expanding the rights of refugees to family reunification – explicitly excludes its application to individuals benefitting from temporary protection (Article 3 of the Directive).[115]

Justice Vogelman uses this comparison to emphasize that, even in the EU, there is no status of "temporary protection," which grants its beneficiary full rights, similar to those conferred to recognized refugees. Specifically, the EU determined that "temporary protection" does not grant the right to establish a new family by granting status to the foreign spouse. Justice Vogelman's reference to two directives was made in order to interpret the local law and to compare laws, which allowed the court to reject the petition while basing the rejection extensively on comparative law in general and EU law in particular.

In *The Movement for Quality Government v. Prime Minister of Israel* case,[116] the petitioners disputed the legal validity of the "Gas Outline" arrangement adopted by the Israeli Government by way of government resolution.[117] The state and the gas companies that held the franchises to off-shore gas production defended the Gas Outline. In the ISC ruling, however, the majority ruled for the cancellation of the Gas Outline due to the "regulatory stability clause" set in the outline, which bound the government to its conditions for a period of ten years. In his opinion, Vice President Justice Rubinstein examined the interpretation of Section 52 of Israel's Antitrust Law, 1988, which enables the Minister of the Economy after consulting the Knesset Economic Affairs Committee to partially or totally exempt a restrictive trade practice from the provisions of the law, if deemed necessary for foreign policy or national security purposes. Justice Rubinstein referred to the Treaty of the EU[118] and stated, "[w]e can assume that

---

115. *Id.* ¶ 28 (opinion of Vogelman, J.) (translated by the authors).

116. HCJ 4374/15 Movement for Quality Gov't v. Prime Minister of Isr. (Mar. 27, 2011), Nevo Legal Database (Isr.) [hereinafter *Movement for Quality Gov't* Case].

117. *See id.* at 9–15.

118. *See id.* (citing Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 1).

the special geo-strategic situation of the State of Israel stood at the base of this Section. Accordingly, it is difficult to find a similar normative directive in other Western countries, such as the [EU]."[119] Therefore, this citation to European law can be seen as a basis for Justice Rubinstein's interpretation of local law and the comparative law. Later, Justice Rubinstein points out that various countries allow noncompetitive considerations, including security, to be considered in the approval of mergers and acquisitions, while referring, in this context, to a regulation originating in EU law.[120] Therefore, the appeal to European law in this instance was classified as a passing reference. Justice Rubinstein further argues that the Antitrust Law prohibits a monopoly from abusing its power, including setting unfair prices of the asset or service, while referring to the judgment of the CJEU, which prohibits monopolies from price gouging, as well as to a report of the Organisation for Economic Co-operation and Development (OECD) on this subject.[121] This reference to a European court judgment was made in order to reinforce local law. Justice Rubinstein concludes his references to European law by referring to an Israeli ruling from 2005 that indicates "the seeds of support for the European approach."[122]

In the *Israel v. Klein* case,[123] the ISC discussed the decision of the lower District Court in which the appellants were convicted of the use of a forged document and fraudulent acquisition. In her ruling, Justice Procaccia refers to the *Union Royale Belge Des Societes De Football Association v. Jean-Marc Bosman* case and to Article 48 of the Treaty on the Functioning of the EU (TFEU), noting:

> The rules of the Union of European Football Associations (UEFA) prohibit the football team of an EC member state from recruiting more than three players from another member state. In the Bosman case, the [ECJ] rejected the said regulation on the grounds that it contravenes Article 48 of the Community's Treaty, which ensures the free movement of workers between [EC] member states, and therefore the transfer of a player from one country to another within the Community should not be prohibited . . . This principle also applies to other sports, including basketball. The introduction of the principle of the free movement of players within the [EC] has provided incentives for foreign players

---

119. See id. ¶ 33 (opinion of Rubenstein, J) (translated by the authors).

120. *See id.* (citing Council Regulation 139/2004/EC of Jan. 20, 2004, on the Control of Concentrations Between Undertakings, art. 21(4), 2004 O.J. (L 24) 1).

121. *See id.* ¶ 82 (opinion of Rubenstein, J) (citing Case 22/76, United Brands Co. v. Comm'n, 1978 E.C.R. 209, 301). The reference to the OECD report was not counted in this study and it is presented here to shed light on Vice President Justice Rubinstein's significant familiarity with the European law mosaic and its various sources.

122. *Id.* ¶ 82 (opinion of Rubenstein, J.) (translated by authors).

123. HCJ 5102/03 Israel v. Klein, Nevo Legal Database (Sept. 4, 2011) (Isr.).

> from outside Europe to become citizens of a European country in order to be freely accepted by various sport teams in Europe.[124]

This reference to sources of EU law was made as part of the general background of the circumstances of the case and bears no legal significance to the continuation of the decision. The new rules introduced in the European basketball world led to a change in the rules of the Israel Basketball Association and led to the establishment of quotas for foreign players and "Bosman players" within the local teams.[125]

B. *The Influence of EU Law on Israeli Private Law*

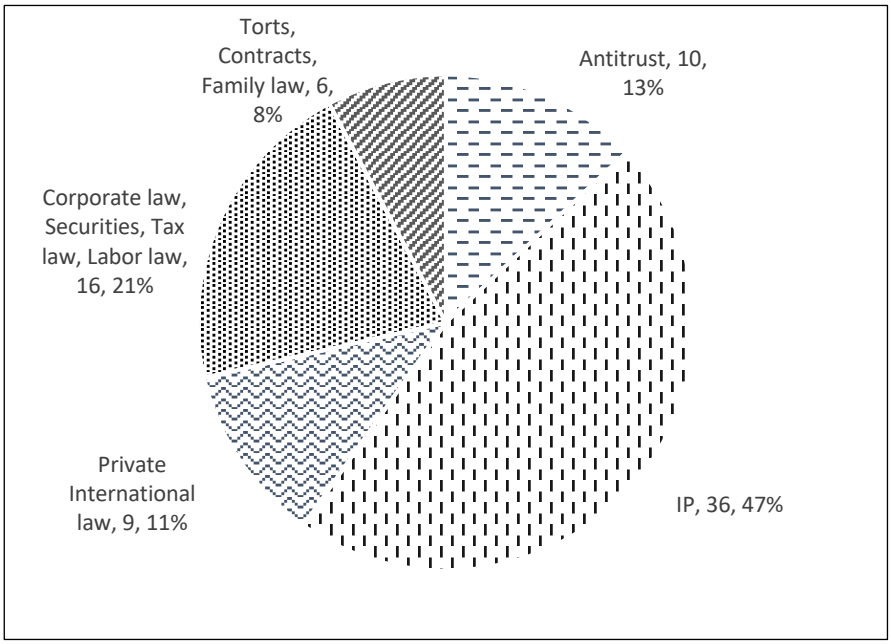
In the field of private law, the ISC cited seventy-seven references to EU law in forty-two of its rulings and decisions. Of these references, 21 percent were by the way of passing references, 11 percent were for the purpose of strengthening domestic law, one reference was cited within the framework of reviewing earlier proceedings of the case, and fifty-one citations—over 66 percent of the citations used in private law—fulfilled the purpose of interpreting domestic law and providing a comparative law prospective. It is noteworthy that, similarly to the field of public law, most citations in the field of private law were for the purpose of actual interpretation and law comparison—a testament to the relevance of the normative sources of EU law in the eyes of the ISC to the interpretation of local law.

---

124. *Id.* ¶ 20 (opinion of Procaccia, J) (translated by the authors) (also citing Case C-415/93 Union Royale Belge Des Societes De Football Ass'n v. Jean-Marc Bosman, 1995 E.C.R. I-5040).

125. *Id.* ¶ 21 (opinion of Procaccia, J.)

Figure 2: Distribution of Private Law Citations to EU Law



When examining the types of sources that are referenced, over 36 percent of the citations were of EU case law, 31 percent were of EU directives, 18 percent were of regulations, and over 14 percent were of the founding treaties of the EU.

Table 3: Distribution of Private Law Citations by Inferred Purpose

Private Law; N = 77		
Purpose	**Sum of citations**	**Percentage**
Passing reference	16	20.77
Background	1	1.29
Strengthening of local law	9	11.68
Interpretation/comparison of local law	51	66.23

Table 4: Distribution of EU Normative Sources, by Source Type

Normative source	No. citations	Percentage
Case law	28	36.36
Regulation	14	18.18
Directive	24	31.16
Treaty	11	14.28

As this Part presents, the most prominent subcategory of cases, accounting for approximately 47 percent, is intellectual property law; sixteen citations representing a collective 21 percent of all cases were in commercial law—corporate law, securities, tax law, and labor law—while ten citations, which constitute around 13 percent of cases, were related to antitrust law; nine citations accounting for approximately 11 percent of the cases pertain to private international law; and six citations, which are 8 percent of all private law citations, were in the miscellaneous fields of torts, contract law, and family law.

