

## **AGING, GLOBALIZATION, AND THE LEGAL CONSTRUCTION OF “RESIDENCE”: THE CASE OF OLD- AGE PENSIONS IN ISRAEL**

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*This article looks at the construction of the legal requirement of “residence” in the context of the right to old-age pension under Israel’s social security law in the age of globalization. The authors argue that an aging human society, along with other major social changes of globalization and migration, necessitate a change in the requirement of residence as a precondition for receipt of old-age pension. This requirement was challenged before the Israeli High Court in the Halamish affair in 1999, and despite an initial promise of change, the attempt to reform the legal construction of residence ultimately failed. The article demonstrates how conceptions of social rights in Israeli constitutional law, social perceptions of old age, and plain ageism resulted in persistence of the traditional construction of “residence.”*

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## I. Introduction

Imagine that after decades of employment in public service, volunteer work in the community, as well as a lifetime of paying taxes and social security, you finally reach retirement age and retire. For the first time in your life, you not only pay taxes and make financial allocations, but also enjoy the fruits of these payments by receiving an old-age pension from your country. Further imagine that upon retirement, you choose to move to a small village in a foreign country, far away. There, you manage to buy a small country house in a rural area. In this farm house you realize your long-held dream, growing vegetables and enjoying the peace and calm that were sorely missing in the everyday reality of your home country. You continue to visit your country once or twice a year for several weeks, as your children and grandchildren still live there, and you even maintain an apartment there that generates rent income enabling you to live abroad.

Or imagine that upon reaching old age, your adult children choose, for various reasons, to emigrate and settle outside your country. They have already been away for many years with their own children, and their visits back home are fairly infrequent. You miss them and would like them to be close by to help you as you grow older. Subsequently, you decide to purchase an apartment near your children, where you spend most of the year.

This may all seem like a well-planned dream but this idyll creates an interesting legal question. Try to imagine your reaction to a letter from your country's social security administration that solemnly informs you that you have been denied eligibility for an old-age pension because you have ceased to be a "resident" of your country. In many countries in the Western world this cannot happen, as governmental pension benefits can be exported outside the home country.<sup>1</sup> In Israel and some other countries,<sup>2</sup> however, residency is a preliminary legal requirement for receiving an old-age pension.<sup>3</sup>

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1. See generally DEP'T FOR WORK & PENSIONS, REVIEW OF RESIDENCY-BASED PENSION SCHEMES (2005), available at [http://www.dwp.gov.uk/pub\\_scheme/2005/mar/rev\\_res\\_based\\_pen\\_schemes.pdf](http://www.dwp.gov.uk/pub_scheme/2005/mar/rev_res_based_pen_schemes.pdf).

2. See, e.g., Susan St. John & Larry Willmore, *Two Legs Are Better Than Three: New Zealand as a Model for Old Age Pensions*, 29 WORLD DEV. 1291, 1291-1305 (2001) (discussing a similar legal requirement in the New Zealand legal system).

3. *Id.*

The two hypothetical stories above may seem to tell of marginal or unimportant problems that few people share. However, as this article will show in depth, the legal construction of "residency" raises a much broader principle relating to the older population as a whole: the right to social security in an era of aging and globalization. Moreover, analogous scenarios have faced legal examination in Israel, both in the Labor Courts<sup>4</sup> and in the Supreme Court.<sup>5</sup> One of these cases, which received considerable legal and public attention, is known as the *Halamish* affair.<sup>6</sup> Initially, Israel's Supreme Court ruling created a level of expectation among elderly people in Israel of a possible change in the fundamental approach to the requirement of residency in the context of old-age pensions. Ultimately, however, Israeli legal reality remained virtually unchanged, and the *Halamish* affair did not bring about a new legal status for the elderly population. Moreover, the legal dispute surrounding the concept of residency in old age does not relate solely to people of high socioeconomic status; it ultimately concerns the fundamental rights of all segments of the elderly population in this era of globalization.

The Israeli dilemma regarding the construction of "residency" is also interesting in the context of international comparative law. Unlike the situation under Israeli law, no legal dispute would surface if the stories above involved citizens of countries such as the United Kingdom, France, or Germany. The legal situation in these countries and others is that residency is not a condition for old-age pension eli-

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4. See Nat'l Labor Court Rulings, 1987, 14-0, *Yalouz v. Nat'l Ins. Inst.*; 32(2) 208. In general, the structure of the Israeli court system consists of three levels. The first level is comprised of a large number of "courts-of-peace" (lower courts) which are located in many cities and towns across the state of Israel. These courts handle the vast majority of civil and criminal cases. The second level consists of five Regional courts sitting in Nazareth, Haifa, Tel-Aviv, Jerusalem, and Be'er-Sheva. These courts function mostly as courts of appeal and administrative courts, but they may also operate as first instance courts. Finally, the last level is the Israeli Supreme Court, also known as Israel's High Court of Justice, which functions both as a court of appeals and as a constitutional and administrative court. In addition to this basic three-layer system, Israel established a parallel system of professional courts, which includes labor courts, religious courts, military courts, and other specialized courts. These professional courts have exclusive jurisdiction in their specific fields of law, but they are subject to the rulings of the Israeli Supreme Court. For an overview of the Israeli legal system, see Nili Cohen, *Israeli Law as a Mixed System. Between Common Law and Continental Law*, GLOBAL JURIST TOPICS, 2001, available at <http://www.bepress.com/gj/topics/vol1/iss3/art1>.

5. See CA 8313/02 *Halamish v. Nat'l Ins. Inst.* [2002] IsrSC 44(4) 432.

6. *Id.*

gibility<sup>7</sup> and, therefore, the decision of retirees to emigrate should not deprive them of the right to continue to receive their social security benefits.<sup>8</sup> These countries utilize the sociolegal approach that views the old-age pension as a quasi-insurance right, and the role of the welfare state as a guarantor of social rights throughout the life cycle of an individual.<sup>9</sup> This article explores the legal challenges of construing the concept of residency in the context of globalization and aging.

Part II begins by describing the social perspective of greying societies in Israel and around the world, as well as the ramifications of the aging process in the specific context of migration in its diverse forms. Part III of the article describes the relevant provisions in Israeli law concerning the requirement of residency as a condition for receiving an old-age pension, and the interpretation of these provisions in the Labor Courts over the years up to the ruling in the *Halamish* affair. Part IV focuses entirely on describing the “rise and fall” of the *Halamish* affair by examining the diverse legal developments that arose from the case. Finally, Part V of the article discusses and analyzes the ramifications of the *Halamish* affair for the rights of elderly people in Israel.

## II. Old Age, Globalization, and Migration

### A. Aging in the Human Society

The massive aging of society is a relatively recent phenomenon. The world population was relatively static until the early eighteenth century.<sup>10</sup> Most people lived a life that was “nasty, brutish and short.”<sup>11</sup> Since then, however, the composition and size of the global population has changed dramatically. More than three decades have already been added to average life expectancy, and a further two decades are expected to be added during the twenty-first century.<sup>12</sup>

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7. The European Comm’n, Main Conditions of Eligibility, [http://ec.europa.eu/employment\\_social/missoc2001/missoc\\_290\\_en.htm](http://ec.europa.eu/employment_social/missoc2001/missoc_290_en.htm) (last visited Jan. 22, 2007).

8. In 1986, the European Union established that discrimination among different groups of immigrants is prohibited, thus making it possible to export the pension to any country. *X v. Sweden*, 8 Eur. H.R. Rep. 253 (1986).

9. DEP’T FOR WORK & PENSIONS, *supra* note 1, at \*1.

10. David E. Bloom & David Canning, *Global Demographic Change: Dimensions and Economic Significance* 1 (Nat’l Bureau of Econ. Research, Working Paper No. 10817, 2004), available at <http://papers.nber.org/papers/W10817.pdf>.

11. *Id.* (quoting THOMAS HOBBES, *LEVIATHAN* 62 (1651)).

12. *Id.* at 2.

Moreover, the population of the world has risen to more than six billion and is expected to reach nine billion by the middle of the century.<sup>13</sup>

These changes in the structure of global population were partially caused by a massive aging process.<sup>14</sup> In 1950, approximately 200 million people around the world were age sixty or older, constituting 8.1% of the global population.<sup>15</sup> By 2050, however, this population will increase nine-fold to some 1.8 billion, constituting approximately 20% of the world's population.<sup>16</sup> The phenomenon of aging is nothing less than a demographic revolution.<sup>17</sup> The scope and scale of the phenomenon of aging can be seen in Table 1. The table shows that aging

**Table 1**

**Percent of Elder Population by Region: 2000, 2015, and 2030<sup>18</sup>**

Region	Year	65 years or older	80 years or older
Asia	2000	5.9	0.9
	2015	7.8	1.4
	2030	12.0	2.3
Europe	2000	14.7	3.0
	2015	17.6	4.7
	2030	23.5	6.4
Latin America / Caribbean	2000	5.6	1.0
	2015	7.6	1.5
	2030	11.5	2.5
Middle East / North Africa	2000	4.4	0.6
	2015	5.5	0.9
	2030	8.4	1.4
North America	2000	12.4	3.3
	2015	14.7	3.9
	2030	20.0	5.4
Oceania	2000	10.1	2.3
	2015	12.4	3.1
	2030	16.3	4.4
Sub-Saharan Africa	2000	2.9	0.3
	2015	3.1	0.4
	2030	3.6	0.5

13. *Id.* at 1.

14. *See id.* at 3.

15. PETER AUER & MARIÁNGELS FORTUNY, EMPLOYMENT SECTOR, INT'L LABOR OFF. GENEVA, AGEING OF THE LABOUR FORCE IN OECD COUNTRIES: ECONOMIC AND SOCIAL CONSEQUENCES 7 (2002), available at <http://www.ilo.org/public/english/employment/strat/download/ep2.pdf>.

16. *Id.*

17. *See id.*

18. U.S. Census Bureau, International Data Base, <http://www.census.gov/ipc/www/idbnew.html> (last visited Jan. 22, 2007).

is a global phenomenon: although its pace and dimensions vary, it transcends borders and regions.

There is a growing consensus that the elderly world population will be one of the most important socioeconomic groups of the developed nations.<sup>19</sup> Dramatic demographic change will have an extremely significant effect on the future of labor relations, economic growth, and international socioeconomic relations.<sup>20</sup> It will also impose an economic burden on the welfare and health budgets of the developed nations, making these spheres top priorities for social policymakers in these countries.<sup>21</sup> In the particular case of Israel, the internal political debate will concentrate on various aspects of aging in distinct demographic groups and on the far-reaching ramifications of this phenomenon in the economic and social spheres.

As a result of strong geographic, political, and socioeconomic proximity to Europe, Israel is likely to share the European nations' particular burdens of the aging revolution. In proportional terms, the elderly population in the European Union will increase from approximately 20% of the total population in 1998, to approximately 35% in 2050.<sup>22</sup> By the mid-twenty-first century, one in every three citizens will be age sixty or above. In Southern Europe, the "oldest" region of the world, the proportion of elderly people is projected to reach almost 40% during the same period, and the world "leaders" in terms of aging will be Italy and Spain.<sup>23</sup>

## B. The Aging of the Israeli Society

The global phenomenon of aging also affects Israel. During the early years of independence, Israel was a relatively young society. In 1955, residents ages sixty-five and above comprised less than 5% of the total population.<sup>24</sup> In contrast, there were 670,000 residents in Israel ages sixty-five and above by the end of 2003, constituting almost

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19. See Bloom & Canning, *supra* note 10, at 23.

20. *Id.*

21. *Id.*

22. See AUER & FORTUNY, *supra* note 15, at 8.

23. *Id.*

24. ISRAEL MINISTRY OF FOREIGN AFFAIRS, POPULATION OF ISRAEL: GENERAL TRENDS AND INDICATORS (1998), <http://www.israel-mfa.gov.il/MFA/Archive/Communiques/1998/Population%20OF%20ISRAEL-%20GENERAL%20TRENDS%20AND%20INDICATOR>.

10% of the population.<sup>25</sup> While the overall population of the state increased by a factor of approximately 3.7 during this period, the elderly population grew more than twice as fast, at a factor of approximately 7.7.<sup>26</sup> A further dimension of aging in Israeli society relates to the rate of growth of the "old old" population, comprising those seventy-five years old and above. During the period from 1970 to 1990, the population of people ages sixty-five and older doubled, the population of those ages seventy-five and older tripled, and the age group showing the fastest growth rate during this period was the eighty and older population.<sup>27</sup> These trends are partially due to the significant increase in life expectancy in Israel.<sup>28</sup> In 1956, the average life expectancy was 70.5 years for men and 73.2 years for women.<sup>29</sup> As of 2004, life expectancy has risen by almost 10%, reaching 77.3 years for men and 81.2 years for women.<sup>30</sup>

The discrepancy between the life expectancies of men and women reveals another important aspect of the phenomenon of aging in Israeli society: the gender aspect. Women constitute a majority of the population ages sixty-five and above.<sup>31</sup> The predominance of women is even more pronounced among the "old old" sector.<sup>32</sup>

Further evidence of the aging Israeli society can be found by examining the Elder Support Ratio (indicating the number of people ages sixty-five and older for every 100 people of working age). In the 1960s, this ratio in Israel was approximately ten elderly people for every 100 people of working age. By 2003, the ratio had almost doubled, to 18.6.<sup>33</sup> In the future, the trend of aging in the Israeli population is expected to continue. The proportion of elderly people in Israel is forecast to reach 14% of the total population by 2025, against the backdrop of a further rise in life expectancy and an ongoing decline in

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25. See JENNY BRODSKY ET AL., *THE ELDERLY IN ISRAEL: STATISTICAL ABSTRACT 2004* (2005).

