Position Paper

The Law of Return at Sixty Years: History, Ideology, Justification

Ruth Gavison

Translated from Hebrew

The Metzilah Center
for Zionist, Jewish, Liberal and Humanist Thought

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The Metzilah Center was founded in 2005 to address the growing tendency among Israelis and Jews worldwide to question the legitimacy of Jewish nationalism and its compatibility with universal values. **We believe** that Zionism and a liberal worldview can and must coexist; that public discourse, research, and education hold the key to the integration of Zionism, Jewish values, and human rights in the Jewish state; and that the integration of these values is critical for the lasting welfare of Israel and the Jewish people worldwide.

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About the Author

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Executive Summary

Introduction

Jewish *Aliyah* and *kibbutz galuyot* (the "ingathering of the exiles") are two of the primary goals of the Zionist enterprise and of the State of Israel. The 1950 Law of Return is the political and legal instrument through which the State of Israel has sought to fulfill these ideals. This law is perceived by many as one of the major expressions of the state's Jewishness. The Law of Return serves as a focus for controversy, both with respect to the justification for the preference given to Jews in Israeli immigration policy, and with respect to the internal Jewish question regarding the essence of the Jewish collective and the standards for identifying its members or for becoming one. This position paper addresses these topics.

Chapter One: *Aliyah* and the Law of Return

Aliyah and the struggle for *Aliyah* began years before the foundation of the state. With the Proclamation of Statehood the gates of the country were opened to Jewish immigration, and *Aliyah* from numerous overseas communities began immediately. It was only two years later, in 1950, that the passing of the Law of Return established that "Every Jew has the right to come to this country as an *oleh*." In the state's first years, despite the war and the difficult situation in the country, tens of thousands made *Aliyah* from every corner of the world. The state worked to bring many communities in distress to Israel and found a variety of ways to assist their immigration. The numerous problems of immigrant absorption which accompanied the large waves of *Aliyah* in those years led to controversy among policy makers regarding the perpetuation of a large-scale *Aliyah* and even led to noticeable shifts in policy. And indeed, the priorities were not consistently applied. The law's statement that "Every Jew has the right to come to this country as an

oleh" was not taken as requiring an unlimited *Aliyah* policy. The actual extent of the *Aliyah* was not determined exclusively, or even primarily, by the provisions of the Law of Return, but rather by the *Aliyah* policy instituted by the government.

Chapter Two: The Principle of Return – Presentation and Justification

The meaning of the ***principle*** of return (as opposed to the ***specific arrangements*** contained in the law) is that within the framework of the immigration policy it is acceptable and correct to prefer members of the Jewish people. The primary objection raised against the principle of return is that it is a racist principle which discriminates on the basis of religion or ethnicity. This chapter presents the general justifications for the principle of return, while addressing the criticisms against it. The central claim presented in this chapter is that the principle of return is justified by virtue of the fundamental principle of self-determination, which justifies both the establishment and continued existence of a Jewish nation-state as well as the right of members of the Jewish people to lead a full Jewish existence in such as a state. Justifications such as these are the basis of the immigration preference granted to the majority ethnicity in other nation-states as well; and these justifications are recognized by international law. The large-scale concerted effort to bring Jews to Israel can also be justified, at least up until a certain point, by the need to "remedy" past injuries – persecution, and even genocide – from which Jews have suffered throughout their history on account of the fact that they have not had a nation-state. This enterprise helps in that it creates a territory in which Jews can live and fulfill their right to self-determination. In this chapter the objections against the Law of Return raised in light of the extended conflict between Jews and Arabs are also examined – and rejected. In this context we will examine the objections that Jews should not have exercised their own right to self-determination in view of the inevitable injury

sustained by the population living in the territory which they wanted, and that the recognition of the principle of return for Jews is inconsistent with the fact that Israel fails to recognize the "right" of return to Israel of those Palestinians who had lived in the territory of the state before the War of Independence, and of their descendants.

Chapter Three: Specific Arrangements pertaining to Return

In this chapter the arrangements for return which have been enacted in the law and in its various amendments, in rulings, and in practice, are surveyed with the understanding that it is difficult to analyze and evaluate these arrangements without taking into account the context in which they were created and the implications of their application. This evaluation is undertaken with regard to three topics: ***1) The identification of the group of individuals eligible for Aliyah –*** a discussion of the original attitude of the law and the manner in which it was amended following the rulings in the cases of ***Rufeisen*** (Brother Daniel) and ***Benjamin Shalit***: The definition of "Jewish" took on a halachic basis while eligibility for *Aliyah* was extended to include three generations of a Jew's descendants and their spouses. The eligibility of a Jew's descendants and of their spouses is not dependent on the Jew who entitles them to make *Aliyah*. ***2) The characteristics of the right to make Aliyah*** – the right to make *Aliyah* bestows immediate and automatic citizenship upon the person making *Aliyah*, as well as the right to bring relatives to Israel, according to the 1952 Law of Citizenship. This is in addition to certain benefits, economic and otherwise. ***3) The policy and practice of encouraging Aliyah –*** the conduct of the Israeli government, not only as a body responsible for the integration of immigrants but also as a promoter of and catalyst for *Aliyah* from Jewish communities all over the world, will be examined.

Chapter Four: A Critical Discussion of the Specific Arrangements Pertaining to Return

In this chapter we survey a few problems in the existing legal arrangements, in light of the situation described in Chapter Three through an examination of the application of the justifications – which have been presented for the principle of return – to the existing arrangements. ***First of all***, according to the justification which bases the preference for Jews on the principle of self-determination, it would seem that on the one hand the characterization of *Aliyah* eligibility according to the law is too broad and includes numerous people who lack any connection to the Jewish people or to its national home; on the other hand, the characterization of "Jewishness" according to the law is too narrow and excludes individuals who actually have a strong connection to the Jewish people but who nonetheless are not considered Jews by part of the Orthodox religious leadership. The amendment to the law which was passed in 1970 (Law of Return [2nd Amendment] 1970) does indeed grant the right to make *Aliyah* to the vast majority of those who are not considered Jewish by the Orthodox establishment, but it does so at the price of labeling them as "non-Jews." While the significance of this label is mainly theoretical and symbolic and not practical, it nonetheless greatly influences the self-perception of the Jewish collective and its right to self-determination. It also has far-reaching social ramifications with respect to the integration of immigrants, and affects the social characteristics of the population living in Israel. ***Second,*** even with respect to those eligible for *Aliyah* it is advisable to maintain the basic distinction between *Aliyah* and receiving citizenship, so that the preference granted by virtue of the Law of Return be expressed only in eligibility for *Aliyah* (that is, entering and settling in Israel) and not through the automatic acquisition of Israeli citizenship. It would be preferable to require that acquisition of citizenship by *olim* be granted only if appropriate conditions are met – for instance a period of residence in Israel, integration into its social and economic life, and a declaration of loyalty - as is the practice with the naturalization of

other applicants. The right to grant status in Israel to relatives also needs to be reviewed in accordance with the goals and justifications for the principle of return. Such an examination indicates that the original phrasing of the Law of Return is preferable to the provisions of the law resulting from its amendment. Nonetheless, it is often possible to achieve the desirable states of affairs by modifying the relevant ***policies*** without necessarily changing the provisions of the law themselves.

Chapter Five: Summary, Conclusions and Recommendations

In the sixty years of its existence, the State of Israel has absorbed millions of Jews who have made *Aliyah* from around the world. In this way the state has accomplished one of the most important goals of Zionism: *kibbutz galuyot*. It is essential for the state to return even now to a discussion of the centrality of this ideal and its influence on the image of the state and its policies. It is important that these discussions be reflected not only by low-profile policy decisions. This requirement concerns both the policy with regard to encouraging *Aliyah* from Jewish communities, as well as policy decisions regarding the encouragement of *Aliyah* among non-Jews eligible by virtue of the Law of Return, or among communities whose Jewish identity is disputed and where there are wide cultural gaps separating them from the Jewish community in Israel. These decisions should not be framed as humanitarian questions regarding the unification of Jewish families whose members wish to make *Aliyah*, but rather as strategic questions with a potential influence on the demographic make-up of the Israeli population.

Israel needs to re-examine not only the ***provisions of the law***, but its ***immigration policy*** as well. Israel needs to make informed and clear decisions regarding the subject of encouraging *Aliyah* and to distinguish clearly between the absorption of *olim* who initiate their own *Aliyah*, and the decision to adopt state initiatives for its facilitation. It is important to maintain approaches to immigrant integration which are adjusted to the needs of the

individuals and groups eligible for *Aliyah* in order to preserve the hitherto impressive achievements of this integration. Upon establishing an immigration and integration policy for those eligible for *Aliyah*, it is essential to avoid abusive behavior aimed at those who do not meet the approval of a particular minister or civil servant. The conclusions chapter also discusses the question of the level of the legal arrangements on return (constitutional, statutory or administrative) in the event that an Israeli constitution will in fact be adopted.

This being said, the current position paper ***does not*** propose legislative changes in the provisions of the law regarding the immigration of Jews and their families, and this is for a number of reasons. ***First***, the highly sensitive character of the Law of Return; ***second***, the extent of the current *Aliyah* is rather limited, and it appears that this situation will continue; ***third***, most of the suggested changes can be made on the policy level, with no need for a legislative change; finally, the main challenge at hand is actually how to deal with the successful integration of individuals already in Israel.

Preface

A. Introduction

This position paper is based on a lecture which I delivered as part of a lecture series at the Cherrick Center at the Hebrew University of Jerusalem, devoted to the sixtieth anniversary of the Israeli Proclamation of Statehood. The lecture focused on an evaluation of Israel's fulfillment of the commitments which it took on itself in that document. The relevant section of the declaration opened with the following sentence: "The State of Israel will be open to Jewish *Aliyah* and *kibbutz galuyot*." Only afterwards came the universal commitments to the values of the state and to the protection of human rights in it. *Kibbutz galuyot* and the renewal of Jewish independence in the Land of Israel were indeed listed as the most important goals of the Zionist enterprise, the culmination of which was the foundation of the State of Israel, and they were part of the most basic features of the state's Jewishness. The 1950 Law of Return was the political, symbolic and legal instrument with which the state fulfilled its obligation. While the struggle for *Aliyah* dated from the very beginning of the Zionist enterprise, the State of Israel nonetheless needed to implement an active policy of encouraging *Aliyah* immediately upon the end of the British Mandate and the issuance of the Proclamation of Statehood. The Law of Return was passed only two years later.

Today, the debate about the Israeli policies for *kibbutz galuyot* and Jewish immigration centers on the Law of Return and the connection between it and the 1952 Citizenship Law, which regulates the acquisition of Israeli citizenship by individuals who acquired it through *Aliyah* as well as those who obtain it in other ways.

B. The subjects of the position paper

In this position paper I re-examine the question of Aliyah according to the Law of Return. I focus on the following four subjects:

- A description of the place that the ***ideal*** of *kibbutz galuyot* and Jewish *Aliyah*[1] holds in the Zionist enterprise and the manner in which Jewish *Aliyah* ***policy*** developed before the founding of the state and following it. In the discussion I indicate that the legal framework is an important element of the policy which is in fact implemented, but that it does not exhaust or determine it.
- Confronting the question: Was it, and is it still, justifiable to adopt the ***ideal of*** kibbutz galuyot and subsequently the ***principle of return***? That is to say, is it justifiable to establish ***in law a preference for*** the immigration of Jews to Israel over that of other people? The answer to this question is in the affirmative.
- A review of developments in the Law of Return, including the 1970 Second Amendment after the Supreme Court ruling in the ***Benjamin Shalit*** affair, and an account of its contribution to the realities of immigration from the moment when it was passed until today.
- An examination of the principal features of the ***specific arrangements for return*** as they are established in the Law of Return, including a response to the questions, "Who is entitled to preference under the law?" and "What are the scope and characteristics of this preference?" This critical examination reveals that there is tension between some of the specific arrangements for return and the justifications for the principle of return.[2]

In the position paper I claim that Israel has indeed fulfilled its commitment that the state be open to Jewish *Aliyah*. Mechanisms which could, for different reasons, have limited this commitment, despite its enunciation as a principle in the Law of Return, were not in fact applied – mostly on account of political considerations. Additionally, according to the 1970 amendment, there are individuals, considered to be Jews by part of the public, who enjoy no preference under the law, and on the other hand there are – mostly in the past few decades – many individuals who are not Jews by any standard and nonetheless benefit from this preference.

This position paper supports the continued anchoring in law of the principle of return (including the possibility that this principle would be established in a future state constitution). This paper ***does not*** recommend changes in the legal framework pertaining to the question of return which is currently in effect, but nonetheless emphasizes the need to re-examine the question of *Aliyah* – of both Jews and non-Jews – with special attention to those components of policy which do not currently find explicit expression – and perhaps should not find such an expression – on the level of the law itself.[3]

Chapter One

Aliyah and the Law of Return

A. *Aliyah* before the founding of the state

Deliberations on the subject of *Aliyah* have accompanied the Zionist enterprise from the beginning. They have focused on the limitations imposed on *Aliyah* by the powers-that-be or the obstacles to *Aliyah* and to the successful integration of individuals who make *Aliyah*, and on internal discussions within the Zionist movement on subjects such as the nature, identity and extent of the preferred Jewish immigration at every stage of the movement's existence.

The subject of immigration has always been a source of controversy in the conflict between Zionists and Arabs. Resistance to Jewish immigration reflected a consistent and even understandable Arab position. The Arabs understood that the Jews wanted to be the majority in the country, and did everything in their power to prevent them from succeeding. For the Zionists, the aspiration for a Jewish majority was the touchstone for membership in the Zionist camp.[4]

Even within the different Jewish groups there broke out, at the beginning of the 20th century, numerous disputes regarding the entire Zionist enterprise and regarding its implications with respect to *Aliyah*.[5] While the leaders of the Zionist movement all agreed that an important goal for the Jewish state should be to serve as a place of refuge open to Jews who wished to become a part of it, there nonetheless arose not a few disputes around the question of whether it was advisable to bring to the Land of Israel immediately anyone who so desired, or whether perhaps the Zionist enterprise ought to be a long-term process, one that had to be well prepared by elite "pioneer" forces which had been properly trained. Such forces would

prepare the ground—politically, socially, militarily and economically—for the establishment of the state and for the absorption of large groups of Jews.[6]

This is the backdrop against which we must view Ze'ev Jabotinsky, who already in the 1920s envisioned a large-scale *Aliyah*, in opposition to the elitist approach which he believed was held by the leaders of the Labor movement. Jabotinsky called for a mass *Aliyah* movement and for the creation of a Jewish majority in all parts of the country, both in order to rescue the Jews of Europe and to build a demographic "iron wall," since this alone, in his opinion, would make a stable Jewish state possible. In this state, Arabs were to be entitled to dignity, equal rights and an independent status as a minority in the Jewish state.[7] We should mention that other Zionist leaders as well, including Herzl, were concerned about the fate of European Jews even before the Holocaust, and that this concern lay at the center of their readiness to consider the Uganda proposal. We should also mention that their concerns for the physical well-being of the Jews of Europe were by no means a prediction of the extent of the Holocaust, and that fundamental to Zionist thought was also the deep interest in creating conditions for a full Jewish existence which would not be possible in the Diaspora.