The ISC referenced European law for the first time three decades ago in the field of patent law in the *Blass v. Hashomer Hatzair* case, in which the court discussed the issue of royalties from a registered patent.[126] As part of the comparative law review, Justice Meltz discussed the critical balance between the interests of encouraging invention and the need to promote free market activity. While citing a large section of the *Beyard* case in his ruling, Justice Meltz emphasized that "that is the law in the common European market."[127] Later, Justice Meltz noted that this precedent was incorporated into various provisions of European regulations.[128] His reference to two European normative sources served two purposes—that to European case law was for comparative purposes while that to EC regulation was to reinforce local legislation.

Directives play a meaningful role in ISC efforts to interpret intellectual property law. For example, in the *Bristol-Myers Squibb Co. v. Minister of Health* case,[129] which involved a large number of drug manufacturers whose products are imported to Israel, the petitioners argued not to allow an arrangement for "parallel importation" of patented drugs by entities which do not act in coordination with the manufacturers. The pharmaceutical companies asked that the

126. *See* CA 427/86 Blass v. Hashomer Hatzair, 33(3) PD 323 (1989) (Isr.).

127. *Id.* at 336 (opinion of Meltz, J.) (citing Commission Decision 76/29 of Dec. 2, 1975, Relating to a Proceeding under Article 85 of the Treaty Establishing the EEC (IV/26.949 AOIP/Beyard), 1976 O.J. (L 6) 8 (EEC)).

128. *See id.* (citing Draft Block Exemption Regulation (EEC)).

129. HCJ 5379/00 Bristol-Myers Squibb Co. v. Minister of Health, 55(4) PD 447 (2001) (Isr.) [hereinafter *Bristol* Case].

regulations be struck down because they infringed on the companies' intellectual property, specifically their patent rights.

In this case, Justice Englrad discussed the doctrine of the period of exclusivity, which was supported by a European directive.[130] He later draws in detail a clear distinction between the principle of "national exhaustion" and "international exhaustion" of a patent, as well as the "intermediate situation"— the regional exhaustion.[131] Englrad summons EU law in this instance to strengthen domestic law, which ultimately led to the rejection of the petition in this case.

In several constitutive copyright-related judgments, the ISC turned to sources from European law as well as to EU interpretations of the elements comprising the right. In the *Holon Municipality v. NMC Music* judgment,[132] the court heard an appeal against a ruling in which the respondent's claim of copyright infringement was accepted with respect to the operation of a public library in the city of Holon, where there is also a music library which lends music CDs to the public. This ruling is central in the development of Israeli copyright law, fair use, and the rights of rental and lending. In his opinion, Justice Levin refers to and discusses a European directive,[133] as well as its interpretation and application within the EU. His analysis of EU IP law is interwoven throughout the entire judgment. Here, the discussion of the directive was conducted for the purpose of interpreting the local law and for legal comparison. In his summary, Justice Levin notes:

> We have seen that the EU Directive, which arose out of a different concept of copyright law - a concept that emphasizes the creator's right to remuneration for his work - allows exemptions by EU member states with respect to the kind of activity we are discussing at this time. It seems to me that it is necessary to state that there is no literal text, and that the activity of the library, which is the object of this appeal is not activity for commercial purposes . . . It seems that the Respondents' claim that they should be allowed to completely prevent the lending of CDs by public libraries goes even beyond the perception of the relatively stringent European Directive discussed above.[134]

These extensive references, together with other references that can be found across the ruling, demonstrate the importance of the content of the European directive and its implications for the

130. *See id.* (opinion of Englrad, J.) (citing Council Directive 65/65/EEC, art. 4(8), 1965 O.J. (L 369) 20, 21).

131. *Id.* at 461–65.

132. CA 326/00 Holon Municipality v. NMC Music Ltd., 57(3) PD 658 (2003) (Isr.) [hereinafter *Holon Municipality* Case].

133. *See id.* (opinion of Levin, J.) (citing Council Directive 92/100/EEC, 1992 O.J. (L 346) 1, 61).

134. *Id.* at 671 (translated by the authors).

interpretation of Israeli law and for the comparison of the laws in this area of law.[135]

In the case of *Golden Channels (Arutzei Zahav) and Co. v. Tele Event Ltd.*,[136] the court discussed technological methods for broadcasting programs and performances without the consent of the owners of the content. An Israeli broadcaster's use of these methods led to a violation of the owners' copyright.[137] In this case, the petitioners broadcasted the Wimbledon tennis tournament games without the approval of the respondent, the holder of the broadcasting rights.[138] In another hearing on this matter, Justice Cheshin, in a minority opinion, sought to elaborate the distinction in different legal systems between "broadcasting" and "secondary broadcasting," noting that, in accordance with the 1993 European Copyright Directive,[139]

> [c]opyright shall also apply to secondary broadcasting. However, the exercise of copyright in this context . . . (the cable retransmission right) – the exclusion and prohibition of the secondary transmission and the setting of royalties – was transferred from the owner of the copyright to a central organization – a "collecting society"—with which the cable companies are supposed to conduct negotiations. In addition, the Directive set rules governing the conduct of negotiations in its implementation (see Sections 8, 9, 11 and 12 of the Directive).[140]

The purpose of this reference to the directive and the implementing rules is the interpretation of local law regarding the applicability of EU law to IP rights in Israel.

In the *Talran Communications v. Charlton* case,[141] the ISC heard an appeal against the decision of the trial court that the sale and distribution of devices enabling circumvention of technological protection software constitutes an "indirect breach" of copyright. In his ruling, Justice Zilberthal refers to a European directive,[142] which "impose[s] on member states an obligation to take legal action to prevent indirect breaches of IP rights, and consequently the European states enacted legislation prohibiting the technological 'circumvention'

---

135. *See id.* at 666–67.

136. CAD 6407/01 Golden Channels (Arutzei Zahav) & Co. v. Tele Event Ltd., 58(6) PD 6 (2004) (Isr.) [hereinafter *Golden Channels* Case].

137. *See id.* at 10–12.

138. *See id.*

139. *See id.* (opinion of Chesin, J.) (citing Council Directive 93/83/EEC of Sept. 27, 1993, Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission, 1993 O.J. (L 248) 15, 15).

140. *Golden Channels* Case ¶ 59 (Cheshin, J) (translated by the authors).

141. CA 5097/11 Talran Commc'n's Ltd. v. Charlton Ltd., Nevo Legal Database (Sept. 2, 2013) (Isr.) [hereinafter *Talran* Case].

142. *See id.* (opinion of Zilberthal, J.) (citing Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167) 10, 12).

[of IP protection] and declaring activities related to this as violations."[143]

This reference to the directive was made in order to compare European law to Israeli law, underscoring the substantive disparity between the two, which inevitably leads to different legal consequences. Clearly, the various issues that were developed in the copyright rulings, such as the unlicensed transmission of content over the Internet and the continuous technological improvements, raise novel normative questions pertaining to issues related to intellectual property. A review of the advanced European legislation in this field relative to Israeli IP law can facilitate more fitting normative regulation.

Another citation of European law is found in the constitutive ruling in *Aloniel v. McDonald*,[144] which discusses the violation of the McDonald's trademark during an advertising campaign conducted by the Burger King chain in Israel. Within the framework of the judgment, the court discusses the limits of what is permitted in relation to the use of a person's name, which happens to be identical to another's trademark, when the said use is liable to be deceptive. Another question arising in the ruling concerns the economic rights held by a person with regard to the use of his/her/its name or image. Justice Rivlin refers to the term "comparative advertisement" and compares Israeli law with European law by the European Directive EC/97/55 (O.J. L290/18).[145] In his ruling, Justice Rivlin offers a hypothetical example[146] and notes that:

> [T]he existence of comparisons and competition in sub-markets is in the public interest, therefore in such cases, EC law states that if the terms of use are set forth in good faith, the trademark is not infringed.[147] In Israeli law, the Court is called upon to examine to what extent the use of the trademark is the use of

143. *Talran* case, ¶ 23. (translated by the authors).

144. CA 8483/02 Aloniel Ltd. v. McDonald, 58(4) PD 314 (2004) (Isr.).

145. *Id.* at 333–34 (opinion of Rivlin, J.) (citing Directive 97/55/EC, of the European Parliament and of the Council of 6 October 1997 Amending Directive 84/450/EEC Concerning Misleading Advertising so as to Include Comparative Advertising, 1997 O.J. (L290) 18, 18).