26. ASS'N FOR PLANNING & DEV. OF SERVS. FOR THE AGED IN ISRAEL ET AL., *ISRAEL'S ELDERLY: FACTS AND FIGURES* (Shmuel Be'er ed., 2004) [hereinafter *FACTS AND FIGURES*] (on file with *The Elder Law Journal*).

27. BRODSKY ET AL., *supra* note 25, at 4.

28. *Id.*

29. *Id.* at 74.

30. *FACTS AND FIGURES*, *supra* note 26.

31. *Id.*

32. BRODSKY ET AL., *supra* note 25, at 21.

33. Jenny Brodsky & Brenda Morginstin, *Balance of Familial and State Responsibility for the Elderly and Their Caregivers in Israel*, in *WORK AND CARING FOR THE ELDERLY: INTERNATIONAL PERSPECTIVES* 68, 69 (Viola M. Lechner & Margaret B. Neal eds., 1999).

birth rates.<sup>34</sup> Accordingly, it is apparent that the State of Israel is undergoing a dramatic change in terms of the number and proportion of elderly people within the overall population. This change will have significant and wide-ranging social ramifications.

Lastly, it should be noted that elderly people make up a disproportionately large component of the poorest segments of Israeli society. At the end of 2003, 59.3% of all Israeli families whose head was an elderly person were living below the poverty line, as calculated before transfer payments and taxes (compared to 33.9% of the population as whole).<sup>35</sup> This trend held even after transfer payments and taxes were taken into account, as 22.3% of these families were still below the poverty line (compared to 19.3% of the general population).<sup>36</sup> This prevalent poverty is due in large part to the fact that only 35.7% of all elderly people in Israel have work-related pensions,<sup>37</sup> and to the fact that basic old-age state pensions, even after supplementary income, cannot ensure a decent living for the elderly.<sup>38</sup>

### C. Globalization and Migration

The concept of globalization is as controversial and vague as it is fashionable. The meaning of this concept is multidisciplinary and interdisciplinary to such a degree that the task of defining it is very difficult, if not impossible.<sup>39</sup> It has been suggested that the only point of agreement regarding the term is that there is no agreement as to its content, scope, or application.<sup>40</sup> Guy Mundlak even suggested that there are those who are inclined to use globalization as a comprehensive label for everything that changed in the world as we know it, arguing that “the more we think about globalization, the less obvious it really is.”<sup>41</sup>

Despite its lack of clarity and the absence of a clear definition, globalization has several notable characteristics. There is a broad con-

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34. BRODSKY ET AL., *supra* note 25, at 300.

35. *See id.* at 183.

36. *Id.*

37. *Id.* at 174.

38. YITZHAK BRICK, AGEING UNDER THE POVERTY LINE 14 (2005).

39. IAN CLARK, GLOBALIZATION AND INTERNATIONAL RELATIONS THEORY 33–35 (1999).

40. *Id.* at 33.

41. Guy Mundlak, *The Transformative Weakness of the Global Core Labor Rights in Changing Welfare Regimes*, in CHALLENGES TO THE WELFARE STATE IN AN ERA OF GLOBALIZATION 231, 236 (Eyal Benvenisti & Georg Nolte eds., 2003).

ceptual consensus that the term relates to the "shrinkage" of the world because of an emerging sense of awareness of the world as a single and integral entity.<sup>42</sup> Based on this broad perspective, one of the many definitions of globalization is the following:

[T]he process of increasing interconnectedness between societies such that events in one part of the world more and more have effects on people and societies far away. A globalized world is one in which political, economic, cultural, and social events become more and more interconnected . . . . In each case, the world seems to be shrinking, and people are increasingly aware of this.<sup>43</sup>

A different perspective on the "shrinkage" of physical space in the global era focuses on the difficulty in creating an affinity between humans and places. This viewpoint is powerfully expressed in Alvin Toffler's book *Future Shock*:

Never in history has distance meant less. Never have man's relationships with place been more numerous, fragile and temporary. . . . Figuratively, we "use up" places and dispose of them in much the same way that we dispose of Kleenex or beer cans. We are witnessing a historic decline in the significance of place to human life. We are breeding a new race of nomads, and few suspect quite how massive, widespread and significant their migrations are.<sup>44</sup>

The disengagement from the physical affinity to nation, society, or community has been strengthened and accentuated by a revolution in mass media. International press, the Internet, telephone-based communications, cables, television, and satellites, alongside sophisticated technologies for the transfer of information in unprecedented volume and speed, have all, during the past century, changed the meaning of the term "media." In many ways, the communication revolution has made all the citizens of the world a single "audience" addressed by countless sources of information. In this context, the development of the Internet and the instantaneous access it provides to information from countries and cultures throughout the world has imbued physical and political borders with a completely new meaning, or even rendered such borders meaningless.

Today, the physical location of an individual has almost no significance. An Israeli can divide his time between an apartment in

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42. ROLAND ROBERTSON, GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE 8 (1992).

43. THE GLOBALIZATION OF WORLD POLITICS 7 (John Baylis & Steve Smith eds., 1997).

44. ALVIN TOFFLER, FUTURE SHOCK 69 (1970).

China and a winter estate in Argentina, can read newspapers in Hebrew over the Internet, and can come to Israel to visit his or her parents while performing military reserve duty. This person may make a living teaching an Internet-based English course to French students, use an e-mail address suggesting residence in San Francisco, and deposit a paycheck in German marks into a bank account in South Africa.

#### D. When the Aging Revolution and Globalization Meet

The encounter between globalization and the aging revolution leads to various novel social phenomena, and one of the most significant is the movement and migration of elderly people. Consequently, old age is undergoing a global transformation. It is increasingly acquiring international dimensions, both on the individual level and on the national level. Global forces are completely changing the social environment in which elderly people live, creating hitherto unknown tensions and dilemmas. As described by Carroll Estes, Simon Biggs and Chris Phillipson, globalization “has produced a distinctive stage in the social history of ageing, with a growing tension between nation state-based solutions (and anxieties) about growing old and those formulated by global actors and institutions.”<sup>45</sup>

In more concrete terms, globalization and the aging of human society have led to extensive domestic and international population migrations. Although these movements are extremely rich and diverse, we shall attempt to map them briefly in the following sections.

##### 1. “SUN BELT” MIGRATION

One type of migration among the elderly is known as “sun belt migration.”<sup>46</sup> This term refers to elderly people who choose to retire in countries and regions offering more agreeable weather conditions.<sup>47</sup> In the past, this phenomenon mainly occurred in the United States, where wealthy retirees chose to move to warmer states such as Florida or California, establishing retirement communities or neighborhoods populated by migrants who arrived specifically to spend their retire-

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45. CARROLL L. ESTES ET AL., *SOCIAL THEORY, SOCIAL POLICY AND AGEING* 102 (2003).

46. Anthony M. Warnes, *The International Dispersal of Pensioners from Affluent Countries*, 7 *INT’L J. POPULATION GEOGRAPHY* 373, 374, 381–84 (2001).

47. *See id.*

ment years.<sup>48</sup> In the case of particularly wealthy retirees, sun belt migration can include purchasing a yacht and adopting a "nomad/tourist" lifestyle, which allows them to cruise and tour the oceans and continents of the world, enjoying pleasant weather all year round.

Recent decades have also seen the emergence of sun belt migration among the European elderly. For example, many British, German, and Scandinavian retirees move to Southern European countries such as Spain, Italy, Greece, or Malta.<sup>49</sup> In some cases, they create ethnic communities, such as the "Scandinavian villages" in Costa Blanca in southern Spain.<sup>50</sup> Such migrations have also led to dramatic changes in the economy of entire sections of Southern Europe, with the development of a "migration market" and the emergence of competition among states and local authorities for attracting wealthy migrants from Northern Europe.<sup>51</sup>

Because Israel enjoys a relatively pleasant climate, elderly Israelis do not need to migrate due to traditional sun belt reasons. However, if we extend the definition of climate-motivated migration to include the prevailing social and political atmosphere, one can certainly imagine Israelis preferring to spend their retirement in "calmer waters" than those of the Middle East. Elderly Israelis may opt to migrate to Italy or Spain, not because of the sun, but to live in peace and to get away from the daily threat of violence that accompanies life in the volatile Middle East.

## 2. OLD-AGE FAMILY REUNION

A different type of elderly migration is the migration associated with the ongoing care of older parents. These movements typically involve young people who migrate from developing countries to de-

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48. *Id.*

49. *See id.* at 383–84.

50. *See* EUROPEAN SCI. FOUND., EUROPEAN DIMENSIONS OF RETIREMENT—OLDER MIGRANTS IN EUROPE: PROJECTS AND SOURCES (Maria Angeles Casado-Diaz et al. eds., 2002), available at [http://www.shef.ac.uk/sisa/esf/EW\\_Bibliography.shtml](http://www.shef.ac.uk/sisa/esf/EW_Bibliography.shtml). *See generally* Maria Angeles Casado-Diaz et al., *Northern European Retired Residents in Nine Southern European Areas: Characteristics, Motivations and Adjustment*, 24 AGEING & SOC. 353 (2004) (summarizing the results of six social surveys of migration patterns in Southern Europe with emphasis on socioeconomic backgrounds and behavior of various retiree migrant groups and their interaction with host and home societies).

51. *See* Casado-Diaz et al., *supra* note 50, at 376.

veloped countries, while their parents remain in the home country.<sup>52</sup> Years later, as their parents grow older and require ongoing care, the adult children “bring” their parents to the country to which they migrated to alleviate the difficulties of providing care from afar. Thus, for example, Indian or Pakistani immigrants to Britain bring their elderly parents to live with them because they cannot provide for their parents’ needs in India or Pakistan. Similarly, immigrants to Canada from Japan and other Asian countries may eventually bring their elderly parents to Canada, so that their elderly parents can live with them and receive the care they need.<sup>53</sup> This phenomenon entails considerable difficulties, largely the result of starting a new life in a foreign country at an advanced age. Although these elderly parents usually reside with their adult children, they suffer from total cultural and social isolation due to the strange new environment, language barriers, and the overall disconnect from the social and cultural fabric of life they have known since childhood.

In the Israeli context, examples of this phenomenon abound. For instance, many adult children brought their elderly parents with them to Israel as part of the wave of immigration from the former Soviet Union, partly out of the desire to continue to care for their elderly parents.<sup>54</sup> Conversely, there is anecdotal evidence of aging Israelis being “transferred” to the United States, where their children—many of whom are successful employees in the high-tech industry—house them and care for their every need.<sup>55</sup>

### 3. RETURN MIGRATION IN OLD AGE

“Return migration” happens when older people who had migrated from their country of birth to more developed nations choose to retire to their country of origin and live on the pensions they have accumulated in the developed country to which they migrated. In many cases, a modest pension in the country to which they migrated provides for a much higher standard of living in their original coun-

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52. Russell King et al., *International Retirement Migration in Europe*, 4 INT’L J. POPULATION GEOGRAPHY 91 (1998).

53. Eleanor Palo Stoller & Charles F. Longino, Jr., “Going Home” or “Leaving Home”? *The Impact of Person and Place Ties on Anticipated Counterstream Migration*, 41 GERONTOLOGIST 96 (2001).

54. Protocol of the Health and Welfare Committee (no. 241), DK (2000) 6.

55. See Allen Gliksman, *Multi-Generational Immigration: The Soviet-American Experience*, 79 GERONTOLOGY 83, 88–89 (1997).

try. For example, American pensioners of Canadian origin often return to Canada, English pensioners return to their native Caribbean, and elderly Polish-Canadians, who moved to Canada many years ago, return to Poland in their retirement.<sup>56</sup> The pension and benefits these Polish-Canadian retirees receive from Canada enable them to attain a relatively high standard of living in Poland. Such migration enables the retirees to return to a culture and society they may have missed since emigrating, and to renew associations with relatives, friends, and places from which they have been separated for many years in a country that they still perceive as their "real home."<sup>57</sup>

Due to the unique historical context of the Zionist movement, no broad phenomenon akin to return migration can be observed in Israel. However, such cases can be encountered among those who moved to Israel relatively recently from developed countries.<sup>58</sup> Some of these immigrants, who have a certain sense of alienation because they feel that they never integrated into Israeli culture and society, choose to return to their original country in their old age.