During the Mandate period the British government set the immigration policy, and the *Aliyah* activity of the Jewish *Yishuv* institutions took place for the most part within this framework. The policy of the Mandate also underwent shifts resulting from developments in Palestine, in the region and in the world. The immigration policy of the Mandate government was based, until July 1937, on the principle of the economic absorption potential of the country without damage to its social make-up.[8] Following the Arab uprising which occurred from 1936-1939, and following the recommendations of the Peel and Woodhead Commissions, which were not approved, the policy was radically altered. The new policy was published in the 1939 "White Paper," which established severe limits on the continued immigration of Jews to the country. The struggle against this restrictive policy united all the groups of the Jewish community, who demanded "free *Aliyah*." (The

groups were divided with regard to cooperation with the British in the fight against the Axis Powers.)

The struggle for Jewish *Aliyah* yielded impressive results. In 1882, at the beginning of the period of *Aliyot* and the new settlement in the spirit of Zionism, 24,000 Jews lived in the country. Within 65 years, in 1947, there were 645,000 Jews living in the country. The success of the Jews in creating a critical mass of Jews who generated an impressive activity of settlement and industrialization was one of the main reasons for the Peel Commission's recommendations for the partition of the country and for the establishment of a Jewish state in part of it. By the 1940s, Ben-Gurion also began to support the mass *Aliyah* of all who wished to come. Ben-Gurion judged that in this way it would be possible to reinforce the strength of the Jewish community, and thus greatly impede any possibility of an anti-Zionist solution to the Palestine question upon the end of the Mandate. Indeed, Ben-Gurion's concept, according to which huge masses of Jews should be brought to the country after the Second World War just because they were Jews, gained a broad consensus. This consensus stemmed not only from the national interest or from the feeling that this was a one-time historical opportunity for Zionism to fulfill its goals, but rather from the understanding of the terrible calamity which had befallen the Jews of Europe. The idea of "selective *Aliyah*" became anachronistic during the war and did not suit the new situation. Humanitarian and political considerations, as well as historical timing, clearly tipped the scales in favor of the immediate adoption of the Land of Israel as a place of refuge for those uprooted by the war, and brought about the unequivocal rejection of the preferred model of some of the leadership: limited and slow *Aliyah* for the purposes of building a new society of workers and settlers.

B. The Proclamation of Statehood and the passing of the Law of Return

1. The Proclamation of Statehood

Thus it is not surprising that the third part of the Proclamation of Statehood opens with the issue of *Aliyah*, and states the following:

> The State of Israel will be open to Jewish *Aliyah* and *kibbutz galuyot*, will strive to develop the country for the benefit of all of its inhabitants, and will be founded on the principles of liberty, justice and peace in light of the vision of the prophets of Israel; will maintain a complete equality of social and political rights for all of its citizens, regardless of religion, race or gender; will insure freedom of religion, conscience, language, education and culture; will preserve the holy places of all the religions, and will be faithful to the principles of the United Nations Charter.

The first part of the opening sentence contains the only specifically Jewish element in all of the third part of the document. While the principles of liberty, justice and peace are ascribed to the vision of Israel's prophets—and not to humanistic or international principles of ethics—all of the other components of the paragraph are universal. Indeed, in the debate in the People's Council before the ratification of the document, it was said that this section expressed the Israeli response to the demands made of the two states by the General Assembly, and reiterated in the Partition Resolution.[9] In this way the declaration sought to link the particularistic-national character of the Jewish state with universal equal rights and liberty. Accordingly, as opposed to the other parts of this passage, the clause "will be open to Jewish *Aliyah*" expresses the Jewish aspect of the declaration, which is distinct from its democratic and universal aspect.[10]

As we have said, it is one of the goals of this position paper to determine to what extent the vision of this declaration has been realized. I should state that, along with the Proclamation of Statehood, the first legislation passed by the institutions of the state removed the limitations imposed by the Mandate government on *Aliyah*; the country's gates were opened wide

and the State of Israel intensified its efforts to encourage *Aliyah* from various countries.[11]

2. Passing the Law of Return

2.1 The separation of the Law of Return from the Citizenship Law

The Law of Return, which is brief and and ceremonial in nature, was ratified in the *Knesset* over the course of two days, on the 5th of July 1950, the twentieth day of *Tammuz* 5710, on the memorial day for Herzl, the man who envisioned the state. But its passing was the culmination of a long and drawn-out process.

Shortly after the founding of the state, discussion of the legal arrangements regarding citizenship and *Aliyah* commenced. The aim was to pass a Citizenship Law which would not explicitly distinguish between Jews and non-Jews. Seventeen proposals, processed by the Ministry of Justice and discussed by the provisional government and its various committees, preceded the proposal for the combined Citizenship Law, which was brought before the First Knesset on July 3, 1950. The Ministry of Justice refrained from proposing a special privilege for Jews making *Aliyah*, and stuck to its proposals for a "neutral" Citizenship Law. Thus, the explanatory notes for the seventeenth proposal reads: "The law refrains from discrimination. 1) It does not discriminate according to race, ethnicity, religion, language or gender. 2) It does not distinguish between Jews and non-Jews." The preface to the same proposal reads: "Accordingly, Israeli citizenship is not contingent on membership in the Jewish people or the Jewish religion or the Jewish national movement, and on the other hand such membership is not sufficient to confer the status of Israeli citizenship."

The encouragement of Jewish *Aliyah* was supposed to be accomplished by means of ***immigration policy***. The condition for acquiring citizenship was a permanent residence permit which was to be granted to Jews easily and quickly, according to the discretion of the Ministry of the Interior. Although the conditions for acquiring citizenship were also supposed to be neutral, the proposed law opened a fairly wide window for releasing

individuals or groups from some of these requirements. This approach was stable, and was supported by legal and public statements made by leading jurists such as Prof. Benjamin Aktzin and Prof. Nathan Feinberg.

The turning point came in the wake of the decisive intervention of Zerah Warhaftig, who was the director of the Institute for the Study of Jewish Law in the Ministry of Justice. Warhaftig believed that the law should state unequivocally the principle that a Jew "returns" to his homeland and is not an immigrant like all other immigrants. In a memorandum submitted to the Minister of Justice on December 7th, 1949, in response to the 15th proposal for the Citizenship Law, Warhaftig wrote:

> It is inevitable that the Citizenship Law in the State of Israel will struggle with the apparent contradiction between two fundamental principles of the state: a) the ingathering of Israel's exiles; b) the guarantee of equal rights for every citizen and resident. The realization of the goal of Zionism—*kibbutz galuyot*—requires a special stance toward *Aliyah* from the Jewish Diaspora and the naturalization of its immigrants. There is a need and a necessity to give expression to this stance in law. Every disregard for or an attempted neglect of the quest for an appropriate way to underscore the principle of *kibbutz galuyot* in law, out of fear of creating a disparity of treatment between Jews and non-Jews, will only pass the core of the problem on to the administration. Apparent discrimination will perhaps disappear from the law, but not from life. Camouflaged discrimination is far worse than open and clearly defined discrimination. Leaving the organization and formal arrangement of these matters in the hands of the governmental administration is likely to undermine the rule of law in effect in the country, and will undermine the principle of equal rights at the stage of execution, which is the critical stage of any law.[12]

Warhaftig believed that it was necessary to separate the general Citizenship Law from another special law, which would be called the "Law of *Kibbutz Galuyot*," which would define who was an *oleh* (i.e., an individual making *Aliyah*), and the essence of which would be the principle that every Jew making *Aliyah* in order to settle in the country should be viewed as an

individual returning to his or her homeland.[13] An *oleh*, according to Warhaftig's proposal, would receive an "*oleh* visa" as opposed to an "immigrant visa" which would be given to other immigrants. In the Citizenship Law a special clause would establish the automatic naturalization of *olim* on the basis of the Law of *Kibbutz Galuyot*. Warhaftig rejected the objection that such a law was discriminatory. While a democratic state must maintain equal rights for its citizens, he acknowledged, this does not apply to those wishing to immigrate to it, and every state is at liberty to determine its own principles of immigration.[14]

Indeed, the government rejected all the earlier proposals, preferring instead Warhaftig's position, which encompassed two separate law proposals: the proposal for the Law of Return and the proposal for the Citizenship Law.

2.2. The main provisions of the Law of Return

Article 1 of the law states the principle of return decisively and clearly:

> **Every Jew has right to *come* to his country as an *oleh*.**

There are four principles in this article:

- The article confers the ***right*** to make *Aliyah*—the right and not just the freedom to do so. It is a right in the sense that it is forbidden to prevent a Jew from exercising it. Nonetheless this declaration does not state that the State of Israel must ***assist*** Jews who wish to make *Aliyah*, and if so—to what extent.
- The right is not to become a citizen, but rather ***to make*** *Aliyah*—that is, to come to Israel and to settle there.
- The article does not define who is a "Jew" for the purposes of this right.
- The right to return refers to the historical territory called "the Land of Israel," and not to the legal jurisdiction of the State of Israel.[15]

Despite the broad and symbolic definition in Article 1, the legislature chose to limit eligibility for *Aliyah* by some additional requirements, which were specified in the second article of the law. ***First***, the law creates a procedural barrier when it states that "*Aliyah* shall be by *oleh*'s visa", the latter being granted by the Minister of the Interior.[16] This barrier can be of practical significance, since it apparently grants the minister broad discretion regarding *Aliyah*. It is not clear if the authority to grant or not grant a visa was limited to determining whether all of the conditions established in the law had been fulfilled.[17] ***Second***, the law states that the minister will not grant the visa if he learns that the applicant "is engaged in an activity directed against the Jewish people" or "endangers the public health" or "the security of the state."

Already at the time of the drafting of the original law, there was debate concerning limitations on *Aliyah*. There were those who objected to the statement that *Aliyah* would be limited by means of the administrative action of granting a visa and saw in this an immediate violation of the principle declared in Article 1. Others objected to the criteria established by the law as the basis for rejecting a visa application. Thus MK Yaakov Gil (General Zionists) said in the course of the legislative debates:

> The Law of Return, which is a historic law, is not the proper place to specify that the *Aliyah* Minister […] can prevent the entry of a Jew into the State of Israel, on the grounds that he has acted against the Jewish people or the State of Israel. If he is a criminal, he should be brought to the country and put on trial here […]. The second clause is more problematic, in that it seeks to prevent the *Aliyah* of an individual likely to jeopardize the public health […] [I]f there is a sick Jew outside the country, he should be brought to the State of Israel in order to heal him, or to quarantine him, so that he will not endanger the public health […] [T]he prevention of the *Aliyah* of an individual who is likely to endanger the public safety—I do not understand this. Why do we have prisons? If a person threatens the public safety, he should be isolated, he should be arrested, and then he will

> not threaten the public safety. It is not possible to punish a Jew for some crime or for some defect by denying his right to make *Aliyah*.[18]

In the same spirit MK Benjamin Minz (United National Front) asked: "Supposing a Jew is guilty, what are his children guilty of?"

Against these objections Ben-Gurion responded:

> There is nothing better for the people of Israel than Zionism, but foolish Zionism is not good for the people of Israel […] I object to the statements of MK Gil who said that if there are criminals or prostitutes or crazy people we should bring them here and put them in prison or in a hospital. We are not building a prison or an insane asylum; we are building a promised land for the people of Israel.[19]

Nonetheless, the substantive restrictions of the Law of Return are relatively narrow and certainly do not leave room for political considerations such as the absorptive capacity of the country, the economic or professional abilities of the *olim*, or their actual capacity to contribute to the project of establishing a Jewish state in Israel. It appears as if the Law of Return ruled very clearly ***against*** a policy of selective *Aliyah*, but in practice the deliberations in the government about *Aliyah* policy and its timing continued even after the passing of the law. It would seem therefore that the Minister of the Interior was permitted to prevent the entry of a Jew who had arrived in the country and was requesting entry solely for the reasons listed in the law; but the government (and the minister) had a wider discretion with regard to initiating *Aliyah* or active assistance in bringing eligible individuals to Israel. This discretion therefore went beyond these reasons.