146. *Id.* at 314 ("A advertises that the product he produces is fitting - as a substitute or as a supplement - for a product bearing the trademark of B, in which case A makes it clear that his product is not B's product, and does not create a false association between his product and the trademark. Is the use of advertising in the trademark of B, then according to the provisions of Section 1, infringing is the trademark? Indeed, such an advertiser derives advantage from another's trademark, but he merely describes the product he produces and its intended usage in a manner that is perhaps the only possible way to do so.") (translated by the authors).

147. At this point Justice Rivlin refers to Article 6 of Directive 89/104/EEC. *See id.* at (citing Directive 89/104/EEC, First Council Directive of 21 December 1988 to Approximate the Laws of the Member States Relating to Trade Marks, 1989 O.J. (L40) 1,5 [hereinafter Trademark Directive]).

> ". . . a genuine characterization of the nature or quality of its goods" - a use protected by under Section 47 of the [Trademarks] Ordinance.[148]

When Justice Rivlin turns to a discussion of the comparative advertisement between the two competing companies, he remarks that

> a quick glance at the Burger King ad suffices to understand that it was not meant to be a comparative advertisement. A comparative advertisement, in our opinion, is what the name implies: a comparison between the products supplied by competing vendors, the prices charged by each of them, the nature of the service provided by each of them, and so forth. None of this appeared in the Burger King ad. It is not enough, in our opinion, to simply mention the name of the competitor in order to turn an advertisement into a comparative advertisement.[149]

After reviewing the Israeli law at issue, Justice Rivlin compared it to European legal practice:

> [EC] law seems to differ on this matter, as it defines in section 2a, of Directive 82 / EC / 97/55 (OJ L290 / 18) that a comparative advertisement is any advertisement in which the competitor is mentioned - if only hinted. At the same time, one should point out that, even in the light of this Directive, the Burger King advertisement is defective because the provisions of Section 3a of the Directive prohibits the use of comparative advertising if it denigrates a competitor's trademark or discredits its reputation - then it will be considered a violation of a trademark. See: recital 15 of the Directive.[150]

Justice Rivlin, however, qualifies his remarks, stating that Israeli law does not grant any protection for the use of a competitor's trademark for comparative advertising.[151] The reference to EU law in this particular case is made to compare laws and assist in interpreting local law.

In the *V & S Vin Spirt Aktiebolag v. Absolut Shoes* case,[152] the alleged violation of the registered trademark of Absolut vodka was litigated. The petitioners requested that the owner of the chain of footwear stores cease from using her trademark and remove it from her stores. In his ruling, Justice Rubinstein invoked numerous sources of European law and even dedicated an entire chapter of the judgment to review European law covering the legal question at hand.[153] The chapter presents a normative framework for trademarks in the EC as articulated in the Trade Marks Directive, which was enacted in 1988 following the Paris Accords. In his opinion, Justice Rubinstein fully cites the provisions of the relevant directive (particularly Article 5,

---

148. *Id.*

149. *Id.*

150. *Id.*

151. *See id.* ¶ 16 (opinion of Rivlin, J).

152. CA 9191/03 V & S Vin Spirt Aktiebolag v. Absolut Shoes Ltd., 58(6) PD 869, 882 (2004) (Isr.).

153. *See id.* at 881–83.

which discusses the concept of generating public "confusion" by means of a possible association),[154] which was found by the court not to be an issue in this case given the dissimilarity in product lines. Justice Rubinstein's extensive citation to the sources of European law was used to interpret local law and to compare EU law to Israeli law. In this context, Justice Rubinstein refers to the ECJ ruling of *Sabel BV v. Puma AG* in a passing reference, noting that it is evident in this judgment that the tendency in the EU is to narrow the interpretation of the term "association" within the context of creating "confusion."[155] Additionally, Justice Rubinstein refers to non-EU European literature linking the two concepts, which is not counted in the database created in the Article.[156]

Another interesting case that calls upon EU sources in detail is *August Storck KG v. Alfa Intuit Food Products*.[157] In this case, the court addressed the violation of the 3D trademark of "TOFIFEE" candy. In his opinion, Justice Grunis refers to various ECJ rulings to demonstrate that, for a specific shape to be acceptable for registration as a trademark, it must have a unique set of characteristics that reaches a level at which consumers expect to perceive the mark as a symbol of the company's goods.[158]

Justice Grunis notes that when a trademark falls under one of the categories that limits the registration of the trademark as set out in the European directive, the mark is not valid for registration, and, therefore, the question of a trademark's inherent or acquired distinguishing features is rendered moot. Later in his ruling, Grunis adds that the ECJ ruled that the above-mentioned rules also apply to two-dimensional signs comprising a graphical representation of the shape of the product.[159] At a later stage, he presents additional provisions and regulations dealing with the subject in his judgment.[160]

With regard to the stipulation relating to marks assembled from the shape of products, Justice Grunis chooses to refer to the *Philips Electronics NV v. Remington Consumer Products* case, where the relevance of the distinction between inherent and acquired

---

154. *See id.* at (citing Trademark Directive, *supra* note 147, at 2).

155. *See id.* at (citing Case C-251/95, Sabel BV v. Puma AG, 1997 E.C.R. I-6191).

156. *See id.* at (citing Gert Würtenberger, *Risk of Confusion and Criteria to Determine the Same in European Community Trade Mark Law*, 24 EUR. INTELL. PROP. REV. 20, 20–29 (2002).

157. CivA 11487/03 August Storck KG v. Alpha Intuit Food Prod.'s Ltd., Nevo Legal Database (Mar. 23, 2008) (Isr.).

158. *See id.* at (opinion of Grunis, J.) (citing Joined Cases C-456/01 & 457/01, Henkel KGaA v. OHIM, 2004 E.C.R. I-5115, I-5130–32, ¶¶ 34–39).

159. *See id.* at (opinion of Grunis, J.) (citing Case C-25/05, August Storck KG v. Office for Harmonization in the Internal Mkt. (OHIM), 2006 E.C.R. I-5739, I-5752–53, ¶¶ 25–29).

160. *See id.* at (citing Trademark Directive, *supra* note 147; Council Regulation 40/94 of Dec. 20, 1993, on the Community trademark, 1994 O.J. (L 11) 1, 2).

differentiation is discussed.[161] Referring to the "natural shape" of the goods, in his discussion of shapes emanating from the very nature of the goods, Justice Grunis refers to another European ruling that was discussed by the ECJ.[162] The regulations and the directive are cited several times throughout Justice Grunis's judgment, and many sections of these sources are detailed at length.

One subject that generates significant legal conflict in the field of trademarks is parallel import. In the *Swissa v. Tommy Hilfiger Licensing* ruling,[163] the petitioners imported clothing products belonging to an international clothing company, even though they did not hold the rights to the registered trademark of the company in Israel and did not contract with them in a direct agreement that confers the status of an official importer on them. Importation is carried out through purchases from suppliers in third countries, where the company's products are marketed at lower prices. The appellants operated their business activities, emphasizing the fact that they sell name brand items at lower prices. Justice Barak-Erez refers to no less than twelve EU pieces of legislation and rulings, all of which aim to interpret local law through a comparison with European law. Justice Barak-Erez dedicates paragraphs thirty-seven to forty-one of her opinion to citations from EU law. These paragraphs focus on the parallel import phenomenon and on the manner in which European law relates to it. Justice Barak-Erez notes that parallel importation to European markets is prohibited, but no restrictions are placed on parallel imports between European countries, which, in practice, enhances competition, at least within the European single market.[164] She notes that Article 101 of the TFEU[165] prohibits action to prevent, reduce, or distort competition within the framework of trade between EU member states. Justice Barak-Erez also notes that the ECJ had already ruled in 1966 that trademarks could not be used to bar parallel imports between EU countries.[166] Article 36 of the TFEU allows import restrictions designed, *inter alia*, to protect "industrial and commercial property" but prohibits arbitrary discrimination or covert restrictions on trade between EU members.[167] Article 36 states that it also serves as the basis for the European "exhaustion doctrine"; that is to say that

---

161. *See id.* at (opinion of Grunis, J.) (citing Case C-299/99, Koninklijke Philips Elec.'s NV v. Remington Consumer Prod.'s Ltd., 2002 E.C.R. I-5490).

162. *See id.* at (opinion of Grunis, J.) (citing Philips Elec.'s NV v. Remington Consumer Prod.'s Ltd., [1999] R.P.C. 809, 820).

163. CivA 7629/12 Swissa v. Tommy Hilfiger Licensing LLC, Nevo Legal Database (Nov. 16, 2002) (Isr.) [hereinafter *Swissa* Case].

164. *See id.* ¶ 37 (opinion of Barak-Erez, J).

165. *See id.* at (citing Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

166. *See id.* at (citing Joined Cases 56 & 58/64, Établissements Consten, S.A.R.L. v. Comm'n, 1966 E.C.R. 299, 349).