#### 4. IMMIGRATION TO ISRAEL IN OLD AGE

An elderly migration phenomenon that is unique to Israel is *Aliya*.<sup>59</sup> *Aliya* refers to Jews who decide to move to Israel out of Zionist motives.<sup>60</sup> In the particular case of the mass Jewish emigration from the former Soviet Union in the 1990s, the fall of the Iron Curtain represented the first opportunity for these people to emigrate, although many of them dreamt of it all their lives. Sometimes the motives for emigration are religious in nature, such as the desire of some religious Jews to be buried in the Holy Land, close to the Temple Mount and Jerusalem. Sometimes the motives for delaying immigration are economic: only after retirement can people permit themselves

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56. Warnes, *supra* note 46, at 373–74; see also Margaret Byron & Stephanie Condon, *A Comparative Study of Caribbean Return Migration from Britain and France: Towards a Context-Dependent Explanation*, 21 *TRANSACTIONS BRIT. INST. GEOGRAPHERS* 91, 91–104 (1996).

57. See generally Stoller & Longino, Jr., *supra* note 53 (presenting an empirical study showing that ties with children and community tend to influence whether elders will move back to their country of origin).

58. ISRAEL MINISTRY OF FOREIGN AFFAIRS, *supra* note 24.

59. FUNDAMENTAL LAWS OF THE STATE OF ISRAEL 156–57 (Joseph Bad ed., 1961).

60. *Id.*

to move to Israel on the pension and benefits they receive from their country of origin.

In the context of *Aliya*, more than half a million immigrants came to Israel from the former Soviet Union between 1989 and 1995.<sup>61</sup> Figures from the Ministry of Immigrant Absorption indicate that the proportion of people ages sixty-five and older among these immigrants was higher than in the Israeli population as a whole (approximately 14% among the immigrants, as compared with 10% within the Israeli population as a whole).<sup>62</sup> The relatively high proportion of older immigrants within the wave of immigration in the 1990s exposed Israel to a wide range of unique dilemmas in the sphere of social policy.<sup>63</sup>

#### E. Interim Conclusion

As we have seen, the phenomenon of aging in the era of globalization greatly complicates the concept of residency. Older people change their place of residency for a wide range of reasons: some are attributable to the universal phenomenon of globalization, and others directly stem from unique incidents of old age. This new reality means that older people have become far more mobile than in the past. Freedom of choice, together with numerous economic and familial considerations, have led to a constant rise in the number of elderly people who choose to spend their twilight years in countries and regions different from those where they spent the bulk of their lives. The current scope and diversity of this new reality has created the complex legal problem of defining the concept of residency, which was previously not used in this context.<sup>64</sup> The remainder of this article examines the definition of “residency” in the context of entitlement to old-age pensions in Israel.

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61. See Pnina Ron, *The Integration of Older Immigrants from the Former Soviet-Union: Differences Between Gender and Age in Israel*, 79 GERONTOLOGY 64, 64–75 (1997).

62. *Id.*

63. See Denise Naon & Nerit Strosberg, *The Absorption of Older Immigrants from the Former Soviet-Union: Selected Findings in the Fields of Health, Housing and Society*, 79 GERONTOLOGY 5, 5–14 (1997).

64. For examples of recent legal debates about the new issues surrounding the legal construction of “residency” in light of the globalized reality, see Thomas Kleven, *Why International Law Favors Emigration over Immigration*, 33 U. MIAMI INTER-AM. L. REV. 70 (2002). See also Gareth Davies, ‘Any Place I Hang My Hat?’ or: *Residence is the New Nationality*, 11 EUR. L.J. 43 (2005).

### III. Old-Age Pensions and the Definition of Residency Prior to the *Halamish* Affair

#### A. Old-Age Pensions in Israel: General Background

Old-age pensions were some of the first components of the welfare system to be introduced in Israel.<sup>65</sup> An old-age insurance plan was first introduced in Israel in 1954, as part of the first version of the National Insurance Law, enacted in 1953.<sup>66</sup> The two most important legal requirements were that of residency and age.<sup>67</sup> All residents of Israel were included in the plan, with the exception of those who were already age sixty or above when they arrived in the country.<sup>68</sup> The minimum age for a pension was set at seventy for men and sixty-five for women; eligibility was not conditioned on retirement or income level.<sup>69</sup> The old-age pension for a single person was set at a fixed rate of IL 15 (Israeli Liras) per month, a significant sum at the time, constituting approximately 25% of the average wage.<sup>70</sup> The financing of the National Insurance system was determined by a progressive scheme of National Insurance fees linked to salary or income.<sup>71</sup> Accordingly, each individual contributed to the plan in proportion to his or her income and received a pension at a fixed level, thus securing an egalitarian outcome.<sup>72</sup>

The structure of the pension plan was intended to reflect the universal, egalitarian and centralized character of the National Insurance system in Israel, as established following the report of the *Kanev* Commission in 1950.<sup>73</sup> This situation made scholars argue that in Israel, "social legislation constitutes the clearest expression of a community's commitment to all its members. It is based on the principles of social solidarity and the state's responsibility for the members of the local community."<sup>74</sup> This egalitarian approach was also apparent in case law relating to pension eligibility. Rulings in this field empha-

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65. ABRAHAM DORAN & RALPH M. KRAMER, *THE WELFARE STATE IN ISRAEL* 87-88 (1991).

66. *Id.* at 91.

67. *Id.*

68. *Id.*

69. *Id.* at 91-92.

70. *Id.*

71. *Id.* at 92.

72. *Id.*

73. See generally *id.* at 90-91 (describing the goals of the *Kanev* Commission).

74. Guy Mundlak, *Workers or Foreigners in Israel? Structure Contract and the Democratic Deficit*, 27 *EIUNEY-MISHPAT* 423, 476 (2003).

sized the significance of mutual liability among the insured, as the insurance fees were paid “on the basis of mutual assistance among insured and ensuring the pension from one generation to the next.”<sup>75</sup>

Throughout the years, Israel’s old-age pension system has undergone various changes. These changes have reflected political, social, and economic shifts within Israel. For example, in 1965, an element of selectivity was added to the universal system, under which the old-age pension was increased only for recipients who depended on it as their primary source of income, thus creating an additional, income-related layer of pension known as the “social benefit” (and later on, “supplementary income”).<sup>76</sup> In other examples of the evolving pension system, old-age pensions were reduced by 4% during the early 2000s, and their economic value was frozen between 2002 and 2006.<sup>77</sup> Despite the various changes, however, the Israeli old-age pension remained intact in its core legal requirements and rationale: there are still certain age and residency requirements to receive old-age pension.<sup>78</sup>

## **B. Interpretation of the Concept of Residency in Israeli Case Law Prior to the *Halamish* Affair**

### **1. THE CORE OF THE DEFINITION OF THE CONCEPT OF RESIDENCY**

In the National Insurance Law, and indeed in Israeli legislation as a whole, there is no definition of the term “resident.” Accordingly, the burden of imbuing the concept with meaning has been borne mainly by case law, through numerous rulings passed down over the years. The basic definition developed over the years has been that a person’s residence is the place that constitutes that person’s “center of life.”<sup>79</sup> The test of the center of life primarily includes an objective dimension (the sum total of objective data actually indicating the place to which the individual is most closely attached) with limited weight given to the subjective dimension (the place to which the individual personally feels most strongly attached).<sup>80</sup>

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75. Regional Labor Court Rulings, 1990, 0-22, Nat’l Ins. Inst. v. Glick; 22, 161, at 167.

76. See DORON & KRAMER, *supra* note 65, at 95–97.

77. See BRICK, *supra* note 38, at 13.

78. See DORON & KRAMER, *supra* note 65, for a general description of the various developments.

79. See CA 8313/02 Halamish v. Nat’l Ins. Inst. [2002] IsrSC 44(4) 432.

80. See DORON & KRAMER, *supra* note 65, at 95–97.

However, in cases where the person claiming the status of residency belongs to a group that is generally denied residency (such as the group of *yordim*—Israelis who have emigrated from Israel to other countries, as in the *Halamish* case, which this article discusses at length below), the case law grants lesser weight to subjective evidence.<sup>81</sup> The courts generally argue that personal declarations contradict the objective evidence that speaks against conferring residency—despite the claimants’ repeated declarations that they consider themselves “residents of Israel.”<sup>82</sup>

The actual application of the general criteria outlined above has proven complex, due to the diverse nature of case-specific personal circumstances. Accordingly, in the *Yalouz* affair,<sup>83</sup> the National Labor Court summarized the applicable legal standard:

Determination of the question as to whether a person is a resident of Israel “will come from the totality of circumstances . . . that, in the final reckoning, will establish the actual affinity to Israel.” . . . The determination of the “affinity,” the place “where he lives,” and which “is his home” is effected in accordance with the factual infrastructure and the evaluation of the facts, with reference to the totality of circumstances.<sup>84</sup>

It appears that there is a considerable degree of discretion in determining when a person is a resident, as courts are able to take into account numerous variables unique to each specific case. The tests employed by the courts look at numerous economic, familial, or even cultural factors: where the citizen purchased his apartment, where he works (both in terms of statutory status—where he obtained his work permit—and in terms of his actual work), whether the citizen has any general economic connections to Israel and, if so, what the nature of this connection is.<sup>85</sup> This article details how this range of tests is applied in the rulings of the labor courts.

## 2. FORMAL SECONDARY TESTS: PERIOD OF STAY ABROAD, POSSESSION OF AN IDENTITY CARD, AND THE DECLARATIVE TEST

In order to establish the location of a person’s center of life for the purpose of defining “residency,” the courts in Israel have em-

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81. *Id.*

82. *Id.*

83. See Nat’l Labor Court Rulings, 1987, 14-0, *Yalouz v. Nat’l Ins. Inst.*; 32(2), 208.

84. *Id.*

85. *Id.*

ployed various secondary tests. Some of these secondary tests have been consolidated through technical criteria established through legislation.<sup>86</sup> These secondary tests are as follows:

*a. The Test of the "Period of Stay" in Israel* Article 244(E) of the National Insurance Law establishes that "subject to the provisions of Article 324, the Institute shall continue to pay the pension to a person who has ceased to be a resident of Israel."<sup>87</sup> Article 324(A) of the Law establishes that "a person who is situated abroad for more than six months shall not receive a benefit on account of that time in excess of the first six months, otherwise than with the agreement of the Institute; however, the heads of the Institute are entitled to pay any or all of the benefit to the dependents thereof."<sup>88</sup> In the *Fishman* affair, the court quotes these legal provisions to show that a person who is abroad for more than six months ceases to be a resident of Israel as defined in Article 244(E).<sup>89</sup> A further test is in the Entry to Israel Regulations,<sup>90</sup> which establish that, for the purpose of examining the validity of an entry visa to Israel and a temporary residency permit, a person shall be considered to have settled in a country other than Israel if he or she has spent a period of seven years outside Israel and if they have received a permanent residency permit or citizenship in another country.<sup>91</sup>

*b. The Identity Card Test* In the *Bahiya* affair, the appellant argued that his Israeli identity card supported the conclusion that he was a resident of Israel.<sup>92</sup> The court rejected this argument, ruling that a person's identity card is a means of identification, but that this evidence is controvertible.<sup>93</sup> In the *Fatana* affair, the court argued that "many residents of Israel have emigrated, acquired citizenship in a foreign country and live therein, without relinquishing their citizen-

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86. See, e.g., National Insurance Law, 1995, art. 324(A), S.H. 1522.

87. *Id.*

88. *Id.*

89. Regional Labor Court Rulings, 1997, 0-242, *Fishman v. Nat'l Ins. Inst.*; 8, 639.

90. Entry to Israel Regulations, 5734-1974, KT 3201.

91. *Id.* at art. 11(A).

92. Nat'l Labor Court Rulings, 1989, *Bahiya v. Nat'l Ins. Inst.*; 1(1), 856.

93. *Id.*

ship in Israel, and they indeed continue to bear an Israeli identity card," and asked "are all these to be recognized as 'residents?'"<sup>94</sup>

*c. The Test of Declarative Emigration* In the *Meir* affair, the claimant, born in 1929, left Israel for Canada in 1961, and returned in 1996.<sup>95</sup> The court held that Meir was outside Israel on a permanent basis, with no actual affinity to Israel during the entire period pending his return immigration in 1996. The court found support in the fact that Meir declared upon leaving Israel that he was not leaving on a temporary basis, but that he intended to emigrate from Israel.<sup>96</sup>

### 3. SUBSTANTIVE TESTS: ECONOMIC AND EMPLOYMENT

In addition to technical tests, such as the actual number of days a person has been in Israel, the courts have also applied a wide range of substantive tests. One type of test attempts to examine the individual's affinity to Israel or to another country in terms of economic and employment factors. The following subsections discuss these factors.

*a. Possession of Property in Israel and Abroad* Evidence of possession of property enables the court to disqualify claimants from old-age pension eligibility, both as a positive factor (the existence of such property abroad) and as a negative one (the absence of property in Israel).

Accordingly, possession of property abroad is perceived as supporting the denial of pension eligibility. In the *Mandil* affair, for example, the court noted that the possession of property abroad is evidence of the claimant's lack of affinity to Israel.<sup>97</sup> In other cases, such as the *Ziegelaov* affair, the court rejected the claim that evidence of temporary domicile does not create the affinity of residence in response to claimants who argued that they lived abroad only to be with their family.<sup>98</sup>

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94. Nat'l Labor Court Rulings, 1995, 0-19, *Fatana v. Nat'l Ins. Inst.*; 29, 133.