It is important to note that in the deliberations on the Law of Return there was no debate about ***the very justification*** for preference for Jews in *Aliyah*. This was self-evident. The question was: ***Who should decide*** about *Aliyah* eligibility and about its limitation? The concern was not only with respect to the unjustified limitation of the principle of freedom of *Aliyah*,

but rather with respect to the abuse of the power given to the government or to one of its ministers or with respect to the generation of bureaucratic difficulties. The concern about the abuse of power was based on the objections raised against *Aliyah* policy in the past: the fear that the authorities would prefer to bring their political or social associates and would prevent or limit the *Aliyah* of others.[20]

We will conclude by briefly addressing Article 4 of the law, the importance of which will become clearer later. Article 4 states:

> ***Every Jew who made** Aliyah **before this law came into effect, and every Jew born in the country either before this law came into effect or afterwards, is to be treated as one who made** Aliyah **according to this law.***

This Article creates a fiction in that it includes in the group of *olim* according to the Law of Return three different groups of Jews who are not *olim* according to the law in the normal sense of the word: a) Jews who ***made** Aliyah **before*** the law; b) Jews who ***were born*** in the country ***before*** the law; c) Jews who ***will be born*** in the country ***after*** the enactment of the law. Whereas the first two groups were "static," and their members could be identified at the moment of the law's passing, the third group was dynamic and not limited in time. The justification for this provision was that it created a sort of common destiny among Jews. Thus the right of return of one who has used it in the past was symbolically equated with the right of *olim* in the future. The article created a fiction which applied the law to past generations and future generations alike. This article, when read together with Article 2 of the Citizenship Law (see below), meant that the acquisition of citizenship by virtue of the Law of Return did not necessarily require the applicant to be an "*oleh*." Every Jew ever born in Israel received citizenship by virtue of the Law of Return.[21] A reservation regarding this article was raised by MK Meir Wilner, who claimed that the logic of the article became clear when one combined it with the provisions of the Citizenship Law (which by now was separated from the Law of Return), and that it had a serious impact in that it distinguished between the automatic granting of citizenship to Jews

and the conditional granting of citizenship to Arabs born in the country before or after the law.[22]

At the end of the deliberations in its first reading it was agreed to "abbreviate procedures" regarding the Law of Return in order to enable the ratification of the law the next day. Before that, it had been decided to separate the Law of Return from the Citizenship Law, some of whose provisions were controversial, and which was passed only two years later. The Law of Return did come up for a second and a third reading the next day, and was unanimously accepted by the Knesset—after a discussion about some reservations (most of which were dismissed)—and with a great sense of celebration. Despite this feeling, the Law of Return was ***not*** defined as a "Basic Law," and Ben-Gurion rejected a proposal to entrench it (that is, to limit the power of a future Knesset to change the law). This was because the law was ratified a short time after the Harari decision, which suspended the adoption of a constitution. Ben-Gurion did not wish to return to this debate and to enact entrenched laws.[23]

2.3 The acquisition of citizenship by virtue of return as opposed to naturalization based on the Citizenship Law

In order to obtain a complete picture of the arrangements concerning *Aliyah* and the naturalization of Jews in Israel, it is also necessary to examine the provisions of the Citizenship Law, which as we have said was passed only in 1952. The Law of Return itself does not deal with the granting of citizenship, but rather only with *Aliyah*. The Citizenship Law completes the formal arrangements and states in Article 2(a) of the law: "Every *oleh* by virtue of the 1950 Law of Return will be an Israeli citizen." Article 2 was interpreted as the ***immediate and automatic*** bestowal of citizenship on anyone defined as an "*oleh*" by the Law of Return.[24] Apart from citizenship by virtue of return, the Citizenship Law establishes additional mechanisms for acquiring citizenship: citizenship by virtue of residence in Israel (Article 3) was the primary channel through which Arabs who were citizens under the British Mandate and remained residents in Israel received citizenship.

Citizenship by virtue of birth (Article 4) was granted according to the *ius sanguini* according to which an Israeli citizen passes citizenship on to his/her children.[25] In addition to these routes, in which citizenship is granted automatically on the basis of certain factual conditions which the individual satisfies, the law states in Article 5(a) the conditions for the naturalization of an adult. Article 6 exempts certain categories of people from satisfying some or all of these conditions. Article 7 makes it possible to relax the conditions for the naturalization of the spouse of an Israeli citizen, or of one who applies for citizenship and satisfies the conditions of Article 5(a) or is exempt from them. Article 8 of the law states that the naturalization of an individual grants citizenship to those of his/her minor children who were in his /her custody or who were residents of Israel or of territory occupied by the IDF on the day of the parent's naturalization. Article 9 enables the Minister of the Interior to grant Israeli citizenship in certain circumstances.

It should be noted that while the Law of Return deals with the ***right*** to make *Aliyah*, the Citizenship Law distinguishes between automatic citizenship and naturalization based principally on the ***broad discretion*** of the Minister of the Interior. The conditions established in the law structure his discretion, but the law states explicitly that the decision to grant citizenship is constitutive, and that not everyone who satisfies the conditions stated in the law will in fact be naturalized. Likewise the law requires the naturalized individual to swear loyalty to the state.[26]

C. *Aliyah* policy in the State's first decade

With the Proclamation of Statehood on the 5th of *Iyyar* 5708 (May 14th, 1948), and despite the War of Independence being waged against the armies of the neighboring Arab countries, the gates of the country were opened wide and a diverse and extensive *Aliyah* began to flow into Israel. The situation in which the Jewish community was struggling with the British government to permit the entry of Jewish *olim* had come to an end. The State of Israel invested considerable effort and resources in order to facilitate *Aliyah*

and in order to integrate those who arrived, while bearing the entire burden of the monetary expenses incurred in this titanic enterprise. Indeed, after the Proclamation of Statehood the tide of the *Aliyah* exceeded the expectations. In the thirty months between the Proclamation of Statehood and the middle of 1951, more than half a million Jews made *Aliyah* (15,000-20,000 *olim* per month). Thus, over the course of the first three years of the country's existence the Jewish population in the country was doubled.[27]

Israeli foreign policy in the first years walked on a tightrope between East and West. With the intensification of the Cold War this was no easy task. One of the important goals of the nation's relations with the countries of the Communist Bloc was to obtain permission for the *Aliyah* of Jews from Eastern Europe. In Eastern European countries Foreign Ministry personnel collaborated with people from "The Institute for *Aliyah*." Some of them did so in the context of their diplomatic work in the same countries and some of them did so secretly. The subject of *Aliyah* was linked more than once with trade agreements in order to conceal the giving of a bribe to enable the departure of Jews. These agreements, which involved very large sums, could not take place without the assistance of the Joint, which was the primary financing body. From 1950 onwards Israel clearly aligned itself with the Western Bloc countries, and this had a decisive impact on the continued *Aliyah* from the Communist Bloc countries.[28]

The activity of the Foreign Ministry in Islamic countries was completely different. These countries identified with the Arab struggle against Israel and saw themselves as being in a state of war with the young state. Moreover, nationalist movements began to awaken in the Muslim countries at this time, and the treatment of the Jewish communities in these countries gradually began to deteriorate. In these cases contact was maintained through France or through Britain, depending on which of them controlled the Arab country in question.

The first wave of *Aliyah* brought with it mostly *olim* from the displaced persons camps in Germany, Austria and Italy, who had been saved from the atrocities of the Second World War.[29] After October 1948 a new wave

of *Aliyah* began, which almost completely emptied entire Diaspora communities.[30]

While in Israel the large *Aliyah* had been eagerly awaited, there was insufficient preparation for it. The conditions of war and the disrupted economy greatly impeded the absorption of the multitudes of *olim*. For the purposes of temporary housing, immigrant camps were built in the abandoned British Army camps, and tents and shacks were acquired.[31] In light of the situation, the government discussed the question of limiting *Aliyah*. The Minister of *Aliyah*, Hayim-Moshe Shapiro (NRP), warned against an uncontrolled *Aliyah*. Shapiro wished to make Aliyah dependent on the securing of sources for its funding:

> There must be some regulation of the *Aliyah*. A kind of regime under which not everyone who wants to can load Jews up onto a rickety boat and bring them to Israel even if they are eighty years old. This is not a regime of *Aliyah*, this is a regime which will inevitably lead us to catastrophe, if people getting off the boat now roam without a bed and without a mattress and without a blanket. […] I am also in favor of a large *Aliyah*, but depending on which *Aliyah*, how it is directed, and how it is chosen.[32]

To those who insisted on limitations, Golda Meir(son) objected fiercely:

> There is a state which was founded for nothing else besides the absorption of *Aliyah*. And if it was not founded for this reason, it is not necessary. There is no place for a debate on limiting *Aliyah*.[33]

And indeed, the waves of *Aliyah* continued. They were not preceded by planning at the executive levels of the government, in discussion rooms or by other bodies. This is because the contacts took place in dozens of places simultaneously, and it was not possible to predict when and where the gates would open and what would be the number of those leaving.

The *Aliyah* continued off and on throughout the 1950s as well.[34] Following the difficulties faced by the previous mass *Aliyah*, the government and the Jewish Agency decided to limit *Aliyah* and to filter it based on

the criteria of age, health and fitness for productive labor; but with respect to countries where there was a danger to the lives of Jews or where there was a fear that the exit gates would suddenly close, these limitations were removed.[35] Accordingly, the communities from the Islamic countries and from the communist countries, where Jews were persecuted, were included in the category of "rescue *Aliyah*" and were not limited. Nonetheless the decisions about which country was a country in distress and which community was more urgently in need of rescue were difficult and the subject of constant debate within the government.[36]

In conclusion: While the official policy was that "the State of Israel will be open to Jewish *Aliyah* and *kibbutz galuyot*," nonetheless some members of the government and the Jewish Agency objected to ***bringing*** a large *Aliyah* all at once, without limits and without regard for the personal and economic situations of the *olim*. Those who dissented believed that it would be wrong for the government to ***initiate*** a mass *Aliyah*, since it lacked the capacity to ensure the conditions essential for their absorption. Since only a minority of the *olim* arrived independently and without the assistance of the state, the opponents of unlimited active initiation of *Aliyah* insisted that the scope of *Aliyah* fit the absorption capacity. But the implementation of decisions regarding the limitation of *Aliyah* in the first decade of the country's existence was characterized by inconsistency resulting from the consensus that it was unacceptable to abandon communities in danger and on account of the inability to determine the extent of distress and the urgency of bringing each community.[37] In the end, the *Aliyah* to Israel continued in the first years almost without limit. The State of Israel not only permitted almost free *Aliyah*, but also offered assistance during all of its stages: from encouraging entire communities to pull up their roots, to financing travel expenses, to dealing with the absorption processes in Israel. Not only Zionist ideology accounts for this situation, but also the pressure of time. The leadership acted as if it had before it a one-time opportunity that was likely to come to

an end at any moment. The fear that the "iron curtain" would come down and would block the path of large Jewish communities was very present in the minds of policy makers. The dimension of time was also of the essence with regard to developments within the State of Israel. Ben-Gurion sought to solidify a Jewish majority in the country as quickly as possible in order to defeat diplomatic decisions that would be likely to harm the young state.[38]

It is interesting to note that, in all of the discussions on the subject of *Aliyah* policy and the connection between *Aliyah* and optimal absorptive capacity, there was almost no mention of the provisions of the Law of Return! The governments of Israel did not see themselves as prevented by this law from maintaining an immigration policy which limited the facilitation of *Aliyah* and its active initiation. This subject deserves special emphasis. The Law of Return carries with it a substantial symbolic meaning, but mostly it is a clear declaration that there will be no legal power in Israel to impose a prohibition on Jewish *Aliyah*, such as had existed during the Mandate period. According to this reading, the truly binding effect of the law pertained to instances of Jews who arrived on their own and knocked on the gates of the State. The law was meant to rule out a repetition of the situation which took place during the Mandate government after the issuance of the White Paper.

Nonetheless, *Aliyah* was based to a large extent on the aid extended by the government agencies and at times even began at their instigation. This aid and initiation were not based on the principle of return alone, but rather on its combination with the ceremonial declaration that one of the purposes of the State is ***to act to gather in the exiles***. That is, the State of Israel interpreted the Law of Return as granting it ***legal freedom*** to apply a policy of *Aliyah* facilitation or assistance which would suit its needs, even if ***politically and publicly*** it could not always act according to its wishes on this issue. In other words: the Law of Return does not make discussions of immigration policy with regard to the *Aliyah* of Jews and of individuals eligible for return unimportant or unnecessary. We shall return to this important topic later.

Chapter Two

The Principle of Return: Presentation and Justification

A. Introduction

The Principle of Return states that it is acceptable and correct in the framework of Israeli immigration policy to prefer members of the Jewish people. One form of this preference is the principle which today establishes in the Law of Return that "every Jew has the right to come to this country as an *oleh*." The principle of return is distinguished from the question of ***specific arrangements*** as they are currently stated in the Law of Return, the Citizenship Law, and in regulations regarding Jews and other "individuals eligible for *Aliyah*." In this chapter I will present the justification for the principle of return while dealing with the primary objections raised against it.

We have seen that awareness of the tension between the principle of return and a neutral policy of immigration accompanied Israeli legislators from the beginning of the legislative process. Justifications for a principle of return which is not neutral and which leads to a preference on the basis of ethnicity were proposed in the opinion given by Warhaftig, in Knesset proceedings, and in presentations of the Law of Return in Israel and elsewhere in the world. Harsh criticisms of the law and even statements labeling it as a racist law were voiced in certain circles as early as the 1960s. But in recent years both the justification (even if it is at times qualified) and the criticism have been the subject of more systematic examination.[39] I should say at the outset that the Supreme Court, which consistently applies the principle of equality within the State of Israel, has stated that the Law of Return is different, since it deals with "giving the key to the house," and therefore the principle of equality in the strong sense is inapplicable to the law.[40]

Nonetheless, concerns about a situation in which the Law of Return would be declared unconstitutional because it conflicts with the principle of equality are frequently voiced in discussions about the adoption of a constitution for Israel, and various proposals are produced which are intended to prevent such a situation from evolving.[41]

The main justification for the principle of return is based on its being part of the immigration policy which applies to foreigners seeking entry into the country, and therefore it is not subject to the obligation of the state not to discriminate between its citizens on the basis of ethnicity or religion. But is such a distinction really valid? In terms of international law, the answer is yes. But in ethical terms it must be conceded that an *Aliyah* policy which grants systematic preference to Jews over others, and especially a policy which grants Jews the right to come to Israel and receive immediate and automatic citizenship, has an enormous influence on the welfare of the country's residents. ***First of all***, such a preference influences natural demographic processes, which would perhaps increase the proportion of the Arab minority in the population of the state to the point of being a majority. ***Second***, the allocation of resources for *Aliyah* and absorption is likely to be at the expense of the allocation for improving the welfare of the country's residents and citizens. ***Finally***, the prevalent assumption in international law that states possess almost unlimited authority to establish immigration policy is itself morally debatable, mostly on account of considerations of global justice and on account of a concern about inequality among potential immigrants.[42]

This discussion is divided into two parts: The first part will present the justifications responding to the claims that ethics, or international law, prohibit a state from passing laws that give preference in immigration to members of the majority community. In the second part we will present those justifications that respond to the claims that even if it is permissible for states in general to act in this way—it is forbidden for Israel, since at the very outset Jews had no right to political self-determination in (part of) the Land of Israel, and therefore there was no justification for the very creation

of the state by virtue of whose sovereignty it is permissible to give preference to the members of the majority community living in it. This is especially the case since the Law of Return is conjoined with the refusal to permit Palestinians to return to their homeland and a failure to recognize their "right of return." Dealing with this question requires a response not only to the question of the adoption of the principle of return in the state's legislation, which is an expression of the Jews' right to self-determination in the place in which they are now living, but also a response to the objection that Zionism, which brought Jews to Israel and made them a powerful ethnic factor here, is an "original moral sin."

B. Justifications for the principle of return as a law of repatriation

We have seen that the aspiration to gather in the exiles and to encourage Jewish *Aliyah* stood at the center of the Proclamation of Statehood and has always occupied a central place in Zionist and Israeli policy. But is it a legitimate aspiration? All agree that democracy in general, and liberal democracy in particular, must treat all of its citizens equally. That being said, international law recognizes immigration control as one of the important aspects of state sovereignty. Sovereignty cannot justify every kind of immigration policy, but in general someone who is not a citizen of a country does not have the ***right*** to receive citizenship, and someone who is not a citizen or a permanent resident does not have the ***right*** to enter a country.