168. TFEU, art. 36.

holders of intellectual property rights cannot prevent the sale and distribution of their goods after they have already been distributed with consent in one of the union's countries. In this context, Justice Barak-Erez refers to the landmark judgment in the matter of *Deutsche Grammophon Gesellschaft mbH v. Metro Großmärkte GmbH*.[168] Later, she refers to the 2008 European Directive on Trademarks,[169] in which the doctrine of regional exhaustion is explicitly defined. Justice Barak-Erez refers to sections 7(1) and 7(2) of the directive and explains their significance in relation to the legality of parallel imports. In the commentary to Article 7(2) of the directive issued by the ECJ, the court recognized that parallel importation between EU member states may, in certain circumstances, damage the reputation of the trademark owner. These remarks were underscored in the ECJ's *Parfums Christian Dior SA v. Evora BV*, the main ruling regarding the marketing of Christian Dior perfumes[170] within the framework of parallel importation. Justice Barak-Erez added that the ECJ has refrained thus far from determining that the marketing activities of parallel importers did in fact damage the reputation of a trademark. She refers to the *Bristol-Myers Squibb* ruling, discussed above, to show that the main consideration guiding the ECJ ruling regarding parallel imports was whether the products marketed in the format of parallel imports were sold while introducing changes to packaging or labeling. Justice Barak-Erez summarizes the approach adopted in European law regarding this issue and recalls the 1998 ECJ ruling, according to which the exhaustion of rights doctrine applies only when a product is first sold in one of the EU member states. It has subsequently been determined that EU member states are not entitled to determine in their national law that intellectual property rights are exhausted even when the goods were initially sold outside EU countries.[171]

---

168. *See Swissa* Case, *supra* note 163 at 24 (opinion of Barak-Erez, J.) (citing Case 78/70, Deutsche Grammophon Gesellschaft mbH v. Metro Großmärkte GmbH & Co. KG, 1971 E.C.R. 487).

169. *See id.* (citing Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to Approximate the Laws of the Member States Relating to Trade Marks, 2008 O.J. (L 299) 25).

170. *See id.* (citing Case C-337/95, Parfums Christian Dior SA v. Evora BV, 1997 E.C.R. I-6016 [hereinafter *Dior* Case]). In this case, it was determined that as a rule, a marketer of parallel imported goods is entitled not only to sell the goods with the attached trademark, but to use the trademark to inform the public of the fact that it is marketing the goods. The ruling also held that even when the products are luxury brands, the trademark owner cannot rely on section 7(2) of the Directive to block parallel imports of its products or advertising, unless it proves that the use of the trademark causes serious damage to the trademark's reputation. In addition, it was determined that examining the question of whether the marketing method damages a trademark necessitates scrutiny of all the circumstances, including the type of goods and the market in question.

171. *See* Case C-355/96, Silhouette Int'l Schmied GmbH v. Hartlauer Handelsgesellschaft mbH, 1998 E.C.R. I-4799, I-4831. The Court held that the holder of a trademark may block parallel imports from Bulgaria (which was not an EU member

Justice Barak-Erez moves on to refer to another ECJ ruling which rejected the British court's position that when a manufacturer agrees to market a product in one of the EU member states, it exercises its rights even if the product had previously been marketed outside the EU.[172] On the subject of the trademark dilution through brand overexposure, which was also discussed in the ruling, Justice Barak-Erez notes that the European legal approach to the "dilution doctrine" is more extensive than the one used in Israel.[173] This approach reflects a cautionary approach to applying this doctrine to the marketing of "genuine" products of the trademark owner. While referencing the *Dior* affair[174] again, Justice Barak-Erez explains that, in European law, the trademark owner has the right to object to parallel imports of trademarked products, as the parallel importer's marketing efforts severely impair the reputation of the trademark. In another context, Justice Barak-Erez notes the ECJ's determination that, for the purpose of accepting a claim based on the "dilution doctrine," the trademark owner must prove that the consumer's economic behavior has changed following the alleged dilution or, at least, that there is a high probability that such a change will occur.[175] Justice Barak-Erez concluded by arguing that the European ruling has placed an additional hurdle in the way of trademark owners arguing "dilution doctrine."[176] A final reference was made to two ECJ rulings. In these two judgments, it was determined that the use of a trademark as a "keyword" in sponsored content is not in itself sufficient to violate the trademark provided that there is no deception as to the identity of the seller.[177]

The principle of freedom of competition within antitrust law was discussed in the *Israel v. Borowitz* case,[178] which dealt with restrictive trade practices among insurance companies (i.e., agreements that create illegal cartels which contravene antitrust law). Indeed, as previously discussed, when the violation of the principle of free competition is litigated before the ISC, the references to European law highlight EU competition law, presuming that this law is consistent

---

state at the time), and effectively close the door to parallel imports from outside EU countries. This approach, known as the "Fortress of Europe" (since it became the EU block for any external parallel import), has been widely criticized in the literature.

172. *See Swissa* Case, *supra* note 163 at (citing Joined Cases C-414/99–C-416/9, Zino Davidoff SA v. A & G Imports Ltd, 2002 E.C.R. I-8691, I-8749–52).

173. *Id.* at 59 (opinion of Barak-Erez, J.).

174. *See id.* at 59 (opinion of Barak-Erez, J.) (citing to the *Dior* Case).

175. *See id.* at (citing Case C-252/07, Intel Corp. v. CPM U.K. LTD, 2008 E.C.R. I-08823).

176. *Id.*

177. Case C-236/08, Google Fr. SARL v. Louis Vuitton Malletier SA, 2010 E.C.R. I-02417, I-2515; Case C-558/08, Portakabin Ltd v. Primakabin BV, 2010 E.C.R. I-06963, I-7000–01.

178. CrimA 4485/02 State of Israel v. Borowitz 59(6) P.D. 776 (2005) (Isr.).

with and well integrated into Israeli law. This presumption helps judges in their rulings in these cases in a manner consistent with EU law.

In the *Borowitz* case, the ISC discusses category exemptions for various types of restrictive arrangements in the insurance industry. The judges of the panel referenced EU law to help interpret local law and for legal comparison.

> In the [EC], such exemptions are granted under certain conditions, to arrangements between insurance companies that deal, *inter alia*, involving cooperation in setting risk premiums based on statistics and claims data collected collectively under accepted standard policy terms and in joint coverage of certain types of risks . . . . The need for the exemption arose following the International Court of Justice's [ICJ] ruling that Article 81 of the Rome Statute, which prohibits the drafting of coordinated agreements whose purpose or result impinges on competition, applies to the industry.[179]

Indeed, in the field of antitrust law, the ISC refers to EU law sources in light of the fact that tests accepted in the EU are identical to those in Israel. This is illustrated by the *Restrictive Trade Practices Authority v. Yaron Wall* case, also known as the "envelope cartel" affair.[180] In this case, criminal appeals were heard after a guilty verdict in which the court ruled that the defendants had coordinated tenders, divided the market between them, and paid an envelope importer to curtail his imports. Justice Rubinstein sought to present the similarities between Israeli and EU law in the definition of the term "relevant market," thereby reinforcing domestic law, and cited the *Hoffman La-Roche & Co. v. Commission* ruling while referring to EC guidelines regarding the definition of "market."[181]

The *Kav LaOved* case[182] is one of the rulings in the branch of private international law in which the EU's contribution to the interpretation of domestic law is evident. In this case, the ISC, sitting as the High Court of Justice, discussed an appeal filed by residents of the West Bank, who are not citizens of Israel, against the National Labor Court in Jerusalem.[183] The residents filed a claim with the

---

179. *Id.* at 84 (also referring to Case 45/85, Verband der Sachversicherer e.V. v. Comm'n, 1987 E.C.R. 405).

180. *See* CrimA 2560/08 State of Israel – Restrictive Trade Practices Authority v. Yaron Wall, Nevo Legal Database (July 6, 2002) (Isr.).

181. *Id.* ¶ 118 (opinion of Rubinstein, J.) (citing Hoffman-La Roche & Co. AG v. Comm'n, 1979 E.C.R. 461).

182. HCJ 5666/03 Kav LaOved Ass'n v. Nat'l Labour Court in Jerusalem, 62(3) PD 264 (2007) (Isr.), *translated in Kav LaOved v. National Labour Court*, VERSA, https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Kav%20LaOved%20v.%20National%20Labour%20Court.pdf, (last visited Mar. 10, 2021) [https://perma.cc/L2HA-7R28] (archived Mar. 10, 2021) [hereinafter *Kav LaOved v. National Labour Court*]. Note that citations to specific parts of *Kav LaOved v. National Labour Court* refer to the translated version, rather than the original Hebrew version.