95. Regional Labor Court Rulings, 1997, 0-388, *Meir v. Nat'l Ins. Inst.*; 8, 816.

96. *Id.*

97. Regional Labor Court Rulings, 1996, 0-688, *Mandil v. Nat'l Ins. Inst.*; 9, 976.

98. Regional Labor Court Rulings, 2002, 3030/02, *Ziegelaov v. Nat'l Ins. Inst.*; (unpublished).

Conversely, the absence of ownership of an apartment in Israel is often cited as implying that the claimant has cut off his connections with Israel.<sup>99</sup> In the *Silam* affair, the court noted that the claimant's intent to begin a new life in the United States may be deduced from the fact that he did not have an Israeli apartment or a bank account to facilitate a potential return.<sup>100</sup> On the other hand, in cases where claimants have sought to show that they maintained an apartment in Israel in order to preserve their affinity to the country, as in the *Abramowitz* affair,<sup>101</sup> the *Ben-Zeev* affair,<sup>102</sup> and the *Levi* affair,<sup>103</sup> the courts have ruled that ownership of an apartment in Israel does not constitute sufficient evidence of the claimant's connection with Israel.<sup>104</sup> In the *Yalouz* affair, the court further established that the existence of an active bank account in Israel is not evidence of residency, concluding that "many foreign residents have bank accounts in Israel, but they are not residents."<sup>105</sup>

*b. Possession of a Foreign Passport or Work Permit* Possession of a foreign passport is also regarded as both a positive and negative factor by the courts. In the *Shavit* affair, for example, the court reasoned that the fact that the two claimants, who left Israel at the ages of forty-seven and forty-nine, had received American passports and "Green Cards," constituted proof that the United States, where they lived, was "their home and the center of their lives."<sup>106</sup> On the other hand, in the *Katzir* case, the court determined that merely holding a permit for residency and employment without acquiring American citizenship was sufficient evidence of a lack of affinity for Israel.<sup>107</sup> In the *Kravitz* affair, the claimant declared before the regional labor court

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99. See, e.g., Nat'l Labor Court Rulings, 1998, 117/98, *Katzir v. Nat'l Ins. Inst.*; 32(5), 200.

100. Regional Labor Court Rulings, 2001, 3446/01, *Silam v. Nat'l Ins. Inst.*; 32(5), 200.

101. Nat'l Labor Court Rulings, 1992, 0-71, *Abramovitz v. Nat'l Ins. Inst.*; 25(2), 105.

102. Regional Labor Court Rulings, 1998, 568/98, *Ben-Zeev v. Nat'l Ins. Inst.*; 10, 664.

103. Regional Labor Court Rulings, 2000, 3163/00, *Levi v. Nat'l Ins. Inst.*; (unpublished).

104. See, e.g., *id.*

105. Nat'l Labor Court Rulings, 1987, 14-0, *Yalouz v. Nat'l Ins. Inst.*; 32(2), 208.

106. See Nat'l Labor Court Rulings, 2000, 201-00; *Shavit v. Nat'l Ins. Inst.*; 1(2), 547.

107. Nat'l Labor Court Rulings, 1998, 117/98, *Katzir v. Nat'l Ins. Inst.*; 32(5), 200.

that "it made me very sad to hear the state argue against me that I have no affinity to Israel. I do not have American citizenship. Under no circumstances will I give up my Israeli citizenship. . . . I am not an American citizen. I am only an Israeli citizen. . . . I am a resident of Israel who lives in the USA and maintains a constant affinity to Israel."<sup>108</sup> The court did not accept these or any of the claimant's other arguments.<sup>109</sup>

*c. Receipt of a Pension from Another Country* In the *Meir* affair, the claimant was born in 1929, left Israel for Canada in 1961, and returned in 1996.<sup>110</sup> The court held that the claimant's receipt of a Canadian old-age pension supported his status as a permanent resident abroad, without any practical affinity to Israel, during the entire period until his reimmigration to Israel in 1996.<sup>111</sup> A similar ruling was made in the *Mandil* affair, a case in which the claimant was receiving a Holocaust survivor's pension in Bulgaria.<sup>112</sup>

*d. Force of Circumstances* Israeli courts often refuse to accept the argument that certain circumstances force a person to leave Israel. In the *Kravitz* affair, for example, the claimant stated that he had traveled abroad to seek employment, adding that he "returned to Israel, again attempted to find work, and was completely unsuccessful [because] in terms of sources of employment in Israel, [he is] considered an 'old man'"; however, although the regional labor court accepted these arguments, the National Labor Court reversed on an appeal of the National Insurance Institute, noting that even during the period when the claimant was unemployed in the United States, he chose to remain in that country.<sup>113</sup> In the *Rabani* affair, the claimant argued that he traveled abroad for the purpose of specialized training in his field, as

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108. Nat'l Labor Court Rulings, 2002, 1313/02, *Kravitz v. Nat'l Ins. Inst.*; 33(1), 45.

109. *Id.*

110. Regional Labor Court Rulings, 1997, 0-388, *Meir v. Nat'l Ins. Inst.*; 8, 816.

111. *Id.*

112. Regional Labor Court Rulings, 1996, 0-688, *Mandil v. Nat'l Ins. Inst.*; 9, 976.

113. Nat'l Labor Court Rulings, 2002, 1313/02, *Kravitz v. Nat'l Ins. Inst.*; 33(1), 45.

a researcher and guest lecturer in psychogeriatrics, clinical psychology, and mental health, but the court rejected his argument.<sup>114</sup>

#### 4. PERSONAL AND FAMILIAL FACTORS

Other issues examined by the courts in the course of determining the nature of residency relate to personal and familial factors affecting a person's affinity and bond with the State of Israel.

*a. State of Health* In the *Mandil* affair, the claimant, an immigrant from Bulgaria, argued that she was absent from Israel for most of the year because she was receiving medical treatment abroad.<sup>115</sup> The court rejected her claim because the claimant could not prove that the treatments were unavailable in Israel and because the claimant did not receive any authorized medical referral in Israel to obtain medical treatment abroad.<sup>116</sup> In the *Shteir* affair, the claimant argued that she had remained with her husband in Australia to care for a sick relative.<sup>117</sup> The court rejected this claim, despite being convinced "that the claimant sees her place of residence as Israel . . . [and] as far as the claimant is concerned, she would very much wish to live permanently in Israel," because, "in the objective realm, in terms of the family cell of the claimant and her husband, their place of residence is Australia and not Israel."<sup>118</sup> In the *Nachmias* affair, the claimant argued that he spent an extended period in Brazil to receive treatment for various medical problems.<sup>119</sup> The court ruled that the claimant's medical documentation did not reflect a medical need for such a long stay abroad.<sup>120</sup> The documented medical conditions were not complex and were routinely treated in Israel.<sup>121</sup> The court further established that the burden of proving that the claimant's inability to return to Israel was due to his medical condition rested with the claimant. As he

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114. Regional Labor Court Rulings, 1998, 2223/98, *Rabani v. Nat'l Ins. Inst.*; 11, 444.

115. Regional Labor Court Rulings, 1996, 0-688, *Mandil v. Nat'l Ins. Inst.*; 9, 976.

116. *Id.*

117. Regional Labor Court Rulings, 2003, 401/03, *Shteir v. Nat'l Ins. Inst.*; 18, 902.

118. *Id.*

119. See Regional Labor Court Rulings, 1999, 108000/99, *Nachmias v. Nat'l Ins. Inst.*; (unpublished).

120. *Id.*

121. *Id.*

could not prove this, his claim was rejected.<sup>122</sup> In the *Priloka* case, the court adopted an even stricter interpretation, ruling that even if the claimants' factual claim was true, it was still insufficient evidence of residency:

We have no doubt that these are a most devoted grandfather and grandmother, who are doing all they can to make things easier for their granddaughter and for her parents. . . . However, the motive or need to care for the granddaughter, *per se*, powerful and moral though it may be, cannot, in itself, determine the residency of an individual.<sup>123</sup>

*b. Location of the Family* In the *Mandil* affair, the court regarded the fact that both of the claimant's daughters lived abroad together with their families as negative evidence indicating severed connections with Israel.<sup>124</sup> In the *Nissan* affair, the court rejected claimants' argument that they resided in the United States in order to visit their children and grandchildren.<sup>125</sup>

*c. Cultural Connection to Israel* In the *Sarig* affair, the claimant unsuccessfully argued that, while in the United States, she made efforts to maintain her connection with Israel by sending her children to Jewish schools so that they could maintain their Hebrew language skills.<sup>126</sup>

### C. Interim Summary: Conservatism and Unwillingness to Adapt the Law to Reflect Reality

A summary of the tests applied by the labor courts to determine eligibility for an old-age pension shows that the courts' interpretation of the concept of residency is conservative and highly restrictive. This approach leads to the conclusion that anyone who leaves Israel for a period beyond a normal tourist stay will be denied the status of resident and, therefore, denied eligibility for any benefits and disentitled

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122. *Id.*

123. Regional Labor Court Rulings, 2003, 55/03, *Priloka v. Nat'l Ins. Inst.*; (unpublished).

124. Regional Labor Court Rulings, 1996, 0-688, *Mandil v. Nat'l Ins. Inst.*; 9, 976.

125. Regional Labor Court Rulings, 1996, 0-620, *Nissan v. Nat'l Ins. Inst.*; 4, 614.

126. Nat'l Labor Court Rulings, 1992, 0-75, *Sarig v. Nat'l Ins. Inst.*; 25(4), 156.

of the old-age pension. The courts employ any known facts to justify and corroborate this interpretation. Examples of contrary rulings are few and far between.

Moreover, in the vast majority of the cases reviewed above, the courts do not recognize the legal or practical difficulty inherent in denying the residency status. The courts also ignore the applicability of such rulings to claimants who profess to maintain a strong and meaningful affinity to Israel through such factors as ownership of property in Israel, relatives who remained in Israel, and ongoing payment of National Insurance fees. Indeed, it is unclear what minimum level of disconnect courts will accept as enabling the continued recognition of the claimant as a resident of Israel. Thus, for example, the *Sarig* affair noted that an Israeli citizen who lives outside Israel for a protracted period for the purpose of private employment or for personal reasons is not considered an Israeli resident.<sup>127</sup> Despite the rhetoric of the Israeli courts regarding the examination of the totality of factors, courts in practice have been conservative in their interpretation of residency and excessively liberal in rejecting the status of resident to claimants who have been physically absent from Israel for an extended period.

#### IV. The Rise and Fall of the *Halamish* Affair

##### A. The First Round of the *Halamish* Affair: Willingness to Change

The first significant sign of a possible change in the restrictive interpretative policy applied by the courts as described above emerged in a case known as the *Halamish* affair.<sup>128</sup> For the first time, the Supreme Court created the normative framework facilitating a different legal interpretation that would be far better suited to the new social reality described above. This section of the article describes the course of the *Halamish* affair and shows how Israeli law ultimately returned to its starting point prior to the case.

##### 1. HALAMISH AND THE REGIONAL LABOR COURT

Michael Halamish, an Israeli citizen, lived in Israel for many years.<sup>129</sup> When he reached the age of sixty, he and his wife moved to

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127. *Id.*

128. CA 8313/02 *Halamish v. Nat'l Ins. Inst.* [2002] IsrSC 44(4) 432; Nat'l Labor Court Rulings, 1997, 0-391, *Halamish v. Nat'l Ins. Inst.*; 33, 88.