Despite this broad principle, it is also generally admitted that laws of immigration cannot discriminate and that the reasons for decisions regarding immigration should not be arbitrary. It is therefore important to ask directly: Is the desire to give preference to the members of the majority community (or of other communities living in the country) over members of other groups a legitimate consideration for immigration policy? Theorists are divided on this subject, but it would seem that political philosophy in general supports such a preference, for the same reasons that are the basis of the right to self-determination and the right to preserve the cultures of

communities. There is also basic support for such a preference in the norms accepted both by international law and in the practices of many countries.[43]

1. Self-determination and preserving the character of a community

The main argument in favor of the principle of return is based on the principle of self-determination. This principle recognizes the right to self-determination of groups and even the notion of the "nation state"—a state in which the ethnic majority group realizes its right to self-determination. Indeed, the Zionist narrative, which was adopted by the State of Israel, and which was supported by UN decisions, views the State of Israel as the place in which the Jewish people realizes its right to self-determination.

It is important to remember that the claim in favor of the Jewish people's right to self-determination specifically in (part of) the Land of Israel was not self-evident, since at the beginning of the Zionist enterprise relatively few Jews lived in the country, and the right to self-determination was usually intended to support the will of the people living in a country to cast off the yoke of foreign power (whether this power was colonial or the rule by another people native to the region, as was the case in Europe after the First World War). But the force of this argument against the resolve of the Jews to actualize their right to self-determination precisely in (part of) the Land of Israel was greatest during the first stages of the Zionist enterprise, when this argument was directed against the beginning of Jewish *Aliyah* and against the decisions that facilitated it. The success of the *Aliyah* movement led to a situation in which there was a strong Jewish presence, which resulted in international recognition of the right of the Jewish people to self-determination in (part of) the Land of Israel in 1947. The argument justifying self-determination for Jews precisely in the Land of Israel should therefore distinguish between the first period, before there was a prominent Jewish presence in the Land of Israel, and the second period, after such a presence was established. In my opinion, such a justifying argument—with respect to both periods—should rely not on biblical promise, but rather on

the ***persistent*** historical and cultural connection of the People of Israel to the Land of Israel, even though it was dispersed in exile for hundreds of years; on the fact that only in the Land of Israel has the people enjoyed political independence; and on the fact that it could not realize national self-determination in even one of the other places it which it resided.[44] I shall return later on to the argument justifying the creation of conditions for realizing the right of self-determination for Jews in the Land of Israel.

When we discuss the Law of Return (as opposed to the *Aliyah* activities of the Zionist movement before the founding of the state), and especially when we discuss the Law of Return today, the argument justifying the preference for Jews stems directly from the right of Jews to self-determination. This is because the State of Israel does in fact grant the Jews living in it unique advantages which are possible only in a place where the right to full state-level political self-determination is realized. One of the most important features of such a situation is a stable Jewish majority. Thus Israel is the only place in the world where Jews can live a full Jewish existence on all levels, political as well as economic. The public culture of the state is Jewish-Hebrew. The state language is Hebrew. The national holidays and the public discourse are inseparably linked to Jewish history and destiny. It is only in the State of Israel that Judaism is not "privatized" and can be part of persons' identity in their home as well as outside it; and only in Israel do Jews as Jews need to deal with the problems of war and peace and the use of political power to benefit all the members of the community (both Jews and non-Jews). The Jewish community in Israel has become the central and most prominent Jewish community in the world. The political, social and economic frameworks which the State of Israel has created are important mostly with respect to non-religious Jewish identity. Secular Jewish identity, which until only one hundred years ago was seen by some as a short-term and "hollow" alternative to a rich religious heritage, has gained a sphere of action for a Hebrew-Jewish existence which has continued to develop and prosper for several generations. The resurrection of the Hebrew language and a vibrant existence of Hebrew and Jewish creativity, which is not

limited to the observance of religious commandments, are real accomplishments. In Israel young people are growing up with an unmistakable Jewish identity even though they are not ritually observant and do not maintain a direct or continual connection with the Jewish religious establishment. While secular Jews living in other countries are subject to a real danger of assimilation, secular Jews living in Israel experience a flourishing of culture, literature, art, thinking and secular Hebrew creativity.[45]

It is important to emphasize that the right to self-determination, on the basis of which the founding of a Jewish nation-state and even the Law of Return are justified, ***is not*** a particularistic matter. There is no essential conflict between Zionism, as the national movement of the Jewish people, and human rights. Quite the opposite is the case. "The right to self-determination," the right to national belonging, to the expression of particularistic features of a society and the demand that others recognize and respect it—this is a universal right, recognizing the importance to all individuals of membership in their particular group. This is a universal right applicable to all human beings in the context of their national groups, and it is even a fundamental and central part of the very idea of human rights. Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESC) open with formal declarations of the rights of nations to self-determination. Article 1.1 of both documents reads:

> All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

We have seen, therefore, that the right of the Jewish people to self-determination is the right of Jews to live a full Jewish existence in national-cultural terms. These two rights—the collective right and the right of individuals—are likely to lead to the formulation of an immigration policy which gives preference to Jews and to permit a state to institute such preferences despite the presumption that even immigration policy should

maintain the principle of non-discrimination. This is the case both because of the need of the Jewish collective in Israel to continue to be a majority in its own country,[46] and because Jewish individuals have a distinct interest in the freedom to live in their national home and to contribute to its establishment.[47] The state is permitted to respect this interest by giving preference to Jews who seek to join its ranks. Both of these arguments were cited in Ben-Gurion's comments on the Law of Return.[48]

In contemporary political philosophy there is a debate over the question of preference for the immigration of members of the state's majority community not only with regard to "ethnic nation-states," in which a people defined as a unique ethnic community realizes its right to self-determination, but also with regard to "civic nation states"—countries such as the United States.[49] According to this argument every country, and every country's population, has a legitimate interest in preserving its cultural cohesiveness, and in enabling its citizens to bring to their country their relatives and people who share a common culture with them.[50] Thus, an immigration policy, according to this argument, is a legitimate mechanism to protect such interests.[51]

2. Affirmative action

A more narrow justification for the principle of return is based on the principle of ***affirmative action*** toward Jews who in the past suffered from conditions that denied them a place where they could realize national independence or defend themselves against the pressures of assimilation or from persecution, deportation or extermination. The advantage of this principle as a justification is that it is broadly recognized as a justifiable or even required exception, in certain circumstances, from the demand for equality.[52] Hence the State of Israel, with its special connection to the Jewish people, is permitted to employ a policy which ensures a favorable attitude toward Jews living in distress or subject to persecution on account of their Jewish identity.[53]

This kind of justification is relevant first and foremost with regard to Jewish refugees, who in the past knocked at the gates of different countries

and were not admitted. As such, it does not apply to the situation of Jews after the founding of the state. It is possible to expand this justification and to say that there is also an aspect of repairing past injustice in the fact that a Jewish state enables Jews, even if they are not refugees, to make amends for the past situation in which Jews were not permitted to choose to live in a place where the public culture was their own. Asa Kasher has limited this extension to the situation of ***establishing*** a nation-state. Kasher referred to this particular instance as "the case of Founding Fathers"—that is, the right of an individual who belongs to a minority group to be a "founding father" in the creation of egalitarian, political independence for his group. According to this argument the history of persecution of the Jews and the fact that they were a minority in several countries prove the necessity for creating an independent political entity for the Jewish people. This justification does not have to be based exclusively on the rationale of responding to past injustice in the lack of recognition of the individual's rights or of his/her ability to realize an equal opportunity. It can also be based on the more general utility of the inclusive social value of true equality of opportunities. That is, if populations which have been the targets of discrimination in the past are given a practical opportunity to realize their right to self-determination, not only will the inequality from which they suffered be corrected, but the general good will increase as well.[54] One question regarding this argument is: When does the period of "establishment" come to an end and the argument of affirmative action cease to be valid? Even if we say—as Kasher does—that we have not yet arrived at this point, the idea of the time-bound character of such a justifying argument is an essential part of it.

It would seem that with regard to the Zionist ideal of *kibbutz galuyot* and with respect to the principle of return, it is important to distinguish between the different stages of the Zionist enterprise on the one hand and the period after the state was founded on the other. In the founding stage of a nation-state for a people which did not previously have such a state, there is indeed a special justification for significant preference for the members of the ethnic group, which is intended to assist at the point of creating

the unique conditions for the generation and stabilization of the nation-state. This is the case both in regular circumstances in which a significant portion of the relevant ethnic group resides in the territory in which it intends to establish the basis for its state, and also in the situation in which the ethnic group was dispersed in exile and there was a need to commence the national enterprise with the gathering of the group in the given territory. At this stage the basis is one of "remedial justice." This is also the stage at which to discuss the question of the location of the self-determination for the Jews, and to justify not only their demand for autonomy in their place of residence but also their efforts to bring large numbers of Jews to the Land of Israel in order to create precisely there the basis for political independence for the Jews. As we have said, this effort requires a special justification on account of the potential harm to the native population, which may become a minority in its own country. Part of the justification for this is the necessity Jews had for one place in which they can avoid the risks of persecutions and the pressures of assimilation which they experienced as minorities.

Once a nation-state has been founded, the needs which stemmed from statelessness already find an answer in it. From that stage onward, only the protection of the wish of the community to maintain its cultural identity and allow members to join it can support the principle of return. This preference for members of the majority community is required in order to maintain its ability to conduct a full life of self-determination. This justification, even though its extent is likely to be narrower, is not limited in time, both with respect to the state itself and with respect to the rights of the members of the majority ethnic group.

The argument of "remedial justice" is essential in the first stage of creating the conditions for the realization of the right to self-determination, including the creation of a stable concentration of Jews in the Land of Israel. Nonetheless it can play a role also in the stages after the founding the state, so long as the realization of the right to self-determination is not otherwise ensured. Therefore I will return to discuss it again in the following pages.

3. International law

The claim that the Law of Return is not justified rests not only on ethical objections to illegitimate discrimination. There are also those who claim that it is in conflict with explicit provisions of international law. If this is in fact the case, then the demand that Israel abolish the principle of return gains additional force because, even though the norms of international law do not admit of direct enforcement, they enjoy a stronger status than "simply" ethical norms. However, an examination of international law on this issue does not substantiate criticism of the principle of return.

International law is generally understood to recognize in principle the sovereignty of nations. Control over immigration policy is one of the main characteristics of that sovereignty. The rule is that a nation is sovereign to decide when and how to grant its citizenship, and international law is not supposed to interfere with these decisions.[55]

Against this basic understanding, there are those who argue that a state's control over immigration contradicts the principles of human rights, especially freedom of movement. According to this argument, if we take the right to freedom of movement seriously, then a state is not permitted to prevent an individual or group of individuals from crossing its borders and settling in it. It would seem that this claim does not hold in terms of ethics,[56] but it is clear that it is not valid in terms of international law. A common interpretation of the provisions for freedom of movement in international human rights treaties limits the right of ***entry*** to the ***citizens*** of a state. Thus, for instance, the 1948 Universal Declaration of Human Rights, Article 13.2 reads: "Everyone has the right to leave any country, including their own, and to return to their country." The 1966 International Covenant on Civil and Political Rights states in Article 12.4: "No one shall be arbitrarily deprived of the right to enter his own country." There is, however, a debate about whether an individual's connection to "his country" refers only to citizens or to permanent residents as well.[57] This ambiguity certainly also permits a broader interpretation of an individual's connection to a *country* and not to the *state* in control of

it.[58] In any event it is clear that the norm ***does not permit the entry of any individual***. Article 3.2 of Protocol No. 4 to the 1950 Convention for the Protection of Human Rights, which was signed in 1963, states explicitly that the right of entry into a country is granted only to citizens: "No one shall be deprived of the right to enter the territory of a state of which he is a national." At the point at which the ***individual's right*** to enter ends, the ***state's right*** to determine who is permitted to enter comes into effect. It would seem, therefore, that the universal right to freedom of movement does not limit the state's freedom to control the identity of foreigners entering the country.

A stronger argument against the principle of return can be based on the right to equality, and especially on the prohibition against discrimination on the basis of race. The 1965 International Convention on the Elimination of All Forms of Racial Discrimination, which Israel signed in 1979, deals with this subject. Indeed, this document frequently serves as a main basis for claims that the principle of return contradicts international law. The Convention does not merely deal with racial discrimination, but rather prohibits discrimination on the basis of ethnic origin and religion. On the face of it, the convention also applies to the preference included in the Law of Return. But there are two exceptions to this prohibition: First, the document explicitly permits affirmative action in Article 1.4:

> Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

We have seen that there are those who rely on this exception in order to justify the principle of return. But for our purposes the explicit reservation

regarding immigration policy and the preference for immigrants from a certain group, cited in Article 1.3 of the document, is more relevant:

> Nothing in this Convention may be interpreted as affecting in any way the legal provisions of States Parties concerning nationality, citizenship or naturalization, provided that such provisions do not discriminate against any particular nation.

The usual interpretation of this article says that the Convention allows the preference of a certain group in immigration laws, but prohibits discrimination ***against*** a particular group.[59] This exception was inserted into the document precisely because its framers were very aware of the considerations that underlay such preferences and wanted to exclude them from the broad wording of the document. Not only is the principle of return not in conflict with international law, but the latter actually contains an explicit provision permitting it.

It is not surprising that this is the position of international ***law***, since we have seen that positions such as these may follow from the ***moral*** analysis of implications of the right to self-determination. While it is possible that international law would not recognize rights or the implications of rights for which a solid ethical basis can be suggested, it is difficult to imagine that international law would grant individuals rights of entry beyond those recognized in the accepted ethical analysis.