183. *See id.* ¶ 1 (opinion of Rivlin, J.).

Regional Labor Court against their Israeli employers who operate businesses in the Occupied Territories (OT).[184] The regional courts ruled that Israeli law is applicable here.[185] On appeal, the National Labor Court ruled on a consolidated appeal that the applicable law is the local labor law of the OT, and an appeal of this ruling was filed with the ISC. In the context of reviewing the territorial approach and focusing on a contemporary and flexible approach to weighing multiple contractual ties, the ISC stated that:

> Many Western countries have followed a similar course. Thus the status of the territorial approach, which had [played a key] role in forming the conflict-of-law rules in [both] common law and . . . Continental law until the middle of the twentieth century, has [been] somewhat eroded, because of the inflexibility of this approach and because [occasionally], the connection between the contract and a certain territory, such as the place where the contract was [concluded], is not of great significance . . . [Key] examples of a flexible, modern approach can be found in [Articles] 3 and 4 of the EC Convention on the Law Applicable to Contractual Obligations, 1980 (hereafter: the Rome Convention), which proposes a conflict of law arrangement for contracts within the [EU].[186]

Later, Vice President Justice Rivlin referred to Article 6(2) of the 1980 Rome Convention, noting:

> As a rule, the 'strongest ties' test that we have discussed is also a proper test for choosing the law relating to employment relations . . . Indeed, in most countries [worldwide there is some] degree of regulation in employment relations, and this also has a real and important effect on the conflict of law rules [applied to] employment contracts. Article 6(2) of the Rome Convention, for instance, provides special conflict of law rules for a personal employment contract . . . according to which, as a premise, a territorial conflict of law rule will apply to employment relations (the place where the work is carried out or the employer's place of residence), unless most of the objective and subjective ties of the contract [tie it to] the law of another country with which the contractual relationship has a closer and more realistic connection.[187]

To conclude his reference to European law, Vice President Justice Rivlin notes:

> The influence of the substantive law whose application is being considered and of the policy and fundamental principles that lie at the heart of the legal system on the conflict of law rules is also accepted in comparative law. Thus, [A]rticle 6(2) of the Rome Convention has been interpreted as seeking to protect the (at least ostensibly) weaker party to a contract against attempts to prevent the application of the most appropriate protective law [given] the circumstances of the case, and there are those who have gone so far as to interpret the rule as a principle that was intended to allow the worker to rely on the provisions of law

184. *See id.*
185. *See id.* ¶ 2 (opinion of Rivlin, J.).
186. *Id.* ¶ 15 (opinion of Rivlin, J.).
187. *Id.* ¶ 19 (opinion of Rivlin, J.).

> that [provide] him the broadest protection, even if this protection is based on more than one legal system.[188]

Thus, Vice President Justice Rivlin made extensive references to the provisions of the 1980 Rome Convention in such a manner as to strengthen domestic law based on the provisions of the convention, which seeks to protect the weaker party to the contract from the denial of the most appropriate protective law fitting the circumstances. Justice Joubran also finds corroboration of domestic law in Article 6 of the 1980 Rome Convention, which he cites in full:

> Since the principles of Israeli employment law are more favourable to the worker [than] the provisions of Jordanian law, [under] the circumstances of [this] case, they should be preferred since they reflect the principles of employment law that protect the worker . . . The Rome Convention of 1980 also adopted this outlook for this very reason, namely that the worker should be given maximum protection. The purpose of [A]rticle 6 is to prevent a situation in which a worker, who comes from a country where the employment conditions are worse than in the country [in which] he works, becomes a victim of discrimination. The assumption is that a worker will not go from a wealthy country to a poor one, unless it is worth his while, in which case he does not [require] the protection of the law.[189]

Vice President Justice Rivlin and Justice Joubran made references to the 1980 Rome Convention in order to reinforce local law, leading the ISC to accept the petition and determine that, in the circumstances of the cases under discussion, Israeli law applies to labor relations between Israeli employers and non-Israeli workers in the OT.

In the *Yuviner v. Skalar* case,[190] the court heard an appeal against the judgment of the district court in which the claim against the defendant was dismissed in a summary judgement. The defendant (Skalar) was one of three Israeli citizens who went on a trip to New Zealand. While driving in New Zealand, a car accident left the appellant, a passenger in the car, with a 100 percent disability. The plaintiff filed a claim with the court for compensation for negligent driving in breach of statutory duty. This claim was dismissed in summary judgment. In the appeal, the question placed before the ISC was whether an Israeli court is the appropriate venue to litigate a negligence claim filed in connection with a road accident that took place in New Zealand. The three justices—Justice Naor, Justice Arbel, and Justice Hayut—refer to EU Council Regulation 864/2007 and quote sections of it.[191] The reference to this regulation, together with

---

188. *Id.* ¶ 22 (opinion of Rivlin, J.).

189. *Id.* ¶ 10 (opinion of Joubran, J.).

190. CA 3229/06 Yuviner v. Skalar, Nevo Legal Database (Apr. 26, 2009) (Isr.) [hereinafter *Yuviner* Case] (translated by the authors).

191. *See id.* at (citing Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-contractual Obligations, 2007 O.J. (L 199) 40 [hereinafter Rome II Regulation]).

the discussion of the exception set forth in section 4(2) of it, is made with respect to the question whether the permanent-place-of-residence exception should be applied.[192] In the minority opinion, Justice Naor, cites section 4(2) of the regulation, insisting that:

> [s]ince the judgment was delivered in the Yinon case, the [EU] countries adopted Council Regulation 864/2007, On the Law Applicable to Non-Contractual Obligations, art. 32, 2007, OJ (L 199) 40 (hereafter - ROME II) . . . Chapter 2 [of the Regulation] deals with "torts / delicts", and the rule articulated in Article 4(1) is that the law of the place where damage occurred (in our case - New Zealand) shall apply . . . incidentally, the place where the damage occurred is not necessarily identical to where the wrongdoing occurred, but in our case, this is irrelevant. Article 4 (2) establishes an exception according to which, if the plaintiff and the defendant share a common place of residence, the law governing the place of residence shall apply . . . ROME II is due to come into force in 2009. The rules of Rome II shall not apply to events preceding these rules . . . The focus of our discussion, as explained above, is the question whether it is appropriate to make an exception to the rule set in the Yinon case based on the wording of Article 4(2) of ROME II.
>
> Such an exception, which we found in comparative law, can support the appellant's approach in the matter before us. At first glance, when I read the exception stipulated in Article 4(2) of ROME II, I pondered whether setting a similar exception here could perhaps be the appellant's salvation . . . but, at the end of the day, I reached the conclusion that there is no basis in our law for determining such an exception.[193]

Justice Naor referred to the legal literature dealing with section 4(2) of the regulation, and, in her dissenting opinion, she held that Israeli law should not be applied in the matter at hand. Justice Arbel, in a majority opinion, also discussed the possibility of adopting the exception derived from the European directive, and noted at length that:

> The basic rule, according to ROME II, regarding the conflict of tort is that the applicable law will be the law of the place in which the damage occurred (as opposed to the place where the wrongdoing was committed as determined here). However, this rule contains an exception according to which the law of the place of residence shall apply if both the plaintiff and the defendant reside in the same place of residence. Another exception applies when all the circumstances of the case are clear and it is clear that there is a closer connection to a different state than the one defined under the rule or the one relevant to the common residence exception, in which case the law of that state shall apply. A close connection with another country may be based on previous contacts between the parties, such as a contractual relationship related to the injustice in question. The explanatory notes to ROME II clarify that the uppermost in the minds of the drafters was the need to obtain views and legal certainty in general and to reach a just outcome in individual cases stood. Thus, ROME II was formulated as a rule which includes exceptions (ROME II, Preliminary Statement (14)). With regard to the exception in Article 4(2), the drafters believed that the country of shared residence of the two parties represents the most appropriate connection when determining the rights and obligations of the parties to each other, even if the

192. *Id.* ¶¶ 24–25 (opinion of Hayut, J.).
193. *Id.*

> wrongdoing occurred in a completely different place . . . It should also be noted that one of the primary objectives of ROME II is to create uniformity in the rules of international private law between the member states of the [EU].[194]

In her remarks, Justice Arbel referred to the exception appearing in US, British, and French law and concluded that there is merit in applying the exception based on shared residency to Israel in its European format. Justice Hayut held that the question at the core of the appeal was not whether the exception should be adopted in the spirit of the European directive.[195] She did believe, however, that Israeli law should apply in this case, as its special and rare circumstances cumulatively warrant deviation from the default position adopted in the *Yinon Food Manufacturing and Marketing Ltd. v. Majda Karan* case, deciding in favor of applying the exception on grounds of justice.[196] Justices Arbel and Hayut accepted the exception set out in these regulations despite the dissenting opinion of Justice Naor. This precedent was later reversed in an additional hearing.