129. Nat'l Labor Court Rulings, 1997, 0-391, *Halamish v. Nat'l Ins. Inst.*; 33, 88.

the United States.<sup>130</sup> At the age of sixty-five, Halamish contacted the National Insurance Institute of Israel and claimed an old-age pension.<sup>131</sup> The claim was rejected on grounds that the claimant of a pension must be a resident of Israel at the time of the claim.<sup>132</sup> Because Halamish resided in the United States at the time, he was deemed ineligible for a pension.<sup>133</sup> Halamish petitioned the regional labor court, arguing that he was entitled to receive a pension because of the affinity he continued to feel for Israel and the many years he lived and worked in Israel while paying National Insurance fees.<sup>134</sup> Halamish’s claim against the National Insurance Institute for his pension was rejected by the regional labor court.<sup>135</sup>

## 2. HALAMISH AND THE NATIONAL LABOR COURT

Halamish appealed to the National Labor Court, arguing that the sole purpose of the Israeli residency conditions contained in the definition of an “insured” in Article 240(A) of the National Insurance Law was to ascertain the obligation of payment of National Insurance fees.<sup>136</sup> Halamish maintained that any person who paid insurance fees and reached pensionable age was eligible for a pension.<sup>137</sup> In addition, Halamish argued that the purpose of the National Insurance Law was to provide Israeli citizens, wherever they may be, with a pension upon reaching retirement age.<sup>138</sup> Denial of a pension to those who leave Israel injures their property and personal liberty rights in accordance with the Basic Law: Human Dignity and Liberty.<sup>139</sup> Halamish further

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* Until 1992, Israel did not have a formal constitution, and the prevalent judicial opinion was that Israel’s “Basic Laws” did not have constitutional status. In 1992, however, two new Basic Laws were enacted—Basic Law: Human Dignity and Liberty; and Basic Law: Freedom of Occupation. These new Basic Laws have revolutionized Israel’s constitutional law, and it is now the prevalent view that Israel’s Basic Laws have constitutional status, meaning that the Israeli parliament cannot enact laws that contradict the Basic Laws. As a result, Israel has essentially transformed from a parliamentary supremacy democracy (similar to the United Kingdom) to a partly constitutional democracy where individual freedoms and liberties are upheld through judicial review of parliamentary legislation. *See generally* Ran Hirschl, *Israel’s ‘Constitutional Revolution’: The Legal Interpretation of En-*

argued that the Israeli residency test was at odds with prevalent conditions for old-age pension in most Western countries.<sup>140</sup>

Halamish also argued that he and his wife continued to consider themselves Israeli residents, and that their stay outside Israel was due to a succession of objective circumstances, including the death of his son in the United States and the need to care for his surviving family.<sup>141</sup> Halamish's comments before the court offer an illustration of the subjective feeling of many citizens who are not deemed residents regarding their connection to the State of Israel:

I was born in 1924. Our family came to Israel during the "Third Aliyah," fought at Tel-Chai, paved roads and built Tel-Aviv. My parents were always members of the Haganah, and I followed in their footsteps, joining the Haganah when I was thirteen. I performed my military service in the Air Force in 1947—I was a pilot and among those who founded the Israel Air Force. After regular service in the Air Force, I served in the Civil Aviation Administration until 1984. . . . I consider myself as a resident of Israel for several reasons: I am registered as a resident of Israel, and as part of my service in the Air Force as a pilot, there are three sites on the map of the Land of Israel named after me, as perpetual commemoration. I have here as a witness my grandson, a third generation pilot in the Air Force. I am the first, then my son, and now my grandson.<sup>142</sup>

The court opened its ruling by describing Halamish's contribution to the state as a citizen and as a pilot, then proceeded to review the legal rulings relating to the receipt of an old-age pension and the interpretations of the tests of residency.<sup>143</sup>

*a. The Test of Residency in General* The court reiterated that the insurance component in the National Insurance Law mainly applies to those who are considered "residents of Israel."<sup>144</sup> This condition does not apply solely to the insurance sectors in the National Insurance Law, but is also a characteristic of the application of other social legislation in Israel.<sup>145</sup>

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*trenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427 (1998); Yoram Rabin & Yuval Shany, *The Israeli Unfinished Constitutional Revolution: Has the Time Come for Protecting Economic and Social Rights?*, 37 ISR. L. REV. 299, 300-46 (2003).

140. Nat'l Labor Court Rulings, 1997, 0-391, Halamish v. Nat'l Ins. Inst.; 33, 88.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

According to the court, the condition of residency in Israel is mainly based on the stable affinity between the insured and the state—an affinity without a temporary or transient nature that manifests the commitment on the part of society to ensure a source of livelihood for those for whom society considers itself responsible.<sup>146</sup>

*b. The Test of Residency in Old-Age Insurance* The court reiterated that the old-age and survivor’s pension components in the National Insurance Law apply only to persons who are residents of Israel.<sup>147</sup> Accordingly, the day a person reaches pensionable age, that person is considered insured and, therefore, an Israeli resident for the purpose of determining pension eligibility.<sup>148</sup>

*c. The Application of the Test of Residency* The court recalled that the term “Israeli resident” is not defined in the National Insurance Law and that a person’s status as an Israeli resident is a question of fact to be determined in accordance with the prior rulings of the labor court.<sup>149</sup> Thus, the court argued that it would be improper to establish a rigid formula applicable to all situations in which the question arises as to whether an individual is an Israeli resident.<sup>150</sup> Quoting prior rulings, the labor court noted that determining whether a claimant is an Israeli resident will be based on the totality of the circumstances.<sup>151</sup>

The final inquiry would determine the actual affinity—an affinity not marked by a temporary or transient character, but a particular affinity to a place within Israel where “he lives” and that is “his home.”<sup>152</sup> The determination of “affinity,” the place “where he lives,” and which “is his home” is effected in accordance with the factual infrastructure and the evaluation of the facts, with reference to the totality of circumstances.<sup>153</sup>

After examining the evidence, the National Labor Court ultimately rejected the appeal submitted by Halamish and his wife.<sup>154</sup>

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146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

### 3. THE SUPREME COURT PETITION

After rejection of his appeal, Halamish petitioned the Israel Supreme Court, sitting as the High Court of Justice.<sup>155</sup> Halamish reiterated the arguments he presented to the National Labor Court and also raised an additional claim based on Article 378(B) of the National Insurance Law.<sup>156</sup> The pertinent article states that the Minister of Labor and Social Affairs (as then titled) is empowered, after consulting with the Council of the National Insurance Institute and with the authorization of the Knesset Labor and Social Affairs Committee, to establish rights and obligations in accordance with the National Insurance Law regarding a person who is not a resident of Israel.<sup>157</sup> Because the minister had not exercised this right as of the time of the petition, Halamish asked the Supreme Court to instruct the minister to regulate the pension eligibility of persons who are not residents of Israel and of residents of Israel who live abroad.<sup>158</sup>

In its response, the National Insurance Institute reiterated the arguments it raised before the National Labor Court.<sup>159</sup> It noted that consideration would be given to any changes in the conditions for eligibility as established in the law, including the determination that persons living abroad and meeting the requirement of the minimum period for entitlement would also be eligible for an old-age pension.<sup>160</sup> However, the National Insurance Institute further argued that implementation of such changes required extensive preparations, including an examination of how the group of those eligible for a pension might be expanded while maintaining budgetary limits and the rights of existing insureds.<sup>161</sup> The Institute also noted the difficulty of extending the current relatively brief period of entitlement for a pension.<sup>162</sup>

The Supreme Court opened its opinion by agreeing that the basic model of old-age insurance focuses on providing social security for residents of Israel and for them alone.<sup>163</sup> However, it also acknowledged the changing nature of a world increasingly influenced by globalization:

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155. CA 890/99 Halamish v. Nat'l Ins. Inst. [1999] IsrSC 44(4) 423.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

This concept has, to an extent, been modified in light of the changing reality of life, as reflected in the aging of the population and in the increasing mobility of insureds between countries. The result of these changes has been the creation of a large group of citizens who reach pensionable age and are not permanent residents in their countries. Indeed, the Institute estimates, as noted in its response, that some 100,000 former Israelis may be found in various countries, who have accumulated the minimum period entitling them to an old-age pension, and are not eligible for a pension in accordance with the conditions of eligibility as currently established in the law. The need to expand the circle of insured has also been intensified in light of the tendency to recognize social security as a social human right and a vital component in protecting human dignity.<sup>164</sup>

For the first time, an Israeli court recognized the emerging social reality of elderly people who choose to move abroad in their retirement and who would have been entitled to a pension had they remained in Israel. Moreover, the Supreme Court showed a willingness to recognize that the existing interpretation of the concept of residency, at least in the context of pension, might be erroneous. For the first time in Israeli case law the adoption of a different interpretation seemed possible.

In the final analysis, the Supreme Court accepted the petition in part.<sup>165</sup> The Minister of Labor and Social Affairs was instructed, after consulting the Council of the National Insurance Institute, to consider extending the population of those insured through Article 378 and to bring such extension before the Knesset's Labor and Social Affairs Committee for approval.<sup>166</sup>

The ruling was perceived as innovative at the time, reflecting a new approach and attitude on the part of the Court toward social rights in Israel. It was quoted in several other contexts as evidence of a change in the policy of the Supreme Court regarding social rights in general and the rights of the elderly in particular.<sup>167</sup> Thus, for example, the Israeli scholar Yuval Elbasha argued, in an article published in 2003, that the *Halamish* ruling was one of the two most important social rights rulings issued to date.<sup>168</sup>

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164. *Id.*

165. *Id.*

166. *Id.*

167. See, e.g., Dafna Barak-Erez, *The Israeli Welfare State: Between Legislation and Bureaucracy*, 9 *LABOUR SOC'Y & LAW* 175, 186 (2002).

168. See Yuval Elbasha, *The Accessibility of Weakened Populations to the Courts in Israel*, 3 *ALEI-MISHPAT* 497, 513 (2003).

**B. The Second Round of the *Halamish* Affair: Recommendations of the Goldberg Committee and the Groundwork for Significant Change**

Following the Supreme Court ruling in the *Halamish* affair, the Minister of Labor and Social Affairs established a committee, headed by the former president of the National Labor Court, the late Judge Menachem Goldberg.<sup>169</sup> Although the committee was established with the purpose of reaching conclusions regarding the subject of pension eligibility, it was empowered to discuss the payment of all types of benefits to Israelis outside the country.<sup>170</sup> The committee published an invitation to the public to submit recommendations.<sup>171</sup> Following internal discussions and after receiving public comments, the committee handed down its report and recommendations to the Minister of Welfare in June of 2001.<sup>172</sup>

The committee's report notes that the main claim it received from the public comments was that the citizens who left Israel had for many years been Israeli residents who had respected all of their civil duties and paid insurance fees to the Institute, and they had, therefore, acquired the "right" to receive a pension.<sup>173</sup> Rejecting this argument, the committee stated that, as a general rule, National Insurance is not a regular commercial insurance, and there is no direct connection between the payment of insurance fees and the right to a benefit.<sup>174</sup> The committee determined that a pension is a mutual insurance that is not established on an actuary basis; as a result, there is no correlation between the insurance fees paid by or on behalf of the eligible person and the pension that person is entitled to receive.<sup>175</sup> The committee further noted that the state contributes to the cost of the pension by applying taxes paid solely by the state's current residents.<sup>176</sup> Because the resources available to the National Insurance are limited,

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169. The other committee members included Professor Abraham Doron, Professor Abraham Friedman, Professor Yoseph Tamir, Leah Achdut (head of the research department at the National Insurance Institute), and Advocate Ruth Horn (legal advisor of the National Insurance Institute).

170. MENACHEM GOLDBERG COMM., REPORT TO MINISTER OF SOCIAL AFFAIRS (2001).

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

the report explained, any extension of eligibility to persons other than residents of Israel could impair the amount of benefits paid to insured residents of Israel or prevent the increase thereof.<sup>177</sup>

A key basis for the committee's conclusions was that the state must care for its residents but need not assist those who have left it, especially given the unique character of the State of Israel as reflected in the Declaration of Independence and the Law of Return.<sup>178</sup> This opinion was buttressed by the idea that Israel's character as a Jewish and democratic state could not justify the payment of benefits to Israelis who have left the country and that a one-time grant should suffice.<sup>179</sup>

Despite its negative rhetoric, which was consistent with the precedents of the labor courts, the committee also displayed an awareness of the evolving needs of elderly people in the modern era. The committee recognized that change was taking place and that Israeli law should adapt to meet the new reality. Therefore, the committee concluded that the existing legal situation should be changed and the circle of those eligible for a pension extended: the criteria for pension eligibility for Israelis living abroad should be stricter than for residents of Israel, but elderly Israelis who choose to live abroad in their retirement should continue to be eligible for a pension.<sup>180</sup> However, in order to moderate the scope and economic ramifications of this change, the committee recommended that the pension qualification period for nonresidents should be twice as long as the 144 months necessary for Israeli residents—288 consecutive or nonconsecutive months.<sup>181</sup> The committee added that "this is a significant change in terms of values and finances in the eligibilities for National Insurance benefits, and, accordingly, the proposed change should be made by

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177. *Id.*

178. *Id.* When Israel was founded in 1948, after thirty years of the British Mandate, the formally enacted legal document was the Declaration on the Establishment of the State of Israel (also known as the Declaration of Independence). This declaratory document envisioned Israel as a Jewish, constitutional democracy, which would serve as a home for Jews from all over the world. One of the most important manifestations of this vision was the enactment of the Law of Return, which granted automatic citizenship to any Jew immigrating to Israel. See generally Mark J. Altschul, *Note, Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining Its Present Language*, 2002 U. ILL. L. REV. 1345.

179. *Id.* MENACHEM GOLDBERG COMM., *supra* note 170.