Moreover, the International Covenant on Civil and Political Rights does not grant individuals ***the right to receive citizenship***. This is despite the fact that it contains a general prohibition against discrimination, especially on grounds "such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[60] The ***right*** to citizenship is only included in the Universal Declaration of Human Rights, which is not a legally binding document, and it is not even clear to whom it is addressed, since it does not mention a specific country which is ***obligated*** to grant citizenship.[61]

It would seem therefore that international law is consistent in granting broad discretion to states in shaping their own immigration policy. Of course this fact does not confer legitimacy on any immigration policy whatsoever. But the Law of Return, according to this analysis, is the kind of policy decision that belongs to the realm of decisions which a sovereign state may make.[62] A state is entitled to balance a variety of considerations for the public benefit, and has the sovereign right to determine the group of individuals eligible for immigration on the basis of its own national interests. While the Law of Return imposes a fairly far-reaching obligation on the state, nonetheless, like all the laws passed by the Knesset, this is an act of the state in which elected institutions of the state choose to impose an obligation upon it. This obligation can change or be annulled in subsequent legislation.[63]

This analysis demonstrates that there is no unjustified discrimination among potential immigrants to Israel in the preference established by the Law of Return. Similarly, the demands that Israel must annul the Law of Return if it wishes to be considered a democracy which grants ***equality to all of its residents***, and especially to the Arab minority living within its borders, are unfounded. We have seen that giving preference to Jews in immigration—and especially the policy encouraging the immigration of Jews—can in fact affect the welfare and status of the Arab minority, but this in itself does not constitute unjustified discrimination. Israel ***may*** annul the principle of return, but ***is not required to do so*** on these grounds.[64]

4. The practices of states

One can find additional support for the fact that ethics and international law recognize immigration preference for the members of the majority ethnic group in a given country in the practices of numerous nations in the world, especially in Europe, where nation-states with a national, ethnic and cultural rather than simply civic basis are common. It is possible, of course, to claim that the very existence of such practices in and of itself does not represent a justification, since these practices might not be justified. But this

is a case not only of common practices, but rather practices which international bodies, including those concerned with human rights, have upheld. Immigration policy or naturalization policy which favors the members of the national Diaspora is a common occurrence in European democracies.[65] Immigration laws which clearly favor immigrants sharing the ethnicity of the country of destination are found in different forms in Europe, in countries such as: Germany, Finland, Greece, Ireland, Poland, Hungary, Bulgaria, Slovakia, the Czech Republic, Slovenia, Turkey and Croatia.[66] Tensions related to the desire to preserve an ethnic majority in one state, at least when the second ethnicity has its own adjacent state, are not unique to Israel and to the Jewish-Arab conflict.[67] As we have said, the idea that there would be two nation-states, in which each of the nations had an ethnic majority in order to ensure it the control over immigration and defense, was a basic consideration in the partition resolution which was approved in the UN on the 29th of November, 1947.

C. The historical argument against the principle of return

It is no accident that the desire to control the make-up of the population and to ensure a certain degree of cultural unity in it is an aspiration common to most countries, especially those which are preferred immigration destinations. In any event it is clear that it is unjust to make such complaints ***only*** against the Israeli principle of return, without leveling the same measure of criticism against the similar immigration arrangements of other countries. It is somewhat outrageous that Zionism is the only national movement which is described by so many as a kind of racism, and that racism is consequently ascribed only to the principle of return.

For this reason, those objecting to the principle of return would deserve a better hearing if they would take a step back and complain, not against Israel's right as a nation-state to pass a law such as the Law of Return, but rather against the very legitimacy of the Zionist enterprise and of the founding of the state. In this way one can claim that even if an "ordinary"

nation-state is justified in implementing a certain degree of preferential treatment for the members of the majority community, this claim is not valid for the State of Israel, since its very foundation as a nation-state is a kind of racism. This objection, specific to the nation-state of the Jews, is based on the claim that the Zionist movement by its very nature is immoral, and that the state was "born in sin." This is because it violated, and continues to violate, the right of Palestinians to self-determination in their homeland, and because of the way in which it displaced—and continues to displace—those Palestinians who lived in the state's territory and became refugees following its foundation.[68] A systematic and comprehensive treatment of these claims would of course go beyond the scope of this position paper, but I will nonetheless mention the principal arguments against these two objections: the claim of the illegitimacy of the founding of the state and the claim of the lack of justice in the principle of return, in light of Israel's resistance to the return of Palestinian refugees to their homes in Israel.

1. The status of the principle of return in light of the case for the illegitimacy of the founding of the state

The Palestinian and Arab claims about the illegitimacy of Zionism and of the Jewish state, due to the harm they caused to the local Arab residents who were the majority in the country, were already raised in an eloquent and consistent way at the Paris Peace Conference, after the First World War. These arguments were voiced repeatedly—and usually rejected—at countless international forums up until the partition resolution and even afterwards. Due to this situation, the Zionist leadership was forced to deal with these claims for many years. Accordingly, those who claim that the Zionist leadership ignored the subject and depicted a situation in which there was "a land without a people" here waiting for "a people without a land" are in error. Their positions were varied, but the basic assumption of most of the leaders of the Zionist movement was that the realization of the Jews' right to re-establish political independence in their historical homeland would not infringe, or at least would not have to infringe, on the vested rights of

the non-Jewish residents of the country. The leaders believed that while the Arab residents of the country had lived here for a long time, it was not at all clear that they were a separate people and not part of the larger Arab nation, since they had never enjoyed a separate political independence. With respect to the detrimental change in their status that would follow upon their ceasing to be a majority and becoming a minority, a variety of answers were given. It was said that the Arabs would also benefit from the fruits of accelerated development which the Jews would bring to Palestine, and that the Jewish state would safeguard their rights, including their collective and religious rights, so that their situation in the Jewish state would not be worse than it had been under the Ottoman Empire. On the contrary, it stood to reason that their situation would be improved.

Not surprisingly, the Palestinian Arabs did not believe that these claims were particularly strong. It was natural for them to resist becoming a minority in their own country and to refuse to accept the processes which would bring this about. In the end, the primary argument of the Zionists was that the Jews had no other choice. Their need for one place where they could control their own destiny, and the fact that their only historical connection was to Zion, forced them to act in a manner which was likely to upset the sense of belonging and ownership of Arab residents of the country. This action was justifiable if it was done with a real effort to minimize this injury so that it would not exceed that which was necessary in order to realize the right of Jews to political independence in their homeland.[69]

I am among those who believe that the adamant Arab resistance to the establishment of the Jewish state, even in only a part of the Land of Israel, was understandable and even predictable. At the same time, I do not accept the claims that deny in principle the justification of the Zionist enterprise: that the Jews are not a people, that they have no connection to the land, or that they are a colonial or imperialist entity. In the first period of the Zionist enterprise, when the country was under the control of the Ottoman Empire, Jews were free to come and settle in it. The Arab residents of the country did not then enjoy political independence and they did not have a vested right

to expect that Jews would not try to re-establish their historical homeland—as long as the local residents were not disenfranchised and their rights were not infringed upon. After a critical mass of Jews had been created in the Land of Israel, it is possible to justify their right to self-determination in part of their historical homeland as well.[70]

We should also mention that the right of the Jewish people to a national existence in its own country and its historical connection to the land not only found expression in the Zionist narrative, but also received recognition in international documents. In the Balfour Declaration of November 2nd, 1917, the British government declared that it viewed "with favor the establishment in Palestine of a national home for the Jewish people, and will use their best endeavors to facilitate the achievement of this object." The wording of the Mandate document concerning Palestine which Britain received from the League of Nations stated that through the declaration, "recognition has thereby been given to the historical connection of the Jewish people with Palestine and to the grounds for reconstituting their national home in that country."[71] Article 4 of the Mandate document spoke of the establishment of an appropriate Jewish agency, which would represent the Jewish people in all the countries of the world. This also reflects the recognition that it is the entire Jewish people which is thus fulfilling its right to self-determination, and not only the Jewish community residing in the Land of Israel. Another document worth mentioning is Churchill's 1922 White Paper, which recognized an "ancient historical connection" between the Jewish people and the Land of Israel, in virtue of which they are in Palestine "of right and not on sufferance."[72] We should also mention that the report of the UN committee which recommended the Partition Plan in 1947 foresaw that the Jewish state would encourage the mass immigration of Jews into its territory. The partition into two countries seemed essential, among other things, because of the need for free Jewish immigration.[73]

While the Arabs claimed that all of these documents were based on the violation of rights, on error, on imperialism or on some other injustice, and that Britain and the League of Nations were not entitled to grant to the Jews

what was not "theirs," the mass immigration of Jews to Palestine certainly was not a colonial appearance of a belligerent collective, which arrived without any recognized claim and expelled another people from its land.

My purpose here is not to reiterate these claims, however. Rather, it is to state that following the Partition Resolution of the UN Assembly, the decision on the part of the Arabs to resist it by force in order to prevent the establishment of a Jewish state was an unjustified act of war, and the Palestinian attempt to force Israel to accept exclusive responsibility for the outcome of that war lacks all moral or legal foundation. He who goes to war undertakes a risk. He cannot complain if he then loses it, and if the results of the loss are painful. The Independence War was a war of survival for the Jews and the Jewish state. Israel was accepted as a member of the United Nations, and its sovereignty as the nation-state of the Jewish people was recognized after the war, after the creation of the refugee problem, and after Israel refused to permit them to return to its territory.[74] In the framework of a peace agreement between Israel and its neighbors, including the Palestinians, it is important to try to settle the unresolved questions. These include the issue of refugees, but they no longer include the question of Israel's very right to exist as the nation-state of the Jewish people in recognized and secure borders. The claim of the illegitimacy of the foundation of the state cannot be the basis for rejecting the principle of return.

2. The Law of Return and the Palestinian "right" of return

The foundation of the state did in fact cause much suffering for the Palestinians, including the uprooting of hundreds of thousands of people from their homes. This displacement, and Israel's refusal to permit the return of most of the refugees to its territory, form the basis of an additional argument against the principle of return: By means of this principle, so it is claimed, Israel allows the members of the Jewish people—or according to the hard-liners: the members of an imagined collective or of a religious community—to settle in a place in which they supposedly have a connection that is two thousand years old, while denying the right of Palestinians, who

fled their homes or were driven out of them just sixty years ago, to return to their homes. According to this claim, the Jewish "return"—even if it is not just a myth—has no legal validity, while the Palestinian refugees and their descendants have the ***right*** to return to their homes by virtue of international law.[75]

The discussion of the Palestinian claim that they have a "right" of return to Israel is of course beyond the scope of this position paper and we shall devote a separate paper to it.[76] But it is important to make two things clear: ***First***, there is in fact an essential similarity (and also some substantial differences) between the Jewish demand for return and the Palestinian claims or dreams. It would be a mistake on the part of the Jews in Israel to belittle the importance of the emotional and national force of hopes for return as a part of the formative identity of the Palestinian collective. But the right of (Jewish) return, as recognized in the Law of Return, is a right bestowed by virtue of the sovereignty of the State of Israel (despite the "natural" rhetoric of the state's leaders at the time the law was passed). The Palestinian State which will be established may, if it so chooses, recognize the right of return of Palestinian refugees and their descendants to within its borders. Laws such as these are distinct from the myths and narratives pertaining to the connection of individuals or of a people to their historical homeland. ***Second***, the claim for the right of Palestinian refugees to return to Israel sends us back to the problem of the conflict between the two peoples, to the circumstances of the War of Independence, and to the management or resolution of the conflict. The State of Israel arose following this conflict by virtue of its victory in the war and in the context of the declared solution of "two states for two peoples." This solution was supposed to grant Israel control over its immigration, and such control was part of the historical reasoning behind the Partition Resolution. The Palestinians and the Arab states sought to thwart this solution. It is difficult to understand how those who criticize the Law of Return for this reason expect acceptance of the idea that Israel, precisely because of its victory, should lose its control over immigration and be forced to receive into its borders as a matter of right a population

the size of which would make Palestinians the majority in the state. Even if their return would not make the Palestinians into the absolute majority in the State of Israel, but rather would only increase their portion of the population in a significant way, it would be justifiable and prudent for Israel to resist this return, since it would for all intents and purposes make Israel into a bi-national country, in which the relations between the two national groups would be based to a large extent on an enmity and mutual suspicion rooted in the painful remnants of the past.[77]

We should reiterate the fact that the Partition Resolution was based on repeated assessments that the two populations could not live together in one country since they had not come to an agreement on key issues such as defense and immigration. It had been clear that a bi-national situation with no foreign rule would lead to a continual state of civil war. Both the Peel Commission and the majority of UNSCOP had determined that only the principle of "two states for two peoples" was likely to address the complicated political situation. These basic givens have not changed. Conditioning legitimacy for the principle of the return of Jews to Israel on an Israeli agreement to recognize the Palestinian "right of return" would be tantamount to expecting Israel to relinquish the ability of the Jews to realize in it their right to political self-determination.[78]

D. A time limit on the principle of return?

We have seen that one of the main differences between the argument based on self-determination or cultural preservation and the argument based on remedial justice or "affirmative action" is that the latter is by nature limited in time. Equality is the accepted principle, and "affirmative action" is justified or necessary only as long as the results of the past inequality which it is supposed to redress are operative and visible. In terms of a continuing justification for the principle of return, this difference is one of the virtues of the argument based on self-determination. True, once a nation-state is created where there is a stable majority of members of one group, then the

will of that collective to secure its continued existence does not justify the taking of steps which were justifiable for the purpose of the initial foundation of the nation-state. But this change does not diminish the legitimacy of the nation-state's recognition of the right of individual members of the group to live a full national existence in their historical homeland by means of their being given preference in immigration policy.

Nonetheless, there are those who argue that the Law of Return should only fill a temporary role in the history of the State, and that a date should be set after which Jews should be permitted to settle in Israel only within the framework of its general immigration laws (whether or not the claim is based on the principle of affirmative action).[79] According to their way of thinking, the principle of return must be limited to that period in which it is still needed in order to remedy the injustices of the past (even if this period might be prolonged). At least in principle, a date must be set on which the Law of Return is supposed to expire. Such a claim can also serve to support the idea that there should be a dynamic development in Israel's identity, combining the belief that the State of Israel was founded in order to permit the ***Jewish people*** to fulfill their right to self-determination, and the claim that at a certain point it must become a "state of all its citizens," so that the collective which will enjoy the right to self-determination from then on will be the ***Israeli*** collective (adherents to this opinion differ regarding whether the collective should be Jewish-Israeli or perhaps Israeli-civic).[80]

At least some of the arguments which I have presented here connect the principle of return to the right of the Jews to self-determination without a time-limit. This is the case certainly, and perpetually, with regard to the interest of the Jews to choose to live in the only place in the world where the public culture is Jewish and Hebrew and in which their national and cultural group enjoys self-determination and the ability to control its own security. Therefore those who claim that this right should be limited in time are mistaken, for three reasons: ***First***, even with respect to an individual who might have preferred to live in Israel, but chose at first not to do so, it would be justified to permit him the realization of this possibility. ***Second***, Jews are

continually being born and become adults in the Diaspora, and their right to decide that they wish to live in their nation-state needs to be preserved. The fact that their parents did not make use of their right to live in Israel should not prevent them from choosing this for themselves. This is true for Jews who never were citizens or residents of Israel, but now it is also true for children whose parents were Israelis but who themselves never received Israeli citizenship. For them the connection to Israel can be not only to the nation-state of their people, but also to the "landscape of the homeland" of their parents and grandparents. ***Third***, many Jews have extended family in Israel who are not closely enough related to justify "ordinary" preference in immigration, yet this is a consideration supporting the general preference for Jews in the immigration to the nation-state of their people without a time-limit. The aspiration to allow Jews to live alongside their extended families in their nation-state is a part of the wish to enable them to realize a full national and cultural existence. But beyond this, the collective itself has a continuing right to act in order to reinforce and preserve the conditions which will make self-determination in its homeland possible. All such goals should of course be pursued within the framework of the limitations imposed by international law and human rights. As we have seen, the first condition for Jewish self-determination is holding on to a stable Jewish majority in the State of Israel. This is not, in and of itself, a claim based on corrective justice: the State of Israel exists, it has a Jewish majority, and the Jewish people realize their right to self-determination within it. But the preservation of the Law of Return is also required in order to prevent processes which may lead to the actual danger of the recreation of a situation in which Jews will not enjoy effective self-determination even where they currently do so.