The *Skalar v. Yuviner* case,[197] which is the additional hearing on the matter of *Yuviner*, discussed above, dealt with two main questions. First, what is the law applicable in a tort claim where the wrongdoing is committed outside Israel but where the parties both reside is in Israel? Second, if Israeli law does apply, with respect to a car accident, should the Civil Wrongs Ordinance apply or the Road Accident Victims Compensation Law? As a side note, Vice President Justice Rivlin notes that it appears from Article 4(2) of the Rome II Regulation that the conduct regulation of the country of residence should be applied to the parties in addition to loss-allocating rules. However, according to the vice president, this requirement stems from the article being drafted in global terms.[198] Later in the ruling, a referenced European directive mentions that a so-called green card system was implemented, which "ensures that all tourists entering a foreign country hold valid liability insurance in the country in which he is visiting."[199] Vice President Justice Rivlin's reference is made, in this particular instance, by way of passing reference. Later, in order to broaden the scope of his position that will ultimately lead to reversal of the precedent serving as the subject of the additional hearing, Vice President Justice Rivlin notes:

---

194. *Id.* ¶¶ 9–8 (opinion of Arbel, J.).

196. *Id.* ¶ 3 (opinion of Hayut, J.).

196. *Id.* ¶ 3 (opinion of Hayut, J.). CA 1432/03 Yinon Food Manufacturing and Marketing Ltd v. Majda Karan, (Nevo Legal Database Sept. 1, 2004) (Isr.) [hereinafter *Yinon* Case] (translated by the authors).

197. HCJ 4655/09 Skalar v. Yuviner, 65(1) PD 735 (2011) (Isr.) (translated by the authors).

198. *See id.* ¶ 17 (opinion of Rivlin, J.).

199. *Id.* ¶ 21 (opinion of Rivlin, J.) (referencing Directive 2009/103/EC of the European Parliament and of the Council of 16 September 2009 Relating to Insurance Against Civil Liability in Respect of the Use of Motor Vehicles, and the Enforcement of the Obligation to Insure Against Such Liability, 2009 O.J. (L 263) 11).

> From the comprehensive examination that was conducted prior to the adoption of the Rome II Regulation and the special attention devoted to cross-border traffic accidents, it is evident that the adoption of "shared residence exception" in the Rome II Regulation did not come about in a vacuum. Prior to its adoption, extensive preparatory work was carried out on the various components relating to the subject of road accidents and victim compensation, and on ways to overcome practical difficulties involved in adopting the exception. This work has yet to be concluded, and we anticipate additional legislative amendments pertaining to this in the future. Whether these tools have resolved the difficulties encountered in the adoption of a shared residence exception is still in doubt. Indubitably, these tools are not available to a court deciding this question in Israel.[200]

Vice President Justice Rivlin's extensive reference to the Rome II Regulation and his analysis of Article 4(2) supports the position against the adoption of this exception. In this case, EU law was used to interpret local law and to draw comparisons between EU and Israeli law.[201] Justice Arbel, who held the minority opinion together with Justice Hayut, stuck with her position as expressed in the judgment of the original ISC appeal. Justice Arbel also states openly that:

> In the first question, which concerns the law applicable in a tort claim, where the place of the alleged wrongdoing is outside of Israel, but the joint residence of the parties is in Israel, I expressed my position already in the judgment rendered in the appeal that in my opinion, we should adopt the exception set forth in [EU] law, which stipulates that if there is a common place of residence for both parties to the tort claim, then the law of that place shall apply. My opinion on this matter has not changed.[202]

Justice Arbel continues, stating that, in light of the intrinsic advantages to this exception, she calls for adopting the exception set forth in EU law as an exception in Israeli law. Be that as it may, Justice Arbel was the minority opinion in this ruling; the majority made its decision in accordance with the opinion rendered by Vice President Justice Rivlin that determined that the petition should be denied and that the exception in question should not be accepted, even though this does not fully align with the rules of public international law.[203] It is done with an emphasis on the uniqueness of the "Israeli external public policy" doctrine.[204] The ISC rejects the application of the European regulation after a thorough discussion but explains this in terms of Israel's unique experience, which is not necessarily consistent with international experience in general and EU experience in particular.

---

200. *Id.* ¶ 22 (opinion of Rivlin, J.).
201. *See id.* ¶¶ 10–22 (opinion of Rivlin, J.).
202. *Id.* ¶ 1 (Arbel, J., dissenting).
203. *See id.*
204. *Id.* ¶ 41 (opinion of Rivlin, J.) (emphasis in original).

The *New Histadrut Labor Federation v. Israel Aircraft Industry* case[205] discussed the transfer of a factory from one company to another company with new management and the impact of this transfer on employees. The workers' organization submitted a request to the Regional Labor Court to hear a collective dispute seeking a court ruling stating that, as long as it is not agreed otherwise with the representative organization, the factory workers will continue to be considered employees of the original owners. This petition was rejected by both the Regional Labor Court and by the National Labor Court, and the workers' organization took the appeal to the ISC in its capacity as the High Court of Justice. Vice President Justice Or referred to both the Directive 2001/23/EC on safeguarding workers in the event of transfer and the ECJ ruling as part of a chapter reviewing comparative law. The directive addresses worker rights in the event of transfers of enterprises, business activity, or parts of business to another employer as a result of merger or other forms of business combinations.[206] The vice president quotes Articles 3 and 4 of the directive almost in their entirety. Article 4 stipulates that the transfer of a business or part thereof "shall not in itself constitute grounds for dismissal by the transferor or the transferee."[207] In addition, the vice president notes that Article 7 of the directive imposes a duty on both the previous and new employers to inform and consult with the representatives of the employees who may be harmed as a result of the transfer.[208] Subsequently, the vice president mentions a European judgment in which the question arises whether, in light of Article 3(1) of the directive, an employee may object to his transfer to a new employer and continue his employment with his previous employer, an issue similar to the question before the court.[209] The vice president describes the facts of the case, which took place in Germany and states that, according to German law, when an employee objects to a new employer to whom the business in which he is employed is transferred, the old contract between the employee and the previous employer continues. The ECJ was asked to give a preliminary ruling on whether this law was consistent with the provisions of the above directive. The vice president quotes the European judgment as part of his opinion[210] and concludes that the question of the status of the employee in these

205. HCJ 8111/96 New Histadrut Labor Fed'n v. Israel Aircraft Indus. Ltd., 58(6) PD 481 (2004) (Isr.) [hereinafter *Histadrut* Case].

206. *See* Council Directive 2001/23/EC of 12 March 2001 On the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertaking or Businesses, 2001 O.J. (L 82) 16.

207. *Id.* art. 4.

208. *Histadrut* Case, at 524–25 (opinion of Or, J.).

209. *See id.* (referencing Joined Cases C-132/91, C-138/91 and C-139/91, Katsikas v. Konstantinidis, 1992 E.C.R. I-06577 [hereinafter *Katsikas* Case]).

210. *See id.* at 526–27 (referencing *Katsikas* Case).

circumstances is delegated to the national legal systems of the EU's member states. Vice President Justice Or, who wrote the majority opinion in this case, argues that the petition should be accepted, and the factory employees should be allowed to refuse to be employees of the new owners.[211] Justice Or used the precedent set in European law as an instrument by which to interpret local law and as a tool for comparing laws in a manner which in this case is consistent with EU law.

The sole judgment in the field of corporate law in which a reference was made to EU law is the case of *Kittal Holdings and International Development v. Maman*.[212] In this case, the majority opinion held that the discounted cash flow method should be preferred as a basis for assessing the fair value of the shares in a full tender offer, unless the court finds that the data and characteristics of a particular case warrant an alternative valuation method. In the majority opinion, Justice Danziger notes that the right to a valuation remedy is recognized in European corporate law, which confers on minority shareholders in a company that has materially changed its activity, *inter alia*, following a merger or acquisition, to appeal in certain circumstances to the court with a request to conduct a valuation of their shares and allow them to exit the company.[213]

Later in his judgment, as part of his comparative law review, Justice Danziger refers to the approach taken by Vice President (ret.) Justice Rivlin and the latter's referral to a European directive (discussed below). Justice Danziger emphasizes that he does not believe that there is room for making a judicial "presumption of fairness" based on the majority shareholders' consent or for the turning of the valuation remedy into a "secondary remedy" reserved solely for limited, exceptional cases.[214] This reference was made with respect to the opinion articulated by Vice President (ret.) Justice Rivlin and, therefore, was not counted in our research as a reference to EU law. The EU source was cited as part of Danziger's reservations regarding the position proposed in the minority opinion of Justice Rivlin, which draws clear and direct inspiration from the EU approach to the issue. In a minority opinion, Vice President Justice Rivlin stated his belief that the average market capitalization method should be preferred, subject to certain exceptions for which alternative methods should be applied.[215]

Vice President (ret.) Justice Rivlin draws extensive comparisons between EU corporate law, the State of Delaware's law, and Israeli

---

211. *See id.*

212. Kittal Holdings and Int'l Dev. Ltd. v. Maman, Nevo Legal Database (Aug. 28, 2012) (Isr.) (translated by the authors).