180. *Id.*

181. *Id.*

way of primary legislation, in order that the Knesset can address the significance of the proposed amendment in all aspects.”<sup>182</sup>

In conclusion, despite the committee’s conservative rhetoric in describing the background of the issue, its practical recommendations were far-reaching and revolutionary. The rights of nonresident elderly people were still not equal to those of elderly residents, but the recommendations changed the existing judicial stance, advocating a new legal approach under which elderly people who no longer reside in Israel may continue to be eligible for a pension.<sup>183</sup> In the case of Halamish, for example, adoption of the committee’s recommendations would almost certainly have entitled him to a pension, even though he had effectively emigrated to the United States, which constituted the “center of his life,” as interpreted by conventional judicial practice. It was precisely the far-reaching nature of the proposed modification that ultimately led the committee to recommend codification by way of primary legislation in the Knesset.<sup>184</sup>

### C. The Third Round of the *Halamish* Affair: Back to the Starting Point

The recommendations of the Goldberg Report were presented to the Minister of Welfare and to the National Insurance Institute in June 2001.<sup>185</sup> The Minister of Labor and Social Affairs at the time, Raanan Cohen, decided in principle to support the committee’s recommendations and forwarded them to the government for discussion.<sup>186</sup> In the meantime, Halamish, encouraged by the groundbreaking ruling of the Supreme Court and by the committee’s recommendations, began to lose his patience. He again petitioned the Supreme Court on the matter. In *Halamish v. National Insurance Institute*, Halamish complained of the procrastination in processing the case.<sup>187</sup> On August 6, 2001, the parties in the petition reached the following arrangement:

1. The Respondents [the National Insurance and the Minister of Social Affairs] shall act to advance the decision-making processes in the matter that is the subject of the petition [implementation of the recommendations of the Goldberg Report], whether in the Na-

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182. *Id.*

183. *Id.*

184. *Id.*

185. See HCJ 8313/2002 Eisen v. Nat’l Ins. Inst. [2002] (unpublished).

186. *Id.*

187. HCJ 9405/00 Halamish v. Nat’l Ins. Inst. [2001] (unpublished).

tional Insurance Institute and its committees or among government bodies;

2. The Appellant shall be entitled to petition the Supreme Court again if he realizes that there is no proper progress in the decision-making and legislative processes in the matter.<sup>188</sup>

This arrangement was approved by the Court, and the petition was withdrawn.<sup>189</sup> In the meantime, significant political and economic changes had occurred in Israel: the government changed hands,<sup>190</sup> the Second Intifada erupted,<sup>191</sup> the so-called Internet bubble burst,<sup>192</sup> and Israeli society became embroiled in a downward economic and security spiral.<sup>193</sup> The economic crisis led to the adoption of a far-reaching economic plan, including extensive cuts in a wide range of social welfare programs and other fundamental economic reforms.<sup>194</sup> At this stage, Halamish himself seems to have given up and realized that he was not going to receive a pension.<sup>195</sup> However, another appellant, Yossef Eisen, took over his struggle to change the existing legal situation.<sup>196</sup>

Eisen was born in 1923, and immigrated to Israel in 1950, where lived for almost thirty years.<sup>197</sup> In 1978, he left Israel at the age of fifty-five and has not returned.<sup>198</sup> At the time of filing the petition, he was living in the United States and receiving an American pension in the amount of approximately \$200.<sup>199</sup> Eisen contacted the National Insurance Institute in Israel to request an old-age pension, to which he would have been entitled had he remained a resident in Israel.<sup>200</sup> The National Insurance rejected his claim on the basis of the prevalent test of residency, arguing that he was not a resident of Israel.<sup>201</sup>

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188. *Id.*

189. *Id.*

190. Deborah Sontag, *The Sharon Victory: The Overview*, N.Y. TIMES, Feb. 7, 2001, at A6.

191. Judith Miller, *Whose Holy Land? The Arabs; Nationalism Casts Shadow over Hopes for Coexistence*, N.Y. TIMES, Oct. 14, 2000, § 1, at 13.

192. Grep Ip et al., *The Color Green: The Internet Bubble Broke Records, Rules, and Bank Accounts*, WALL ST. J., July 14, 2000, at A1.

193. Greg Myre, *Israel's Steps to Stem Economic Slide Draw Praise and Protests*, N.Y. TIMES, July 20, 2003, § 1, at 1.

194. *Id.*

195. HCJ 9405/00 Halamish v. Nat'l Ins. Inst. [2001] (unpublished).

196. HCJ 8313/2002 Eisen v. Nat'l Ins. Inst. [2002] (unpublished).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

Eisen turned to the regional and national labor courts, but they also rejected his claims.<sup>202</sup> He then petitioned the Supreme Court, sitting as the High Court of Justice, but he adopted a slightly different legal stance from the one Halamish employed.<sup>203</sup> Eisen had two legal arguments: first, he claimed that the Goldberg Committee had exceeded its authority by determining that its recommendations should be implemented by way of primary legislation; second, he argued that the Minister of Social Affairs had the authority to enact regulations under the terms of the National Insurance Law, as well as to apply and establish the recommendations of the Goldberg Committee within the framework of the enacted regulations, without any need to wait for the primary legislation of the Knesset.<sup>204</sup> According to Eisen, this was the approach required by the ruling of the Supreme Court in the first round of the *Halamish* affair, in which the court supported changing the existing eligibility standards for Halamish and others who lived abroad.<sup>205</sup>

The new Minister of Social Affairs, Zevulun Orlev, replied to Eisen's petition in the following terms, as quoted in the ruling of the Supreme Court:

Having examined the issue, the minister's position is as follows:

The former decision of the previous minister to support, in principle, the recommendations of the Goldberg Committee and to submit these to the government was made at a time when the State of Israel was in a period of economic growth, low unemployment, and rising welfare budgets. At present, in a period of economic recession, a lack of growth, and rising unemployment and numerous cuts in National Insurance benefits, including old age pensions, it would be improper to recommend that the government change the existing legal provisions so as to pay old age pensions to those who have ceased to be residents of the state, and are not such on reaching pensionable age.

It is apparent, in these circumstances, that any expansion of the eligible population will imply additional injury to residents of Israel who are eligible for benefits. In the existing circumstances, it is apparent that it will not be possible to provide these new rights otherwise than at the expense of those currently entitled to benefits.

This will be the case in the context of the granting of rights to those who are no longer residents of Israel, and, in some cases,

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202. *Id.*

203. *Id.*

204. *Id.*

205. *Id.*

have not borne the burden of financing the benefits for many years. In this case, it is a matter of setting priorities, and of a consideration of social justice whereby “we care for our own first.”

In these circumstances, and at this time, the minister does not see fit at this point to ask the government to discuss the amendment of the law as recommended by the Goldberg Committee, and does not see fit to enact regulations in this matter.

If a change occurs in the circumstances and the economic condition of the State of Israel improves, it will be possible to re-examine the amendment of the legal situation in this matter.<sup>206</sup>

The Supreme Court, composed of a completely different panel from that which issued the ruling in the first round of the *Halamish* affair, rejected Eisen’s petition and accepted the position of the new Minister of Social Affairs.<sup>207</sup> The court explained:

The petition should be rejected. The minister’s decision is reasonable and I can find no grounds for intervening therein. Contrary to the Appellant’s claim, this position does not contradict the rulings in the *Halamish* affair, which merely established the duty of the Minister (and of the other bodies involved) to consider and decide with all due speed . . . but did not make any determination regarding the content of the decision. In consolidating his decision, the Minister was, indeed, obliged to take into account the need to reflect new alleviating trends in old age insurance . . . however, at the same time, he was obliged to take into account the current economic condition of the state and the probable damage of his decision to existing eligible persons.<sup>208</sup>

The court also noted that the appellant had the right to ask the Minister to reconsider his decision “as and when economic conditions permit this.”<sup>209</sup> The court also “remind[ed]” the appellant that if he “returns to live in Israel, he shall be entitled to an old age pension.”<sup>210</sup> But all in all, this ruling, as well the subsequent appeal, effectively ended the attempt to change the interpretation of the concept of residency in Israel law.<sup>211</sup>

#### D. The End of the *Halamish* Affair: Back to the Conservative Policy

Although the final stages of the *Halamish* affair, together with the ruling in the *Eisen* affair, ostensibly put a stop to any significant

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206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. CA 7873/2004 Eisen v. Nat’l Ins. Inst. [2004] (unpublished).

change in defining the concept of residency, the initial ruling in the *Halamish* affair and the recommendations of the Goldberg Committee might have been expected to create a different interpretative climate. In practice, however, no real change has occurred in the rulings of the labor courts.

#### 1. THE *DONYEVSKY* AFFAIR

The *Donyevsky* affair offered an opportunity for the court to directly address the *Halamish* precedent and the conclusions of the Goldberg Committee.<sup>212</sup> At the beginning of its ruling, the National Labor Court explained:

This case is presented to us at a time when the trend is to amend some of the rules established in the past regarding the test of residency, in light of the changes occurring in the world and the increasing mobility of individuals in different types of occupations throughout the world.<sup>213</sup>

The factual details of this case seem to embody the increasingly complex nature of the population migrations examined by this article. The case involved a journalist born in the Soviet Union, who came to Israel at the age of forty-one.<sup>214</sup> Donyevsky later left Israel at the age of fifty-six, moving first to Germany and subsequently to the Czech Republic.<sup>215</sup> She was divorced and had two adult daughters, one of whom lived in Jerusalem during the relevant time periods, while the other was studying in the United States.<sup>216</sup> These facts reflected the transitions and changes in the life of the claimant, which courts found difficult to address, particularly in their geographical dimension.

Donyevsky argued that her biographical facts, along with the fact that she owned an apartment and maintained a bank account in Israel, demonstrated a very strong affinity to Israel, which was effectively the center of her life.<sup>217</sup> She argued that she worked abroad because her attempts to find work in Israel were unsuccessful.<sup>218</sup> Moreover, because her place of work is not fixed, and she effectively “migrates” as her work requires, she argued that her stay abroad was

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212. Nat'l Labor Court Rulings, 1999, 386/99, *Donyevski v. Nat'l Ins. Inst.*; 37, 696.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

temporary and solely for the purpose of work, despite the fact that the period involved was protracted.<sup>219</sup>

The National Labor Court rejected Donyevsky's arguments:

The totality of evidence reflects an extensive and protracted stay of more than 15 years outside Israel. . . . According to our approach, the mere fact that the Appellant failed to find a place of work in Israel in her professional field cannot reconnect the Appellant to Israel by way of a connection granting her the right of "residency." We have considered the fact that the Appellant's profession is of the type of profession that creates the need for a profound examination of the circumstances of her stay abroad. In this case, however, the Appellant is not working as a journalist on behalf of an Israeli newspaper, does not receive her salary in Israel, and National Insurance fees have not been paid to the Institute on her behalf. The mere claim by the Appellant that she traveled abroad in order to improve her economic condition cannot connect her to Israel in a manner justifying her determination as a "resident" of the state.<sup>220</sup>

The court also repeated the Zionist-influenced statements made by the Goldberg Committee: "The State of Israel is committed to protecting its citizens. The point of departure is that many people live in the State of Israel who found it difficult to find anywhere else to live, for historical and other reasons."<sup>221</sup> However, the court declined to accept the operative conclusion of the Goldberg Committee's report:

The Appellant does not meet even the period of time set by the Committee regarding the period of qualification. Moreover, it is apparent that even if the Appellant met the period of time proposed by the Committee, we should not consider ourselves empowered to grant her the requested relief, since the Committee, too, determined that the legislature itself should determine the matters therein.<sup>222</sup>

Accordingly, the court concluded that "the Appellant is not entitled to the status of a 'resident of Israel,' even in light of the tendency emerging from the 'new winds' that have yet to reach the status of orderly and clear law."<sup>223</sup>

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219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

## 2. THE NAOMI DAVIDI AFFAIR

The *Naomi Davidi* affair, decided in July 2004, offered another opportunity for the National Labor Court to change its approach.<sup>224</sup> This case involved a citizen and resident of Israel who, at the age of fifty-four, married an American professor.<sup>225</sup> Davidi spent some time in the United States, then moved with her husband to Israel.<sup>226</sup> Her husband received new immigrant status, and the couple purchased an apartment.<sup>227</sup> From July of 1998, the date on which the National Insurance Institute ceased to regard her as a resident, through January of 2002, the claimant and her husband spent approximately half their time in Israel.<sup>228</sup> The regional labor court rejected Davidi's claim, but she appealed to the National Labor Court, and Judge Barak, whose liberal approach to the question of residency in welfare laws was apparent during her tenure as a judge in the regional labor court,<sup>229</sup> ruled in Davidi's favor:

The Appellant is an Israeli who was widowed . . . She married a man who was a guest lecturer in Israel, and followed him to his home in the United States, while maintaining a permanent connection with Israel, including frequent visits. The couple later returned to live in Israel and her husband became a new immigrant. The center of the Appellant's life was once again Israel.<sup>230</sup>

The most expansive conclusion in the ruling was that of Judge Arad:

It is well known that, in modern times, pensioners, more than any other section of the population, are free to tour and visit around the world. Their time is their own, and they often devote it to travel outside the borders of the country in which they have lived all their lives. This is the way of the world in these times in the most developed nations, and so, too, in Israel. A prominent manifestation of this is the flow of tourists of the third age, which is blooming across the world, and also to and from Israel. Against the background of this reality, the position of the National Insurance Institute as adopted before the regional labor court and, more forcefully, before us is completely spurious. As stated, the fact that an Israeli citizen travels and tours around the world, even frequently, cannot deprive them of their status as a resident

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224. Nat'l Labor Court Rulings, 2003, 273/2003, *Davidi v. Nat'l Ins. Inst.*; 33(4), 46.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. See Regional Labor Court Rulings, 1995, 113-0/NG, *Raduan v. Nat'l Ins. Inst.*; (unpublished).