In other words, the arguments on behalf of the principle of return as founded on the principle of self-determination can therefore apply even after the strength of the argument based on corrective justice or of "affirmative action" is diminished. We have seen that this is true not only with respect to Israel, where a revolution was needed in order to establish a nation-state

for the Jewish people, but even in ethnic or civil nation-states that wish to preserve their cultural character without such a revolutionary historical transition period.[81]

E. Conclusion

It is worth emphasizing that this continuing justification for the Law of Return is based on the fact that the relevant collective which defines itself in Israel is not the Israeli collective but rather the entire Jewish people. It is not for nothing that the Law of Return is continually cited as one of the most important elements of the "Jewishness" of the state. Nonetheless, the Law of Return in and of itself does not grant rights in Israel to Jews who are not Israeli citizens. It only grants them the right to choose to live in Israel and to acquire Israeli citizenship. Israel is a democratic country, and every democracy is, in an important way, "a state of all its citizens" and only a state of all its citizens. The Israeli "*demos*" is indeed that of the group of all its citizens, Jews and non-Jews alike. But as we have seen, continuing relationships between ethnic nation-states and their cultural Diasporas are an important aspect of modern life. There is no contradiction between the fact that in Israel there is on the one hand a "civic nation" made up of the entire group of Israeli citizens, and the fact that members of several separate ethno-cultural nations live here, and that the only people that enjoys political state-level self-determination in Israel is the Jewish people.

In either case, the question of whether the Law of Return or the declaration of the principle of return should be abolished has an additional important dimension: the symbolic. This dimension does not depend on the question of whether a law is necessary in order to justify the policy of preference for Jews in immigration to the State of Israel. As we shall see, this has far-reaching consequences in the overall approach to the Law of Return. The demand that Israel abolish the Law of Return is not only, or even mostly, a matter of a demand to change immigration policy or the specific legal arrangements for return. We have seen that Israel could maintain a policy of

"openness to Jewish *Aliyah*" without such a law, and this is what it did even before the law was passed. Therefore it is possible that abolishing the Law of Return would not lead to a significant change in Israel's immigration policy for Jews.[82] But on account of the enormous symbolic importance of the law, the fact of its abolishment or even the fact of a declaration in principle that the principle of return is subject to a time-limit would be highly significant statements. Their significance would be that the State of Israel no longer sees as one of its primary purposes the creation of a place where Jews can choose to live a full Jewish existence, in which there is no need to "be a Jew in one's home and a citizen in public," and in which the "default culture" is Jewish and Hebrew; a place which will serve as a refuge for Jews who are persecuted for their Judaism; a state in which Jews can be certain that they have a right to enter and live there as full members of the community. The State of Israel may decide that this is what it wants to do. If there will be a majority that so chooses—so be it. But I do not believe that such a step is desirable or required by any norms of equality, human rights or the laws of nations.

Chapter Three

Specific Arrangements Pertaining to Return

A. Introduction

We have seen that the principle of return, in and of itself, does not provide a complete description of Israel's immigration policy with respect to Jews and their family members, or of existing realities in this area. Moreover, the justification for the principle of return does not necessarily justify the details of the existing arrangements as well. In this chapter these arrangements will be reviewed with respect to three main points: ***first***, the identification of individuals eligible for *Aliyah* according to the law and current practices; ***second***, the different aspects of the right to make *Aliyah*; ***third***, the policy and practices of encouraging *Aliyah*.

In the state's first years, the debate about *Aliyah* policy did not even address the question of the religious or ethnic makeup of the waves of *Aliyah*, since they consisted almost entirely of Jews and members of their families. The debate in Israel about "who is a Jew" began mostly with regard to ***registration***, identity and integration in the country. The main reason for this is that those who wished to come to Israel and to fit in were mostly people with a real connection to the Jewish people, who wanted to find their place in the Jewish state. The situation has completely changed in recent years, and has led to a variety of phenomena in which individuals or groups who want to come to Israel and cannot do so according to the ordinary immigration laws try to circumvent them through the easier and more immediate route of the Law of Return and its corollaries.[83] At the same time the Israeli policy of encouraging *Aliyah* has begun to look at times as if its goal is to

encourage the *Aliyah* of individuals eligible for return even if they are not Jews by any standard. In this chapter I will review both the legal arrangements pertaining to return and the developments that have taken place in the practices of immigration to Israel by virtue of the Law of Return and its corollaries.

B. Who is a Jew?

We have seen that *kibbutz galuyot*, Jewish self-determination and revival of political independence for the Jewish people in their historical homeland are all part of the primary justifications for the principle of return: ethically, legally and from the rhetorical perspective of the Zionist leadership. Accordingly, the questions, ***"Who is a Jew?"*** and ***"Who is a member of the Jewish people?"*** are of decisive importance. When this question becomes extremely controversial, especially if this is a truly profound ideological debate, the question "***Who decides*** who belongs to the Jewish people?" becomes critical. Moreover, these questions involve the fundamental issues of the nature of Judaism, and of the essence of Jewish identities in the modern era after the widespread phenomena of "enlightenment" and secularization. Even though it was known at the time of the founding of the country that there were deep divisions on these subjects, we have seen that the original text of the Law of Return does not define who is a Jew for the purposes of return. In the deliberations on the Law of Return there were already those who demanded that "Jewish" be defined according to *halachah*,[84] but the immigration policy was that members of mixed families could enter, and there was a clear policy to encourage them to immigrate and to be completely integrated into the life of the Jewish community in Israel. At the end of the 1950s a governmental crisis developed and a fierce debate arose surrounding the "Who is a Jew?" question pertaining to the issue of registration. For the purposes of registration, two separate entries were established in which applicants for *Aliyah* were listed as "Jews": religion and nationality. The practice was to fill in the two entries in an identical way, despite the

fact that part of the debate over the essence of Judaism revolved around the relationship between religious and ethnic/national elements in modern Jewish identity. At the beginning of the 1960s the subject came up again both in the context of the Law of Return (the ***Rufeisen*** Affair) and in the context of registration (the ***Benjamin Shalit*** Affair). The court rulings led to the ***1970 Amendment to the Law of Return.*** It is impossible to understand the debates about the law today without understanding the development of the legal arrangements on this question.

1. The first years

In the period before the founding of the State and in the first years following it,[85] the authorities did not define the term "Jewish" but rather made do with a declaration from the *Aliyah* applicant that he or she was Jewish. Thus Moshe Sharett, in his presentation for the Jewish Agency before the United Nations Special Committee on Palestine (UNSCOP), declared in a meeting on June 17th, 1947: "Usually we [the Jewish Agency] accept as Jews those who say of themselves that they are Jews. Anyone who comes and says that he views himself as a Jew, is accepted by us as such."[86] The lack of a clear and explicit definition gave the Ministers of the Interior and registration officials considerable discretion. There were cases where non-Jews were listed as Jews, mostly in mixed marriages. There was a feeling of a common destiny with such mixed families, which enabled their complete integration into the life of the Jewish community in Israel, regardless of whether or not the non-Jewish family members chose to convert to Judaism. The assumption was that people who did not feel a true belonging to the Jewish people would not present themselves as such in order to immigrate to a young state, struggling with difficulties and hurdles.

On March 10th, 1958, Israel Bar-Yehudah (*Ahdut ha-Avodah*), who was at the time the Minister of the Interior, issued a directive which stated that: "An individual who in good faith declares that he is a Jew, will be registered as a Jew, and no additional proof will be required." These directives were based, in part, on the opinion of Haim Cohn, who was at that

time the Attorney General and wrote, on February 20th, 1958: "It is inevitable that at times the religious determination will be different in content and nature from the secular determination. The fact that an individual is considered by the Jewish law to be a non-Jew, does not prevent or preclude the same individual from being considered a Jew for the purposes of implementation of the law, and vice versa."[87] The NRP ministers, Chaim-Moshe Shapira and Yosef Burg, raised the topic for discussion in meetings of the government. But the government agreed to only one amendment, and decided—contrary to the position of the Minister of the Interior—to include a special qualification so that an individual will be registered as a Jew on the basis of his good faith declaration only if "he is not a member of another religion."[88] Following this decision, the two NRP ministers left the government in July 1958.[89] Later the same month the government appointed a committee of ministers to examine the matter of registration and to compose new directives for the registration of children from mixed marriages.[90] On October 25th, 1958, the Prime Minister turned to fifty Jewish scholars and requested that they issue formal opinions on the question, "How should children born to a mixed marriage be registered in the categories of 'religion' and 'nationality', when the father is Jewish and the mother is not Jewish and has not converted, but they both agree that the child should be registered as a Jew." With regard to an adult, the Prime Minister stated that he should be registered as a Jew, in accordance with his good faith declaration that he was a Jew and not a member of another religion.[91] Forty-six opinions were received (including one which was signed by five Jewish law judges (*dayanim*) from London). Of these, thirty-eight stated that the registration should be according to *halachah*, that is, according to the mother's religion, three stated that the registration of children from mixed marriages should be according to the desires of the parents, and five recommended a special listing for the children of mixed marriages whose mother was not Jewish.[92]

And so, in accordance with the opinions received, the committee reversed the earlier directives. On January 10th, 1960, the new Minister of

the Interior, Chaim-Moshe Shapira (NRP), established new guidelines for registration as a Jew in the "religion" and "nationality" entries: a) one who was born to a Jewish mother and did not belong to another religion; b) or who has converted according to *halachah*.

2. Judicial ruling and legislation in the 1960s

In the 1960s there was almost no disagreement on the subject of the orthodox monopoly regarding the identification of the religion of an individual as Jewish. The profound debate focused on the question: Can an individual who is not recognized as Jewish according to *halachah* be a Jew by nationality or membership in the Jewish people? As we have said, the use of the word "Jewish" in both of the contexts precluded a "semantic space" which would have made it possible to answer the question "Who is a Jew?" in different ways according to the context of the determination.[93] Before long the theoretical and political debates produced practical and legal repercussions.

2.1. The **Rufeisen** Affair: "Brother Daniel" (1962)

Oswald (Daniel) Rufeisen was born in Poland to Jewish parents and grew up as a Jew. During the Second World War he disguised himself as a German-Christian and served as a secretary in the German police station in the town Mir. In the context of this work he informed the Jews in the ghetto that the Germans were planning to wipe out the ghetto, and based on this information many escaped and some of them survived. In 1942, after his identity was exposed, Rufeisen ran away to a Catholic monastery and converted. After the war, in 1945, Rufeisen joined the Carmelite monastery and became a priest. Rufeisen requested to join the Carmelite monastery in Israel. And so, he came to Israel in 1958 and served as a priest in a Catholic monastery in Haifa. Rufeisen turned to the Minister of the Interior and asked to receive an *oleh* certification as a Jew. His request was denied. It was important for Rufeisen to emphasize his feeling of belonging to the ***Jewish people*** (despite having become a Christian), and he petitioned the Supreme Court with the claim that he was a Jew and that despite his conversion to

Christianity he had not stopped seeing himself as an ethnic Jew who was affiliated with the Jewish people.

The court rejected his petition and ruled (in a majority of four against one) that the criterion for belonging to the Jewish people according to the Law of Return was neither subjective (depending only on the feeling of belonging of the petitioner), nor *halachic* (since according to the *halachah* a converted Jew remains a Jew for certain purposes), but rather objective by convention. That is, the general public believed that an individual who has converted ceased to be a Jew, and since the Law of Return is a secular law, one has to interpret its terms in their usual, conventional sense. Justice Haim Cohn contended, in a minority opinion, that any individual who declares himself to be a Jew in good faith should be registered as such, even if he belongs to another religion.[94]

2.2. The **Benjamin Shalit** Affair (1968)

In the ***Shalit*** Supreme Court case, the petitioner requested that his children be listed in the population registry as "Jews" in the nationality entry (and as "having no religion" in the religion entry), even though their mother was not Jewish. The court accepted the petition in a majority of five against four, and directed the registration official to list Shalit's children as Jews in their nationality, and having no religion.

Among the judges there were different approaches. Some of the judges from the majority—Zussman, Cohn, and Vitkon—focused on the powers of the registration official, and determined that according to the 1965 Law of the Population Registry (and against the directives of the Minister of the Interior), the registration official should make the listing in accordance with the information provided, seeing this as a matter of the subjective self-definition of the individual being listed. They stated that the registration official did not have the power to interpret the terms in the secular law according to the *halachah* and in contradiction of the individual making a declaration. Berinson J. was the only judge from the majority who ruled on the merits of the question, and stated that the term "nationality" should be construed

by its ordinary meaning, which conformed to the spirit of the times and which reflected the views prevailing among the enlightened portion of the residents of the country, and that the concept of nationality should not be subjected to the standards of the Jewish *halachah*. In his opinion, Major Shalit's children were in this sense Jews.