213. *See id.* ¶ 55 (opinion of Danziger, J.).

214. *Id.* ¶ 104 (opinion of Danziger, J.).

215. *See id.* ¶ (opinion of Rivlin, J.).

law. At this juncture, in light of the comparison between multiple legal approaches and the results of this comparison, there is a need to pay special attention to the following section of Justice Rivlin's opinion in its entirety:

> There is a clear, fundamental distinction between the legal system in Delaware and the European Directive. The only protection provided by the Delaware legal system to shareholders whose shares have been confiscated by controlling shareholders is the protection given retroactively by the valuation remedy. When a parent company in Delaware holds more than 90% of a subsidiary's shares, it is entitled to merge the two companies and is compelled to purchase the minority shares, while paying in exchange an amount set unilaterally.
>
> The only recourse for minority shareholders in Delaware is the valuation remedy. In contrast, under the European Directive, the primary protection afforded to minority shareholders against the forced forfeiture of their shares is through a market mechanism. It is not possible to forcibly purchase minority shares forcibly until after the tender offer offered to all the company's shareholders has been received. In this manner, the primary way in which the minority shareholders' right to fair compensation is preserved is by rejecting offers tendered at an unfair price. Indeed, the European Directive also allows shareholders to retroactively demand that they be paid a fair price, but this is merely a secondary remedy and it is for good reason that they determined that the acceptance of the proposal by a certain majority [of shareholders] proves that the price is fair. The laws governing a full tender in Israel are not identical to existing laws in comparative law. Particularly striking are the differences between Israeli law and the laws in force in Delaware. Like the European Directive, the Israeli Companies Law affords double protection for minority shareholders - by making the compulsory forfeiture of shares conditional upon the consent of a majority of the shareholders to the tender offer, and by providing a valuation remedy. It is difficult to compare this valuation remedy with the remedy provided by the courts in Delaware as the sole, limited remedy against the absolute tyranny exercised by controlling shareholders.
>
> The comparative difficulty only becomes more pronounced when one compares the risk that undertaken by those claiming a valuation remedy in American, who must refuse to receive any payment for his shares and wait instead for a court decision that may also decide that the fair price is lower than the price offered with the risk undertaken by an Israeli claimant.
>
> The latter can pocket the proposed proceeds, submit a class action on behalf of all the offerees – for which he/she will be adequately rewarded – and, at the same time, benefit from the 'insurance' since the court is not entitled to determine a "fair price" which is lower than the price offered in the tender. These acute differences indicate that the balance of power between controlling shareholders and the claimant of a valuation remedy in Israel is as far from that of Delaware, as East is from West. Therefore, contrary to the majority opinion in the Atzmon case, I do not believe that the laws in Delaware should serve as inspiration for the interpretation of Article 338 (a) of the Companies Law. Greater similarity exists between the Israeli tender offer laws and the European Directive. The principled approach of the Directive, under which the offerees' consent to the tender offer can serve in certain cases as a presumption of fair price, while the valuation remedy should be reserved sole for extraordinary cases, is generally worthy of adoption in our system as well and conforms to the principled approach described above.[216]

---

216. *Id.* ¶¶ 39–41 (opinion of Rivlin, J.).

Hence, Vice President (ret.) Justice Rivlin found that the approach prevailing in the EU is better aligned to the Israeli approach, but his position remained in the minority nonetheless. His citation of EU sources served to interpret local law and as the basis of a multijurisdictional legal comparison.

In the case of the *Eden Nahariya Hotel v. Kessel*,[217] an appeal was filed against a judgment which held that the respondents may annul a contract due to exploitation or undue influence applied at the time of its signing. At the heart of this case were the heirs of an elderly, lonely couple who lived in a retirement home owned by the appellants for a number of years and paid under contracts signed with them. Shortly after the death of the husband, a contract was signed between the elderly woman and the retirement home in which she undertook to give the retirement home a substantial sum of money in exchange for the right to live there until her death. In the contract, the woman exempted the retirement home from having to repay her heirs anything after she passed away. In the context of the discussion of the general freedom of choice in contracting or avoiding association as an expression of personal autonomy, Justice Melcer refers to a European directive on unfair business practices and states:

> The denial of the freedom of contract of the consumer, or a material violation of his freedom of contract, is in itself "the exercise of undo influence." This was set forth in the European Directive on Unfair Commercial Practices (Directive 2005/29 / EC), which EU member states have been instructed to adopt. The Directive states that the "unfair practice" includes not only deception, which prevents the consumer from making informed choices, but also aggressive predatory practice that violates the consumer's freedom of choice and induces him/her to make decisions that he/she would otherwise not make. In the spirit of the aforementioned European Directive, a committee headed by Adv. Dror Strum, the Antitrust Commissioner at the time, recommended that Article 3 of the Consumer Protection Law be reworded and replaced with a new Article entitled "Prohibition on the Exercise of Undo Influence."[218]

Thus, Justice Melcer demonstrates how European law has directly influenced the design of Israeli legislation, which is the reinforcement of domestic law. This is just one example of the impact of EU law as an independent entity rather than a combination of the foreign law of its member states on Israeli legislation, since in practice, the directive in this case was absorbed into Israeli law.

---

217. File No. 617/08 CA, Eden Nahariya Hotel Ltd. v. Kessel, Nevo Legal Database (Sept. 21, 2014) (Isr.) (translated by the authors).

218. *Id.* at 71 (opinion of Melcer, J.).

C. *General Trends in the Status of EU Law as Foreign Law*

Figure 3: Number of Rulings and Citations, 1980–2016

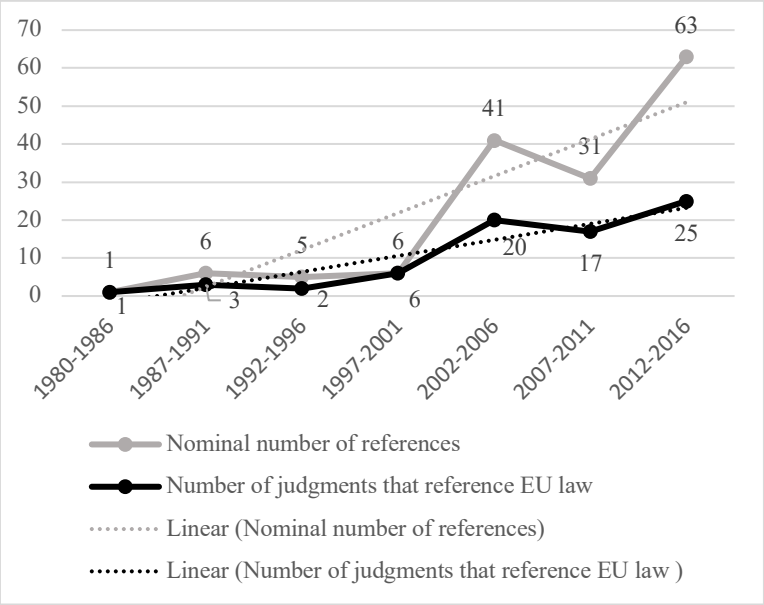


Figure 3 presents the development of the ISC references to EU law as it has developed over the years, ranging from 1980 to 2016. The year 1980 marks the first time the ISC referred to a normative source of EU law in the *Kawasma* case. Figure 3 shows that there has been a clear upward trajectory in the ISC citations, both in terms of the number of citations and the number of cases in which these citations are made. However, both the number of cases and citations began to spike only in the early 2000s, coinciding with the growing general interest on Israel's part to be intimately involved in all things "global" and take a seat at the table of developed western nations. The spike in EU citations also coincides with the growing number of justices who graduated abroad, as well as with the development and rising prominence of the EU itself as a regional and an international power. A second spike, particularly in the frequency of citations, is seen towards the end of the study period, which can be attributed to multiple references in certain ISC rulings. At this juncture, it is hard to determine through the numbers alone if this signals a more permanent shift to higher level of activity; however, it is worth noting that the qualitative analysis of the rulings presented here supports the notion that citations have not only become more frequent but more material to the development of Israeli law as well—both in terms of purely domestic issues and issues related Israel's growing engagement with foreign legal and regulatory systems.