230. Nat'l Labor Court Rulings, 2003, 273/2003, *Davidi v. Nat'l Ins. Inst.*; 33(4), 46.

nor of their eligibility for a pension as the result thereof. In light of the changing times, the requirement of residency for the purpose of rights in the sphere of social law, and particularly for the old age pension, should be rendered more flexible. Residency should be defined in accordance with the purpose of the old-age pension, which is to support those who have reached an advanced age.<sup>231</sup>

The effect of Judge Arad's comments is that visits abroad—even for several months—should not change a person's residency status. By contrast, the reasons for protracted time abroad raised by the claimants in prior cases, such as economic need or family-related circumstances, were not perceived as worthy by the court.<sup>232</sup> Thus, the question remains why seemingly significant circumstances, such as the sickness of a relative, are not considered sufficient by the court, whereas tourism, and tourism alone, is an adequate basis for maintaining residency.

However, in light of the conservative policy expounded by the labor courts, the *Davidi* ruling would seem to be restricted to its facts. This conclusion is supported by the rulings that followed *Davidi*, as the regional labor courts proved reluctant to apply its principles. In the *Ziegalov* affair, for example, the regional court stated:

We did not overlook the ruling of the National Labor Court in the case of Naomi Davidi, however, from the facts in the said case, it can be seen that it concerned an Israeli citizen who traveled and toured around the world, and not, as in the case before us, when the effective place of residence of the claimant, from 1990 through 2004, was in Hungary, from where he traveled and toured to Israel for brief periods.<sup>233</sup>

There were similar assertions in other cases, such as *Hela*<sup>234</sup> and *Abramowitz*,<sup>235</sup> as well as in *Friluka*,<sup>236</sup> where the regional court ruled that the *Davidi* case could not help the claimants:

In the case of *Davidi*, the claimant spent several months outside Israel in 1999 and several months in 2000, and returned to live in Israel with her second husband. In our case, these are not claim-

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231. *Id.*

232. See, e.g., HCJ 8313/2002 Eisen v. Nat'l Ins. Inst. [2002] (unpublished); Nat'l Labor Court Rulings, 1999, 386/99, Donyevski v. Nat'l Ins. Inst.; 37, 696.

233. Regional Labor Court Rulings, 2002, 3030/02, Ziegalov v. Nat'l Ins. Inst.; (unpublished).

234. Regional Labor Court Rulings, 2001, 2770/01, Hela v. Nat'l Ins. Inst.; 18, 453.

235. Regional Labor Court Rulings, 2004, 6837/2004, Abramowitz v. Nat'l Ins. Inst.; (unpublished).

236. Regional Labor Court Rulings, 2005, 55/2003, Friluka v. Nat'l Ins. Inst.; (unpublished).

ants who “are touring the world” (as in the case of *Davidi*), but claimants who chose to relocate the center of their life to Canada, and, even according to their version, “destroyed” the center of their lives in Israel.<sup>237</sup>

## V. Failure of *Halamish*: Old Age and the Law in Israel

As of April 2007, the recommendations of the Goldberg Committee have not been implemented by primary or secondary legislation in the State of Israel. Moreover, Supreme Court litigation to coerce the Knesset and the National Insurance to legislate or apply the recommendations of the report have failed. Despite the ostensibly impressive achievement in the first round of the *Halamish* affair, Halamish himself still does not have the right to receive the old-age pension for which he fought. It is apparent that the rulings of the regional labor courts as well as of the National Labor Court continue to expound a conservative interpretation of “residency,” with the noted exception of the *Davidi* case.

How should we understand the failure of Halamish? How can we explain the conservatism of the labor courts and the failure to amend the law? The following sections attempt to implicate several possible reasons for the continued conservatism of the courts. The discussion is divided into two parts. The first part explains the reasons that do not necessarily relate to old age per se, whereas the second part focuses on the reasons relating specifically to old age.

### A. Explanations Unrelated to Old Age

#### 1. THE *HALAMISH* AFFAIR AS AN EXAMPLE OF THE UNWILLINGNESS OF THE ISRAELI SUPREME COURT TO INTERVENE IN THE SPHERE OF SOCIAL RIGHTS

Much has been written in Israeli legal literature regarding the reluctance of the Supreme Court to intervene in the sphere of social rights in Israel.<sup>238</sup> Since the enactment of the Basic Law: Human Dignity and Liberty in the beginning of the 1990s, and against the background of the ongoing failure to enact the Basic Law: Social Rights, critics have repeatedly suggested that basic social rights in Israel lack

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<sup>237.</sup> *Id.*

<sup>238.</sup> See, e.g., Aeyal M. Gross, *The Israeli Constitution: A Tool for Distributive Justice, or a Tool Which Prevents It?*, in *DISTRIBUTIVE JUSTICE IN ISRAEL* 79, 79–96 (Menachem Mautner ed., 2000).

effective protection.<sup>239</sup> In this context, the *Halamish* affair and the failure of senior citizens in Israel to enforce their legal rights can be seen as another example of unsuccessful efforts to protect basic social rights.

Still, it is unclear why the *Halamish* appeal was partially successful. What led the Supreme Court to deviate from the prevailing line of precedents until this particular petition? It is difficult to provide a comprehensive answer to this question, especially because the case had limited precedential value. It would seem, however, that Halamish's strong biographical facts and his claimed contribution to the founding and development of the State of Israel may have influenced the Court.

The elite background of Halamish and the propensity of the judges to relate to his case may explain the outcome. This would go hand in hand with Gad Barzilai's claim that

judges usually represent the strong elites in social terms in any given society . . . [;] this is also the case in the Israeli Supreme Court. This court has an under-representation of Mizrachim, women, and ultra-Orthodox Jews, and an absence of representation of Arab citizens of the state. . . . This composition influences the unwillingness or incentive of the judges to cause significant social change.<sup>240</sup>

From this perspective, Halamish mirrors the Israeli elite, thus enabling the Supreme Court judges to easily identify with him.

It is also worth noting that liberalism, which allegedly characterizes the Israeli Supreme Court, is perceived as a pan-humanist political philosophy that disfavors national borders, particularly ones based on ethnic affiliation. As Yoav Peled and Gershon Shafir argue, the Israeli elite "is now seeking its way out into the wide world," thereby losing the interest it once had in "a strong, mobilizing nation."<sup>241</sup> Uri Ram argues that social and economic elites in Israel seek "to disconnect from the political and national collectivist stranglehold" while attempting to realize their personal and professional capabilities and that factors such as globalization have led to the decline of stateist na-

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239. See e.g., Guy Mundlak, *Social and Economic Rights in the New Constitutional Discourse: From "Social Rights" to the "Social Dimension of All Rights,"* 7 LAB. L. Y.B. 65 (1999).

240. Gad Barzilai, *Judicial Hegemony, Political Polarization, and Social Change*, 2 POLITICS 44 (1998).

241. YOAV PELED & GERSHON SHAFIR, *BEING ISRAELI: THE DYNAMICS OF MULTIPLE CITIZENSHIP* (2002).

tionalism.<sup>242</sup> The labor courts would strenuously oppose this trend, which they would see as weakening the nationalist integration that is so integral to the welfare state and the rights granted on its behalf. The Supreme Court, however, is traditionally less committed to this ethos,<sup>243</sup> and it expressly defends liberal values that are sometimes contrary to the ideals of the welfare state.<sup>244</sup>

Halamish's relative success may also be interpreted as a demonstration of social inequality. Zeev Rosenhek argues that despite the universal elements in the concept of Israeli citizenship, politically and socially disenfranchised groups have been and continue to be excluded from this concept.<sup>245</sup> Thus, while civil rights are formally applied in a universal manner to the entire population, it cannot be assumed that disenfranchised populations have an equal chance to enjoy these rights. Demographic groups with more political clout and superior socioeconomic status find it much easier to realize their rights, particularly through the Supreme Court. This criticism rings true for rights that are particularly important to stronger groups (such as property rights<sup>246</sup>), as well as for rights applicable to the entire population (such as welfare rights).<sup>247</sup>

According to one critic of the Court,

it is not surprising that the two central rulings recognized in the sphere of social rights, viz. the *Gamzu* and *Halamish* affairs, were cases relating to people who, in cultural terms, belong to the judges' group, in the sense that they might be called "authentic Israelis." The former was a cultured man, a professor of literature and a well-known poet and songwriter from a renowned family; the latter was an air force pilot and businessman. . . . By virtue of human nature, the judges' identification with those who resemble them is greater than in the case of people who are completely different from them culturally.<sup>248</sup>

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242. Uri Ram, *Between the Weapons and the Economy*, in ISRAELI SOCIOLOGY 105 (1999).

243. The Supreme Court is often seen as representing the Israeli elite. See PELED & SHAFIR, *supra* note 241.

244. See Tal Golan, *The Residency Criterion in the Awarding of the Old Age Pension—Communities, Boundaries and the Welfare State*, 69 SOC. SECURITY 32 (2005).

245. Zeev Rosenhek, *Labor Immigrants in the Israeli Welfare State: Exclusion and Inclusion*, 56 BITACHON SOZIALI 97, 112 (1999).

246. See Gross, *supra* note 238.

247. *Id.*

248. See Elbashan, *supra* note 168.

The fact that petitions filed by "weak" appellants after *Halamish* were unsuccessful suggests that appellants like Halamish belong to what Daphne Barak-Erez referred to as "the group of prosperous poor."<sup>249</sup>

The failure of *Halamish* to complete the revolution in the test of residency may also be explained by reference to other failures on the part of the 2005 Supreme Court in defending social rights. Thus, for example, in the 2005 ruling regarding sharp cuts in supplementary income benefits in the Economic Program Law for 2002, the Supreme Court seemed at least as willing as in *Halamish* to evaluate the social right to a supplementary basic income as a supreme right protected under the Constitution.<sup>250</sup> However, it declined to go the extra mile and grant the appeal in order to provide the appellants with the requested right in practical terms. This hesitation on the part of the court is particularly jarring when compared to revolutionary rulings in other spheres, such as property rights and freedom of occupation.<sup>251</sup> One possible explanation relates to the argument of Morton Horowitz and Mark Tushnet, which shows how the definition of rights may be so unstable as to allow rights to be changed frequently and relatively easily.<sup>252</sup> Moreover, the definition of rights may be so vague as to allow a detrimental change to be portrayed as beneficial.<sup>253</sup> Thus, although the Supreme Court is perceived to have helped Halamish and social rights, the ineffectiveness of the ruling actually damages the prospects of securing the social right to an old-age pension.

## 2. HALAMISH AS AN EXAMPLE OF THE LEGAL EMBODIMENT OF THE ZIONIST NARRATIVE

A further explanation for the failure to change the legal definition of "residency" in the context of pensions is based on the argument that Israeli immigration policy is based on nationalist and Zionist elements and clearly shows territorial characteristics. Thus, denial of residency status to the *yordim* carries profound symbolic meaning and allows the courts to deny residency status to Israelis who leave the country. Moreover, the test of residency is applied far more ex-

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249. See Barak-Erez, *supra* note 167.

250. See CA 366/03 Ass'n of Obligation for Peace & Soc. Justice v. Minister of Fin. [2005] (unpublished).

251. See Gross, *supra* note 238.

252. See, e.g., Morton J. Horowitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1998); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

253. Horowitz, *supra* note 252; Tushnet, *supra* note 252.

pansively and liberally to Jewish immigrants, as the courts seek to encourage a selective and active immigration policy, while some groups, such as migrant laborers, are completely denied residency, despite having been in Israel for many years and are, therefore, rendered ineligible for the vast majority of benefits granted by the National Insurance Law.<sup>254</sup>

In accordance with the principle of universalism, which constitutes a key foundation in the Israeli model of the welfare state, the universal status of citizenship ostensibly implies that rights and obligations should be borne by all those who hold this status. In practice, although each individual should be included in Israel's National Insurance system, regardless of class, social status, or income, not all citizens enjoy these rights equally. This results in selective inclusion and exclusion based on social hierarchies without official nonapplication of social rights to a particular group that would imply the state does not recognize the legitimacy of certain groups. Simply put, the person or group that does not receive a social right is effectively excluded from the community. Denial of pensions to senior citizens can be perceived as a manifestation of the state's decision to deprive them of legitimacy for their decision to leave Israel. Viewed through this lens, the Israeli welfare state, as expressed in the granting of the pension, has been used to exclude, characterize, and map the Israeli populace in order to secure the goals of establishing and protecting the national identity.

However, we believe that the treatment of the group of citizens who are not residents, the *yordim*, actually reflects a more ambivalent approach. On the one hand, this group consists of Jews; on the other hand, these people have left Israel, an act perceived as negative and reprehensible in the context of Israeli migration policy. Importantly, the claims for pensions are not merely attempts to secure financial rights; they represent efforts to affiliate with the Israeli collective. It is no coincidence that the claimants in these cases emphasize their cultural connection with Israel or their economic bond with the country.<sup>255</sup> When the courts consistently reject these attempts at affiliation, they are clearly stating that people who leave the Israeli Jewish collec-

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254. See Golan, *supra* note 244.