Silberg J. argued, dissenting, that the only interpretation that could be given to the term "Jewish nationality" was a religious-*halachic* interpretation. Therefore the relevant criterion was the objective-*halachic* standard, and not the subjective definition of the individual himself, based on feelings of belonging to the people and the state. Kister J., who also accepted the objective-*halachic* interpretation, disagreed with the majority about the discretion of the registration official. In his opinion it was unreasonable to direct the official to act in accordance with the good faith declaration of the citizen, and to list him on the basis of his statement, even if other documents contradicted what he said. President of the Court Agranat and Landau J. joined the minority opinion for second-order reasons: In their opinion the matter was not justiciable, and therefore it was inappropriate for the court to undertake to rule against the position adopted by the government and ratified by the *Knesset*.[95]

2.3. The 1970 Amendment to the Law of Return

In response to the ruling in the ***Shalit*** case, and even though the ***Shalit*** case dealt with registration, the Law of Return was amended and for the first time a definition for the term "a Jew" was established ***in law***: "a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion."[96] Additionally, the amendment extended eligibility for *Aliyah* so as also to include the child or grandchild of a Jew, the spouse of a Jew, and the spouse of the child or grandchild of a Jew. All of these categories of individuals were granted independent and equal *Aliyah* rights (with one exception: a person who had been Jewish and then willfully converted to another religion.) It should be noted that the new amendment did not include the phrase "according to *halachah*" after

the words "or has become converted to Judaism," as did the directives of the Minister of the Interior in 1960. The combined result was that the law narrowly defines, in almost *halachic* terms, "a Jew," but grants eligibility to *Aliyah* to many who are not Jews by this definition and who may not even have any connection to the aspirations of the Jewish people to realize their right to self-determination in Israel.[97] Furthermore, the law rejects the approach adopted by the court in the ***Rufeisen*** case and in the ***Shalit*** case, both of which treated the determination of Jewishness according to religion as distinct from the determination of membership in the Jewish people, or Jewishness by nationality.[98]

The debates that have raged in the public and in the Knesset regarding this amendment demonstrate that the legislators were well aware of the issues and problems that might be raised as a result of the adoption of a quasi-*halachic* definition of "a Jew" and of the extension of eligibility to include numerous non-Jews who could then make *Aliyah*. The assumption implied in the statements of some of the Knesset members was that it was appropriate and correct to enable mixed families to make *Aliyah*, but that it went without saying that after making *Aliyah* the non-Jewish members of the families would choose to convert to Judaism.[99] Even at that time, there were already those who proposed that the law be interpreted in a way that would recognize the conversion processes of the Conservative and Reform movements, in order not to alienate the Diaspora communities and not "to cause a public uproar."[100] Others believed that there was no need for conversion, since there was no longer any danger here of assimilation. On the contrary: a gentile who makes *Aliyah* would be assimilated into the Jewish population.[101]

3. The conversion debate

The change in the law following the ***Shalit*** case left open the question: What would be considered a recognized conversion for the purposes of registration or return? The basic question of the relationship between the elements of religion and nationality in Jewish identity was not decided, of course, by

the definition in the law. Nonetheless, for purposes of registration the law made clear that one who is judged not to be Jewish by religion is not permitted to register as a Jew in his nationality.[102] This "clarification" remains in the law today, despite the fact that the ideological debate in the public sphere has not faded away, but rather has intensified and deepened.[103] The lack of legal clarity in the definition of "a Jew" reflected then, and sustains today, the tensions rising between the different denominations of Judaism and the demands of the non-Orthodox denominations for recognition and inclusion. The legitimacy of non-Orthodox conversions (as well as marriage ceremonies and burials) is a painful question that stirs controversy in the Israeli public. These issues have at times reached courts, where they have been subjected to judicial ruling, but these decisions have not "resolved" the controversies—they have merely shifted them to other places. Thus, regarding conversion, in the ***Miller*** case the Supreme Court ruled that, for the purposes of registration, non-Orthodox conversions from outside the country would be recognized.[104] The question of the Orthodox monopoly on conversion in Israel and that of recognition for "pop-over conversions" (non-Orthodox conversion processes where the study and preparation take place in Israel, and the candidate makes the actual conversion in a suitable community abroad) have also landed on the court's doorstep.[105] In the ***Goldstein*** case, the Supreme Court issued a majority ruling that there is no basis in Israeli law for the Orthodox monopoly on conversion and referred the task of legal regulation of the conversion issue to the legislature.[106] While objections in Israel and abroad have prevented legislation that would grant an explicit monopoly to the Orthodox establishment, the objections of the religious parties have also prevented explicit legislation that would recognize religious pluralism on this subject. The difficulties in completing a legislative move have led to the formation of the Ne'eman Commission, which considered the subject for quite some time. They arrived at an agreement that enjoyed wide support in the Knesset, but has not been ratified by the Chief Rabbinate.[107] The commission suggested preserving the Orthodox monopoly on conversion, while founding a joint school for conversion, in

which representatives from the Conservative and Reform movements would take part.[108]

An additional important development in this issue began when Rabbi Sherman, of the High Rabbinical Court in Israel, annulled retroactively all of the conversions which had been processed by Rabbi Druckman's Court for Conversions, which had been formed in accordance with the recommendations of the Ne'eman Commission, because they did not verify the commitment of the individuals undergoing conversion fully to observe Jewish ritual commandments.[109] An additional aspect of the debate has emerged in the struggle over ***state funding***. Recently the Supreme Court has ruled that the practice of the state to fund only private Orthodox institutions for conversion is illegal.[110]

The debate over conversion deals with the possibility of joining the Jewish people and with the essential question of who determines the conditions for joining. This question is the subject of a deep controversy today, both in religious contexts as well as in the context of recognizing Jewish identity for the purposes of implementing the laws of the state, including the Law of Return. The disagreement is not only between those who identify themselves as Jews nationally and culturally and those who see themselves as Jews by religion, and not only between Orthodox denominations and non-Orthodox denominations in Judaism, but rather is in the heart of Orthodox Judaism itself. This is not only an argument about the position of Jewish law on these matters, but also about what the well-being of the Jewish people requires at this moment in terms of its ability to integrate the non-Jews living in Israel. The questions persist: Should the fact that we are speaking about life in Israel, which is a Jewish state, influence the process of joining the Jewish people in this era? Should there be different principles of conversion for the Jewish community in the Diaspora and for the Jewish community living in political independence in Israel?[111]

C. *Aliyah* since the 1990s

Since the beginning of the 1990s *Aliyah* from standard Jewish communities has decreased. The large waves of *Aliyah* came mostly from the countries in the former Soviet Union, from which a substantial number of *olim* who were not Jews according to *halachah* had arrived, and from the Jewish communities in Ethiopia or "*Bnei Menasheh*." The initial argument about "Who is a Jew?" as well as the 1970 amendment were part of the intra-Jewish debate about the complex relationship between religion and nationality in Judaism. They were not considered to be directly relevant to the general question of immigration to Israel, its extent and nature. As we have said, the assumption was that anyone who chooses to come to Israel and to identify as a Jew does so out of a feeling of connection to the Jewish people and to its aspiration to achieve political independence in its homeland. But recently, especially after the 1990s, it began to be clear that the provisions of the Law of Return as they were interpreted, including the policy of encouraging *Aliyah* among those who are eligible, has fundamentally changed the composition of the *Aliyah*. First, this has come about through the widespread use of the provisions in Article 4A of the Law of Return in order to bring a large number of eligible non-Jews, especially from the FSU. Secondly, there are growing pressures, internal and external, to bring to Israel members of communities whose Judaism is debatable, and Israel is expected to take them in, despite the questions surrounding their identity and despite the fact that some of them have undoubtedly converted to another religion. This situation creates a double problem. ***First of all***, it leads to a discrepancy between the scope of the justification of the principle of return on the one hand and the specific legal arrangements for return being used in Israel on the other. ***Second***, it raises a difficulty in the integration of these immigrants, because their different cultural identity and the absence of distinctly Jewish cultural elements common to them and the Jewish public in Israel frequently impede their complete integration in Israel. An awareness of this complexity, both with respect to the size of the immigration to Israel and with respect to the practices for dealing with this question, is important as a background for the normative discussion in the next Chapter.

1. Individuals who are eligible for *Aliyah* and are not Jews

As we have said, the legal framework was established in Article 4A(a) of the Law of Return. It reads as follows:

> The rights of a Jew under this Law and the rights of an *oleh* under the [Citizenship] Law, 5712-1952, as well as the rights of an *oleh* under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.

All of these family members are eligible for return in their own right, even if they are not Jews. The meaning of the extension of eligibility to the third generation (grandchildren and their spouses) is that one grandparent is sufficient, whether from the father's side or the mother's, in order to impart the rights of an *oleh* to a grandchild (and to his or her spouse). This is true even if one's grandfather married a gentile woman, so that all of his descendants are gentiles according to *halachah*, and not one of them lives as a Jew or views himself as a Jew. Furthermore, it is stated in Article 4A(b) that this patrilineal right is not conditioned on the fact that the "Jew by whose right a right under subsection (a) is claimed is still alive and whether or not he has immigrated to Israel."

In addition to the actual individuals eligible for *Aliyah* by virtue of return, who are the family members of Jews according to a fairly broad definition, an immigration policy is developing with respect to *their* relatives, who seek to immigrate to Israel by virtue of the special privileges granted to facilitate immigration of close family members. The result, therefore, is that fairly large groups of non-Jews, including people who may be members of another religion, are entitled to make *Aliyah* because of their own eligibility or that of their relatives. The immigration ***policy*** with respect to all of these cases, as we have seen, is not dictated by the actual provisions of the law. It finds expression in government decisions, in published practices,[112] in unpublished internal practices, and even in the decisions based on the discretion of the

specific decision makers. This abundance of directives in such sensitive and charged subjects creates a situation of ignorance, confusion, and even arbitrariness and discrimination in the treatment of applications.

The dynamic relationship between the provisions of the law and a policy that changes according to social developments is well evidenced in the question of the right of a convert to Judaism to grant the right of return to his family members: It is clear that the law applies to family members who became such because they were married or born after the individual eligible to make *Aliyah* converted and became "Jewish." But does this arrangement also apply to his family members from before his conversion? The law does not provide an explicit answer on this issue. In 1972, Meir Shamgar, who was then the Attorney General, gave a broad interpretation, and stated that any relative of a Jew, even from the period prior to his conversion, is eligible for return.[113] This broad interpretation was perhaps well suited for its time, but has since become a channel through which individuals who are eligible for *Aliyah* and are not Jews have extended their right to pass on rights of return to their relatives through conversion, sometimes even after their own *Aliyah*.[114] Against this background Attorney General E. Rubinstein changed the interpretation of the law and stated:

> Rights of return are imparted to the children of a Jew, who is defined as such at the time of the child's birth. Accordingly, one who is born to a Jew—whether his mother was Jewish, or if he converted—is entitled to make *Aliyah* by virtue of the law, but if his mother or father converted after he was born, then he is not entitled to the rights of the Law of Return unless he himself has converted.[115]

Other family members may of course apply to immigrate to Israel in the framework of family unification, by virtue of the 1952 Law of Entry into Israel.[116]

2. *Beta Yisrael* and the debate over the *Falashmura*

The *Aliyah* from the countries in the FSU reflects the difficulties of a European Jewish community which had undergone long processes of secularization and assimilation, characterized to a large extent by mixed marriages. The *Aliyah* and immigration from Ethiopia (and from similar communities in Latin America, India and other places) reflect a different set of issues. The discussion of the Jewishness of such different communities began with the foundation of the country, because of the desire of some of the members of these communities to make *Aliyah* or to immigrate to Israel. I will briefly address the immigration to Israel from Ethiopia, since this is the largest group about which the question has arisen.

It is necessary to distinguish between "*Beta Yisrael*"—the Ethiopian community which maintain distinctness and Jewish customs, and the "*Falashmura*"—people who emerged from "*Beta Yisrael*" and converted over the course of the nineteenth and twentieth centuries. In January 1973 the Ministry of Absorption prepared a report on *Beta Yisrael*, which denied their Jewish identity and stated that actions should not be taken to bring them to Israel since the Law of Return did not apply to them. A month later, Ovadya Yosef, who was then the Chief Sephardi Rabbi, determined that the members of the community were Jews who needed to be saved from assimilation, and that they should be brought to Israel more quickly.[117] As a result of Rabbi Yosef's opinion, the policy regarding Ethiopian Jews was changed, and a new inter-ministerial team determined that *Beta Yisrael* were Jews and eligible to make *Aliyah* by virtue of the Law of Return. Nevertheless, the decisions were not implemented at this stage, and the members of the community were not brought to Israel.[118] At the end of 1978 news began to arrive about the harsh situation of the members of the community, thousands of whom had fled toward Sudan in order to escape a civil war between the central government and the rebels.[119] In a series of secret missions, the height of which was "Operation Moses" (November 1984-January 1985), 16,000 Ethiopian Jews were brought to Israel. In the summer of 1990 an *Aliyah* channel was opened through Addis Ababa and thousands of

Jews poured out of their villages toward the Ethiopian capital. In the waves of *Aliyah*, the height of which was "Operation Solomon" (in May 1991), more than 20,000 additional *olim* arrived.[120]

When the large wave of *Aliyah* started, the resistance to the *giyur le-humra* (conversion to remove doubt) processes which had initially been introduced also began. When the matter came to the Supreme Court, the Minister of the Interior altered the practice, and the members of the community began to register as Jews. The Chief Rabbinate, while initially accepting as valid the Jewish identity of Ethiopian *olim*, nonetheless continued to require *giur le-humra*, for fear of intermixing with gentiles, and then finally agreed to special registration arrangements for marriage.[121]

If the *Beta Yisrael* community posed a challenge for the State of Israel, the *Falashmura* created a challenge that was far more complex. The fact that these were people whose conversion dated back several generations, in addition to the wide cultural gap between the *olim* and the Israeli public, led to a huge controversy in Israel about whether or not to continue bringing the members of this group into the country. On the one hand, the *Falashmura* found themselves in an intolerable situation, where they were not accepted as equals in the Christian community, and also had not completely severed their ties with the Jewish community. Some of them continued to preserve traces of the Jewish tradition in secret and some of them even maintained family connections with the people of *Beta Yisrael*.[122] Today they also demonstrated a strong desire to return to their Jewish roots. On the other hand, some of the policy makers in Israel have expressed the concern that some of the *Falashmura* will prefer to revert to the rituals of Christian worship when they come to Israel. In any event the absorption of these groups in Israel is difficult and requires extensive effort and resources.