In order to distinguish this trend more clearly, the Article divided the time periods within the period under review. Figure 3 divides the period examined into groups of five years with only the first group having seven years due to the paucity of references during this period. The figure clearly demonstrates the increase in the number of judgments and the increase in the number of references to normative sources in EU law over the years. According to the trend line, it is evident that the increase in the volume of references per period of time is steeper than the increase in the number of judgments citing these sources. This indicates that, despite the relatively moderate increase in the number of referencing ISC judgments, the most significant increase is in the volume of nominal references per time period. It is important to note that the increase in citations presented is not an increase relative to the total references to the comparative law in ISC rulings, since the database created in the Article examines only references to sources of European law and not to other foreign sources.

Figure 4: Citations in Majority v. Minority Opinions

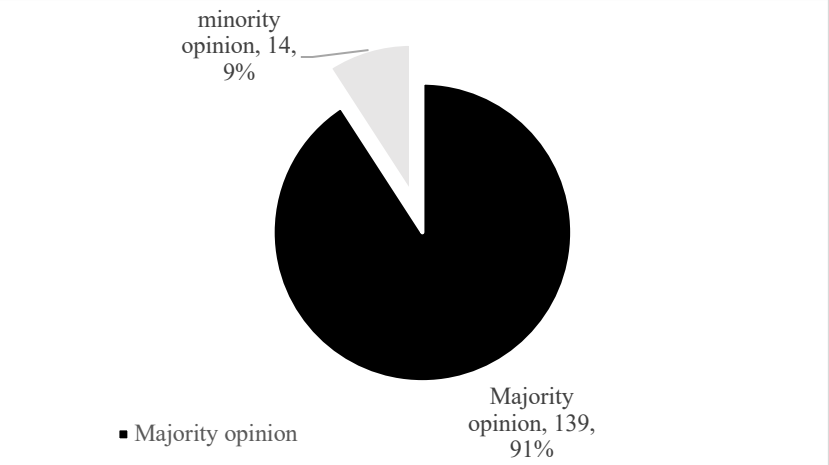


Figure 4 maps the location of the references to EU law within the minority opinions and the majority opinions. The lion's share of referrals, 91 percent, were made within the framework of the rulings' majority opinions, while only 9 percent of the referrals are found in dissenting opinions.

Figure 5: The Number of References Divided by Judges

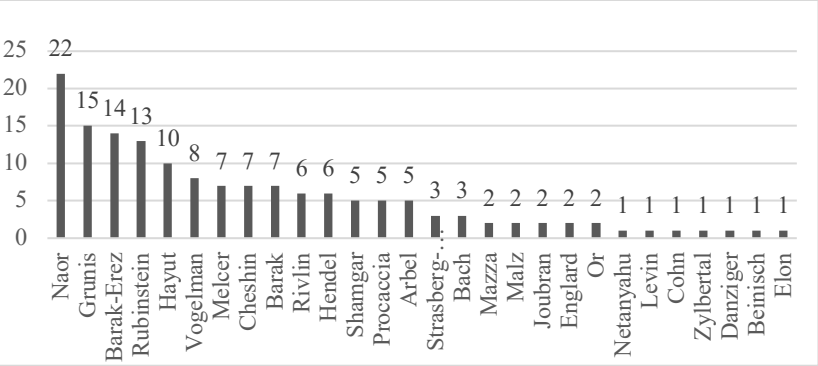


Figure 5 shows the number of references made by ISC justices to normative sources originating in the EU. With a grand total of twenty-two citations to EU law, Justice Naor is the undisputed champion of EU referencing. Other justices who often refer to the EU legal system are the Justices Grunis, Barak-Erez, and Rubinstein. While it is true that some justices served in the ISC for shorter terms than the others, this does not constitute a barrier to their referencing the sources of European law in their opinions. For example, during a relatively short ten-year term, Justice Netanyahu made only one reference to EU law.

Figure 6: The Number of References by Legal Field

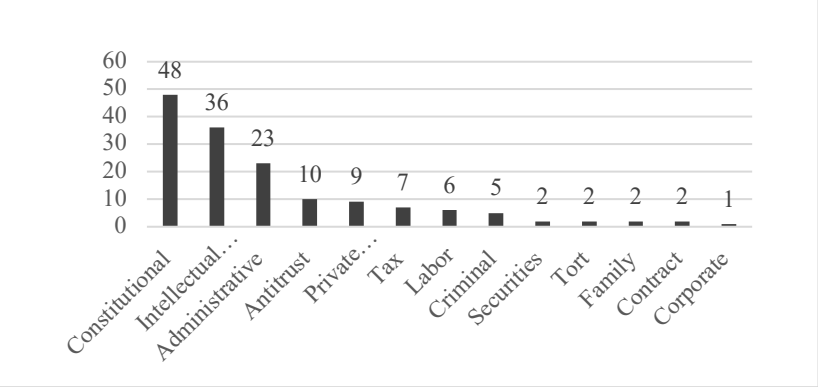


Figure 6 shows that the area of law in which most references to EU law has been made is constitutional law. Following Part III of this study on Israeli-EU relations, it can be assumed that the number of references in the field of commercial law in all its variants would be high in view of the fact that the EU is Israel's largest trade partner. This assumption is also reasonable in light of the examination of what

is happening in EU law almost routinely in the process of preparing new legislation in Israel.

The institutional variance, and perhaps even the cultural variance, in public law might require examining the affinity to Anglo-American law, particularly since Israel's legal system follows common law norms. While the Article does not empirically examine the impact of EU law as opposed to Anglo-American legal sources, the presence of EU jurisprudence is clearly felt in significant precedents in which fundamental issues of public law arise, particularly questions pertaining to civil rights.[219] This stems in part from the nature of the issues with which the Israeli legal system deals.

IV. CONCLUSION

The Article analyzed the approachment of the Israeli legal system towards the EU legal system based on a study of citations of EU legal sources in ISC rulings. The Article employed a methodology that integrates quantitative mapping of empirical data with more traditional qualitative legal analysis. The empirical analysis of the frequency, legal classification, and implied purposes of the citations over the course of thirty-six years served as the foundations for a bird's-eye view of the development of the practice of citing EU sources in ISC rulings over time. The empirical findings presented in the Article confirmed and sometimes refuted casual observations based primarily on biased presumptions. The Article then took a deep dive into the content of the rulings, analyzing, as legal studies do, the texts and occasional tugs-of-war between majority and dissenting opinions. While the Article reviewed all relevant court rulings within the examined period in its empirical analysis, it did not discuss all of them in detail. The qualitative examination of ISC rulings enabled the Article to illustrate in vivid detail not only the types of legal issues invoking citation of EU law but the depth or intensity of the referencing as well. In some cases, the shout-out to the EU was merely in passing or served as window dressing. In other cases, however, reference to EU law was essential and even central to the adjudication. Most cases fell somewhere between these two poles.

What clearly arises from the Article's mixed empirical and qualitative analysis of ISC judgments, however, is a salient increase in both the frequency and quality of references to EU law, indicating that Israeli justices find in the EU legal system a source for legal interpretation and inspiration. This is particularly true in cases where EU law is believed to be more advanced on issues that have not yet been addressed in Israel, either in the legislature or in Israeli courts.

---

219. *See generally* HCJ 7052/03 Adallah Legal Ctr. for Arab Minority Rights in Isr. v. Minister of Interior, 62(2) PD 202 (2006) (Isr.); File No. XX Eitan Israeli Immigration Policy v. Government of Isr., Nevo Legal Database (Sep. 22, 2014) (Isr.).

From the ISC's first referral to the sources of European law in the *Kawasma* case in 1980, throughout the thirty-six years examined, the ISC made increasingly broader and deeper comparisons between Israeli and EU law, often dedicating entire chapters to reviewing EU law regarding a given issue at hand.[220] In some cases, the court's referencing extended beyond interpretation and inspiration. In one case, the incorporation of a principle prescribed in EU law into Israeli case law was discussed, although ultimately rejected. Relative to competing comparative sources of foreign law, EU law is still not suitably recognized in Israeli jurisprudence and has not been given the place it deserves in ISC rulings.

The fact that the CJEU referred only once to Israeli case law does not indicate a lack of EU interest in Israeli law, but probably the fact that the Israeli rulings are published solely in Hebrew and are rarely officially translated. Indeed, the only request made by the CJEU was in reference to a case heard by the High Court of Justice, which was translated by the ISC in cooperation with the Ministry of Foreign Affairs in order to make legal materials dealing with terrorism available internationally. Enhancing the accessibility of Israeli legal materials will improve the judicial dialogue between the ISC and the CJEU, as well as with other judicial institutions around the world.

220. The first time was carried out by Judge Grunis. *See Noach* Case, *supra* note 43 at 226–29.