255. See, e.g., Nat'l Labor Court Rulings, 1992, 0-75, Sarig v. Nat'l Ins. Inst.; 25(4), 156; Nat'l Labor Court Rulings, 1992, 0-71, Abramovitz v. Nat'l Ins. Inst.; 25(2), 105; Regional Labor Court Rulings, 1996, 0-132, Haloani v. Nat'l Ins. Inst.; PDA 29, 197.

tive are not entitled to social rights, including the right to a pension. However, when someone from an elite population, such as Halamish, applies for a pension, a more liberal interpretation of the character and substance of the test of residency may emerge.

This explanation places the *Halamish* affair in a context that goes beyond the sphere of old age and relates to the broad Zionist narrative. From the perspective of the Zionist narrative, senior citizens who migrate from Israel are no different from other migrants who abandon the Zionist enterprise.

### 3. HALAMISH AS AN EXAMPLE OF THE LIMITS OF LAW

Another possible explanation for the adherence to the conservative interpretation of the concept of residency relates to the more generalized claim that law is ultimately a conservative tool that in many cases lags behind cultural and technological developments.<sup>256</sup> According to this argument, while the courts may occasionally be "ahead of their times" by setting progressive precedents, the judiciary usually moves more slowly than the general society, merely reflecting changes that have already occurred rather than setting the pace of reform.<sup>257</sup>

In the case of old-age pensions, it may be argued that Israeli law has simply failed to keep pace with changing patterns in the lifestyles of elderly people. If the law is blind to the changes brought about by globalization and aging, it will continue to act on the basis of principles and rules that are no longer relevant and which are inappropriate for the new reality. From this point of view, the specific problem of residency in the global age is neither new nor unique but rather a further example of the inherently conservative nature of the law.

## B. Explanations Relating to Old Age

### 1. HALAMISH AS AN EXAMPLE OF THE SOCIAL AND POLITICAL WEAKNESS OF SENIOR CITIZENS IN ISRAEL

Another way to examine the legal result in *Halamish* is through the prism of political and social status of the elderly in Israel. After all, the law ultimately reflects the sum total of the political balance of

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256. See SHARYN L. ROACH ANELEU, LAW AND SOCIAL CHANGE 122–23 (2000); LARRY D. BARNETT, LEGAL CONSTRUCT, SOCIAL CONCEPT 16–18 (1993).

257. These kinds of arguments originated in U.S. legal scholarship, finding that Supreme Court verdicts were frequently in harmony with public opinion. See ANELEU, *supra* note 256; BARNETT, *supra* note 256.

power within any given society. The lack of success of senior citizens in Israel to influence the legislature to adopt the conclusions of the Goldberg Committee and to amend the National Insurance Law might reflect their political weakness. In the 1980s, literature relating to the politics of old age argued that the increase in population would ultimately be translated into increased political power, which would eventually lead to favorable legislation and enforcement of rights.<sup>258</sup> However, studies in Israel and elsewhere have shown that these predictions did not come true. Despite the demographics, senior citizens in Israel and around the world have been unable to realize the full potential of their political strength.<sup>259</sup> The chairperson of Israel's Union of Pensioners, attorney Gideon Ben Yisrael, has witnessed this recurring pattern:

The author of this article [Gideon Ben Yisrael] has accumulated extensive experience in struggles to protect the existing rights of senior citizens and to secure additional rights. Experience shows that while certain achievements may indeed be achieved by means of political lobbying and efforts in the realm of public opinion, in any case when the interests of senior citizens clash with those of other sectors that enjoy political power, the latter will prevail. . . . Those who lack political power invariably find themselves on the margins of budgetary priorities.<sup>260</sup>

This argument focuses on Israeli senior citizens as a distinct group, characteristic in its weakness and inability to realize its political strength and, therefore, failing to secure significant changes in its social status.<sup>261</sup> From this perspective, the *Halamish* affair is another benchmark of Israeli senior citizens failing to realize their power. This failure is particularly pronounced, given the Supreme Court's ostensibly favorable ruling and the special committee's recommended amendment to the pertinent legislation. Despite their improving political conditions, senior citizens ultimately failed to translate these circumstances into favorable amendment of the relevant law.

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258. See Alan Walker, *The Politics of Ageing in Britain*, in *DEPENDENCY AND INTERDEPENDENCY IN LATER LIFE—THEORETICAL PERSPECTIVES AND POLICY ALTERNATIVES* (Chris Phillipson et al. eds., 1986).

259. See JOHN A. VINCENT ET AL., *POLITICS AND OLD AGE* 155 (2001); see also Robert H. Binstock & Jill Quadagno, *Ageing and Politics*, in *HANDBOOK OF AGING AND THE SOCIAL SCIENCES* 333, 342–43 (Robert H. Binstock & Linda K. George eds., 2001); Richard B. McKenzie, *Senior Status: Has the Power of the Elderly Peaked?*, 4 *AM. ENTERPRISE* 74, 74–80 (1993).

260. See Gideon Ben-Israel, *Without Political Power There Is No Chance*, in *THE POLITICS OF OLD AGE* 173, 184 (Yitzhak Brick ed., 2002).

261. See ISRAEL DORON, *JUSTICE IN OLD AGE* (forthcoming 2007).

It is also possible that the continued political weakness of the elderly is due to a lack of Israeli nongovernmental organizations specifically addressing old age and law. Unlike women, Arabs, and other vulnerable groups in Israel, senior citizens have virtually no powerful nongovernmental legal organizations fighting on their behalf.<sup>262</sup> Therefore, it is not surprising that while the Supreme Court has previously recognized the special status of other disenfranchised populations, senior citizens continue to struggle to be recognized as a distinct group worthy of protection and equality.<sup>263</sup>

## 2. HALAMISH AS AN EXAMPLE OF AGEISM

Lastly, ageism may explain the outcome of the *Halamish* affair. Ageism is a complex theoretical concept developed over the past three decades. In modern society, aging entails significant components of exclusion, such as structural removal from spheres of social activity, denial of access to centers of power and influence, and systemic lack of attention to senior citizens in the media and culture.<sup>264</sup> The reasons behind ageism and the methods by which it manifests are numerous and diverse. Ageism is a controversial term that has been defined in diverse ways. According to one definition:

Ageism can be seen as a process of systematic stereotyping, of a discrimination against people because they are old, just as racism and sexism accomplish this for skin colour and gender. Old people are categorized as senile, rigid in thought and manner, old-fashioned in morality and skills. . . . Ageism allows the younger generation to see older people as different from themselves, thus they subtly cease to identify with their elders as human beings.<sup>265</sup>

A more progressive definition seeks a greater measure of precision, noting the difference between ageism and racism, sexism, or other "isms":

1. Ageism is a set of beliefs originating in the biological variation between people and relating to the ageing process;

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262. See ESTER IEKOVITZ, ASSOCIATIONS FOR THE ELDERLY IN ISRAEL: MANAGERIAL, FUNCTIONAL AND ORGANIZATIONAL PERSPECTIVES (2004). One of the conclusions of this research was that "[a]ssociations for the elderly in Israel seek to fulfill several objectives. However, the main objective is to provide services for the elderly. The function and activity of advocacy and rights promotions of the elderly is only in the borderlines of the activity." *Id.*

263. See RUTH BEN-ISRAEL & GIDEON BEN-ISRAEL, WHO'S AFRAID OF THE THIRD AGE? 32 (2005).

264. See ROBERT BUTLER & MYRNA LEWIS, AGING AND MENTAL HEALTH 20–21 (1973).

265. *Id.* at ix.

2. It is in the actions of corporate bodies, what is said and done by their representatives, and the resulting views that are held by ordinary ageing people, that ageism is made manifest.

In consequence of this, it follows that:

- (a) Ageism generates and reinforces a fear and denigration of the ageing process, and stereotyping presumptions regarding competence and the need for protection.
- (b) In particular, ageism legitimates the use of chronological age to mark out classes of people who are systematically denied resources and opportunities that others enjoy, and who suffer the consequences of such denigration, ranging from well-meaning patronage to unambiguous vilification.<sup>266</sup>

A rights-centered approach to ageism that recognizes the need to take proactive steps against the phenomenon of ageism permits an additional insight: senior citizens can continue to enjoy cultural life, play an active role in social and civic affairs, or acquire an education, and these varied aspects of life combine to form their social rights and substantive citizenship within Israeli democracy.<sup>267</sup> Recognizing that these aspects constitute a “social right” leads to acknowledgement of the state’s obligation to facilitate, support, and encourage senior citizens to realize this right.

Within the scope of the definitions above, the unwillingness of the Israeli legislature to adopt the recommendations of the Goldberg Committee and the reluctance of the Supreme Court to compel the legislature or the National Insurance Institute to apply these recommendations can be seen as a further manifestation of indifference, if not hostility, toward senior citizens. It is a manifestation of the perspective that it is “not so terrible” if senior citizens lose their pensions if they leave Israel in old age. It is a manifestation of the opinion that senior citizens should not leave Israel in their old age because it is “unfitting and inappropriate” for them to do so. The current legal situation integrates with the network of stereotypes relating to the ageing process, which characterizes senior citizens as people who should be grateful that the state and society pay them a pension—and to “abandon” the nation in old age constitutes “ingratitude” requiring the cessation of payment of these benefits.

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266. Bill Bytheway & Julia Johnson, *On Defining Ageism*, 27 *CRITICAL SOC. POL’Y* 27, 36–37 (1990).

267. See generally Jeffrey A. Burr et al., *Productive Aging and Civic Participation*, 16 *J. AGING STUD.* 87, 88 (2002) (discussing the positive influence of civil participation and activity on the elderly).

Finally, although ageism is a global phenomenon, it might have an especially strong effect in Israel. Three cultural influences may combine to characterize the elderly as a marginal and rejected social group, in contrast to the "ideal" Israeli. Historically, the Zionist revolution aspired to construct the "new Jew," or *Tzabbar*, as a negative to the Jew of the Diaspora.<sup>268</sup> Whereas the Jew from the Diaspora was portrayed as old, the *Tzabbar* Jew had to be young.<sup>269</sup> Consequently, the generation of pioneers and *Tzabbarim* nurtured youth as a prime ethos, further enhanced by the prime role of the army in Israeli society.<sup>270</sup> Western culture, meanwhile, worships eternal youth and is seeped in ageism.<sup>271</sup> This exceptional Israeli ageism lends to a conclusion that the denial of old-age pension is not only a manifestation of ageism, but also a defying act of the Zionist community.

## VI. Conclusion

The aging of Israeli society and the changing perceptions of old age and aging in the postmodern era of globalization present Israeli society with numerous and diverse challenges. This article examines one specific legal challenge relating to this phenomenon: the legal definition of the concept of residency in the context of eligibility for an old-age pension.

As we have attempted to show, the ultimate failure of the *Halamish* affair and of the legal struggle to change the definition of "residency," as well as the failure to enable senior citizens who choose to end their lives outside Israel to continue to enjoy their pensions, has significant implications. Including a given group within the welfare state helps to improve the quality of life within this group, but it also has broader political significance in defining the status of that group within society, for the application of social rights to a particular group

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268. *Tzabbar*, also known as *Sabra*, is the Hebrew word for describing the "new Jew" or the "new Israeli." Literally, the word means "the fruit of an Israeli cactus." In practice, the Sabras were the first generation of modern Israelis, born in the 1930s and 1940s, destined to grow up in the Zionist settlement in Palestine, and socialized and educated in the ethos of the Zionist labor movement. These young Israeli generations were pictured as strong, rough, and brave on the outside (similar to the thorns on the surface of the cactus) but good-hearted, friendly, and soft on the inside (similar to the internal, juicy parts, of the cactus). See generally OZ ALMOG, *THE SABRA: THE CREATION OF THE NEW JEW* (2000).

269. *Id.*

270. *Id.*

271. *Id.*

implies the recognition and legitimization of that group. In other words, withholding the status of residency and the social right to a pension from elderly citizens effectively implies their exclusion from the Israeli community. This contributes to the social conception of old age as a period in which people “should” remain in their own country and adopt a passive and conservative attitude. Behavior that entails breaking the bond to the state is one that Israeli society is unwilling to tolerate.

The failure of senior citizens to secure social and legal change, even after the favorable Supreme Court ruling in the first round of the *Halamish* affair and the recommendations of the Goldberg Committee, speaks volumes about this group’s political weakness within Israeli society. It also reflects the possible limits of the courts as a medium for social change by those who have not yet been recognized as holding a special status within Israeli society.

Ultimately, the Israeli legal system is still faced with the challenge of defining “residency.” The conclusion of the *Halamish* affair did not conclusively decide this issue. The combination of the ongoing aging of Israeli society and the growing trend toward globalization will mean that the pressure on the political system and on the labor courts to find an appropriate solution will only increase in the years to come. We predict that cases such as *Halamish* will become more frequent. Sooner or later, the legal system will again be forced to grapple with this issue. We can only hope that when the time comes, the points raised in this article will add weight to a more liberal approach that will allow greater flexibility in defining “residency” for the purpose of pension eligibility in the era of globalization.