Jewish law is unclear on the question of how to treat converts, forced converts, and their descendants. Most of the members of the community are not eligible to make *Aliyah* by the different articles of the Law of Return. Both because of the exception that the law makes for one who "has voluntarily changed his religion," and because the familial eligibility granted in Article 4A is only valid for three generations, and most of the *Falashmura* have been converted for many more generations. In the frameworks of both "Operation Moses" and the following "Operation Solomon," the government refrained from bringing the *Falashmura* to Israel. In 1993 a committee on behalf of the Chief Rabbinate determined that the *Falashmura* left in Addis Ababa were to be considered Jews and should be brought to Israel, but that they should go through full-fledged conversions.[123] Over the years, despite the many decisions to bring them to Israel, the implementation of these decisions was noticeably clumsy and slow.[124]

The legal status of the *olim* from this community also changed over the years. At first the state did not grant *oleh* visas to *Falashmura* who converted in Israel, on the basis of the claim that *oleh* rights are intended for Jews who make *Aliyah*, and not for residents who entered the country according to the Law of Entry into Israel and converted afterwards. This approach was discredited in the ***Inchobedink*** Supreme Court case, in which it was determined that because this was an *Aliyah* organized by the state for people of Jewish origin returning to Judaism, they should be treated as *olim* from the moment of their conversion.[125]

3. The *Stamka* affair: The right of a citizen to convey status to a foreign spouse

In principle, the question of a citizen's right to pass on his status to his foreign spouse was never supposed to be part of the debate over *Aliyah* according to the Law of Return. This is because if the foreigner is a Jew or is eligible for *Aliyah*, (s)he has an independent right to make *Aliyah* according to the law, while if (s)he is neither Jewish nor eligible, the naturalization procedures for relatives according to Article 7 of the Citizenship Law are supposed to apply. But until 1996 the policy had been to permit Jewish citizens to pass on citizenship by virtue of return to their non-Jewish foreign spouses even if they had not made *Aliyah* or entirely apart from their *Aliyah*. This result was based on a combination of Article 4 (which, as we have said,

states that a Jew born in Israel is like an *oleh* according to the Law of Return) and Article 4A of the Law of Return.

This policy illustrates and highlights the profound difficulty in Article 4 of the Law of Return, which we have mentioned above, which chose to apply a common standard on a national-religious basis for all Jews, including those born in the State of Israel after its foundation, and to see all of them as *olim*, as opposed to the non-Jewish residents of the country, who legally received their citizenship based on the neutral fact that they are the children of an Israeli citizen (who resides in Israel). Here we are not dealing at length with this provision or its premises, because its practical implications were greatly curtailed by the 1980 Amendment to the Citizenship Law which granted anyone born to an Israeli citizen—whether Jewish or non-Jewish—automatic citizenship by virtue of birth. But this problematic fiction was in effect for thirty years, and it had a profound practical and ideological impact on the connection of Jews and non-Jews to their country.

In time, the state changed its policy and today it does not recognize the application of the Law of Return to such cases. The change did not stem from an understanding of the flaws which Article 4 reflected, as seen from the fact that the 1980 Amendment to the Citizenship Law was not accompanied by abolition of Article 4 of the Law of Return or even by explicit reference to it. The change resulted from two combined reasons: ***First***, the earlier interpretation enabled Jewish citizens of Israel to force the state to admit non-Jews who became their relatives by marriage, even outside the context of their making *Aliyah*. The state did not wish to lose its control over the granting of status to foreigners in this way. ***Second***, this situation led to discrimination between Jewish citizens of Israel—who could pass on a status to their foreign family members outside the context of a joint *Aliyah*—and the non-Jewish citizens of Israel who did not have this right.

The new policy determined that passing on rights to family members by virtue of the Law of Return applied only to one making *Aliyah,* as a part of that *Aliyah* itself, and was not available to one who was already an Israeli citizen. This change in policy was challenged in court in the case of ***Stamka***.[126]

The court (Mishael Cheshin J.) determined that the new interpretation of the Ministry of the Interior was the correct one. That is, that Article 4A grants rights of return to a (non-Jewish) spouse ***at the time*** that the (Jewish) spouse ***makes*** Aliyah. This interpretation of the law excludes a non-Jew who became the spouse of a Jew who was a citizen of the country at the time of their marriage. This Jew is not making *Aliyah* and thus the non-Jewish spouse does not have anyone from whom to derive his right. The court based this interpretation on a reading of Article 4A in light of the purpose of the Law of Return as a whole. The purpose of the law is *kibbutz galuyot* and the return of the Jews to Israel, while at the same time seeking to preserve the integrity of mixed families of Jews and to encourage them to make *Aliyah* without risking the need of physical separation or of differences of legal status in Israel. This purpose does not pertain in any way to the spouse of an Israeli citizen, and therefore the Law of Return does not apply in such a case. The court further based its interpretation on the principle of equality, and held that it was unjust to prefer a Jewish Israeli to a non-Jewish Israeli, so that the former will be permitted to pass on rights of return to his non-Jewish spouse, while the latter would not be able to do so.[127]

4. Methods of encouraging *Aliyah* and the stringent verification of eligibility and Jewishness of *Aliyah* candidates

The extension of eligibility for *Aliyah* so that it would include numerous individuals who are not Jews by any standard, and the *Aliyah* policy which led to bringing large groups of individuals whose Jewish identities were disputed, were the subjects of public and political debate. *Aliyah* policy and the treatment of individuals eligible for *Aliyah* were influenced by the particular ministers holding the relevant offices in the government coalition and by the positions of senior civil servants. The legal framework and even the principles which were established in judicial rulings did not always ensure in practice consistency and fairness in the treatment of *olim* and of individuals seeking to make *Aliyah*, both before making *Aliyah* and during the absorption process in Israel.

4.1. Verifying the Jewishness of *olim* and *Aliyah* candidates

As we have said, the first stage in realizing one's right to make *Aliyah* according to the Law of Return is to obtain an *oleh* visa. At this stage an investigation is made, usually in the country of origin, to determine the eligibility of the *Aliyah* candidate. The differences between the relevant communities necessitated different sets of protocols, tailored to the problems characterizing the given community. Thus the "consular practice for dealing with *Aliyah* candidates" from countries in the former Soviet Union for the purpose of granting an *oleh* visa refers first to an inspection of the nationality registration in the official Soviet documentation, even though Soviet documents are known not to be always credible. Nevertheless, even an entry in the Soviet documentation concerning the Jewishness of the father is relevant evidence for the purposes of the Law of Return, since the child of a gentile mother and of a Jewish father is also eligible for return. Therefore, according to the protocol, in those cases where the consul was in doubt about the Jewishness of the candidate's mother, but there was no doubt about the eligibility of the candidate for an *oleh* visa by virtue of a family relation of the degree fixed by law, the eligibility for *Aliyah* was granted by Article 4A. The examination of such a case would then be completed in Israel.[128] This practice highlights one of the problems with the 1970 Amendment. The extension of *Aliyah* eligibility, in addition to implementing an *Aliyah* policy which permits bringing *olim* from societies with a high level of assimilation, also significantly increased the number of individuals eligible for *Aliyah* who were not recognized as Jews. Recognition as a Jew has legal, social and symbolic implications which extend beyond the eligibility itself. This protocol created a situation in which the determination of candidates' Jewish identity (as distinct from their eligibility for *aliyah*) was postponed until after their arrival in Israel, even though they frequently were unaware of the fact that a struggle over their Jewish identity was still awaiting them.

The protocol of the Ministry of the Interior regarding the *Aliyah* from Ethiopia in 1994 states the manner in which the Jewish identity of the

Aliyah candidate will be verified, personally and after individual scrutiny, by the *kesim* of the community.[129]

4.2. Policy of encouraging *Aliyah*

While encouraging and absorbing *Aliyah* were always primary goals for the State (and for the Jewish Agency), it would seem that today the State of Israel and even the Jewish Agency no longer view the encouragement of *Aliyah* as a primary task. The growing trend is for the "privatization" of *Aliyah* encouragement through the funding of organizations dealing with this project. Accordingly, the roles of the State of Israel and the Jewish Agency in the field have gradually been limited. Israeli governments in recent years have financially assisted various private initiatives working around the world for the purposes of encouraging *Aliyah* and in order to prepare the *Aliyah* candidates before their arrival in Israel.[130] Together with the privatization of the initiatives for encouraging *Aliyah* and with the distribution of this activity to many small projects, one can also discern a change in the State of Israel's official attitude toward ties with the Diaspora. Successive Israeli governments as well as the Jewish Agency have in recent years emphasized educational activities and the reinforcement of ties with Diaspora Jewry, while neglecting the direct encouragement of *Aliyah*.[131] While the intention is for the State and the Jewish Agency to preserve their monopoly on establishing *Aliyah* eligibility and on the supervision of the implementation of its conditions, it is precisely here that a fundamental change has taken place in the state's approach, which has not received visibility in public debate. From being at the center of a discourse which placed *kibbutz galuyot* and the encouragement of *Aliyah* as a primary goal for the State of Israel, *Aliyah* has become a political question dictated by power struggles and conflicts of interest between Israeli political leaders, the Jewish Agency institutions, and the leaders of Jewish communities in the Diaspora.

An outstanding example of the changes that occur now and then in the State of Israel's mindset and in its activity in countries of origin for the

purposes of encouraging *Aliyah*, and of their dependence on Israel internal politics, can be found in the processes which the organization known as "Nativ: The Connection Office" is undergoing.[132] At its inception this was a secret organization which worked to 'liberate' Jews from behind the "Iron Curtain." Since the dissolution of the Soviet Union, and especially in recent years, doubts have been raised about the necessity for this organization's continued existence. Over the course of the past two decades several committees have been established to address this issue.[133] These criticisms have come to the attention of successive Israeli governments in the past decade, which proved to be irresolute in their decisions regarding *Nativ*. In 2003 the government decided to reduce the organization's activity,[134] while in 2007 the government actually decided to expand it.[135] Similar winds were blowing in deliberations on this matter conducted by the Absorption, *Aliyah*, and Diaspora Committee in July 2008. Most of the participants supported the expansion of the organization's activities.[136] It was argued that the organization's existence was justified because of the special circumstances of the communities in question. Within the population eligible for *Aliyah* in the countries of the former Soviet Union there are 800,000 people, of whom 80% are assimilated and less than 10% are active in Jewish organizations. It seems reasonable to assume, therefore, that in another generation there will no longer be any large Jewish communities in the FSU countries.[137] However, the consequences of the policy of encouraging *Aliyah* from these locations are unclear, and the subject has not received an open and comprehensive discussion.

As we have said, a similar indecision has marked attitudes toward the removal to Israel of the *Falashmura* sitting in camps in Ethiopia. The Israeli government occasionally discusses the issue, and a decision to halt their *Aliyah* was included in the draft version of the law of arrangements for 2009. But even here there are gaps between the efforts made in the camps to solidify the Jewish identity of the residents and the position of the Israeli government. Israeli governments, subject to pressures at home and abroad on this matter, implement a policy which is frequently marked by hesitation and resistance to the continued *Aliyah* of the residents of the camps (among

other reasons, because family connections repeatedly mean that the number of claimants for *Aliyah* eligibility increases).

A similar vagueness shows up in the guidelines given to Jewish Agency representatives in the Jewish communities of the Diaspora. If in the past it was clear that these envoys were, perhaps primarily, "*Aliyah* representatives," today the element of encouraging *Aliyah* has been reduced to the vanishing point. Attention is diverted instead to quite different causes which are important in and of themselves: reinforcement of Jewish identity in the Diaspora and encouraging ties between the Diaspora communities and the State of Israel.

4.3. The Israeli public administration's treatment of the question of the Jewish identity of *olim*

Even after *Aliyah*, the concern with the Jewish identity of the *oleh* does not come to an end. The Ministry of the Interior, as the body responsible for registration, sometimes implements a *de facto* policy of creating difficulties for *olim* who are not Jewish, or whose Jewish identity is disputed. The debate about "Who is a Jew?" resurfaces, since some of the authorities demonstrate hostility toward individuals who are eligible for *Aliyah*, who view themselves as Jews, but are not Jews according to *halachah* (for instance the child of a Jewish father and a gentile mother). Different coalitions, changing ministers and changing policies all influence attitudes toward this subject.[138] Officials in the Ministry of the Interior sometimes make use of their authority to annul the citizenship of a person who obtained it on the basis of false information in order to act against individuals eligible for *Aliyah* who are not Jews according to *halachah* but have been nonetheless registered as Jews.[139]

It is important to emphasize that, irrespective of the substance of the legal arrangements for *Aliyah* and immigration to Israel—a state has the obligation not to harass and abuse those within its jurisdiction. The state may be stringent with regard to entrance policy according to the Law of Return or concerning general immigration policy—but such policies must

be carried out properly, with state agencies dealing fairly with the individuals concerned.

We should also point out that the *Aliyah* of large numbers of non-Jews raises a variety of concerns extending beyond the subjects of *Aliyah* and registration. In light of the complex relationship between religion and state in the Israeli legal system, the Jewish identity of *olim* is relevant at numerous crossroads throughout their life in Israel in matters relating to personal status, such as marriage, divorce, burial and child adoption. The existing legal arrangement, which facilitates the *Aliyah* of numerous *olim* to Israel who are not Jews according to *halachah*, together with the Orthodox monopoly over the subjects related to personal status, places a variety of hurdles before many citizens throughout their lives. The subject of marriage, for instance, is very important both for those who are not Jews and wish to marry Jews and also—and perhaps especially—for those who view themselves as Jews and discover to their chagrin that the religious establishment does not consider them as such. These phenomena cause alienation and social tensions, even if in many cases it is possible to find practical ways to bypass the legal difficulties. To this should be added the numerous barriers standing in the way of non-Jewish *olim*, which may prevent them from beginning or completing a conversion process—for instance, the negative image of the special court for conversions, the stringent demands of the courts with respect to the adoption of a religious lifestyle and the education of children in religious programs, and the long hours of study required of them in the schools for conversion and *ulpan*s.[140] These topics are beyond the scope of this position paper.

5. Statistics

On the subject of immigration and on questions of demographics, a discussion of principles does not suffice. There is no similarity between the significance on the one hand of a discussion on "Who is a Jew?" when the number of those whose Jewish identity is a matter of debate is relatively small and they are completely assimilated into the Jewish community, and on the other hand a situation in which large sub-communities are created

of individuals eligible for *Aliyah* but who are not Jewish or whose Jewish identity is disputed. Certainly the discussion is very different when every individual eligible for *Aliyah* is in fact well integrated into the Jewish majority than it is when individuals eligible for *Aliyah* are practising Muslim or Christian by religion, and if they fit in at all they tend to do so in the relevant communities of their religion in Israel.

In the past two decades, many thousands of *olim* have arrived in Israel who are not Jews, or whose Jewish identity is disputed. According to the statistics given by the Ministry of Absorption, analyzing the population of *olim* who arrived from the FSU between 1990 and 2001, it appears that 204,700 *olim* did not register as Jews at the Ministry of the Interior during those years. This group of non-Jews represents 25.4% of the total number of *olim* from the FSU during this period. Today this group is estimated to number 350,000 persons!

Within the framework of bringing the families formed by mixed marriages to Israel, according to the official statistics, in 1990 more than 50% of the *olim* were non-Jewish family members (from all the countries of origin, including the FSU and Ethiopia).[141] A report from the Administration of Society and Youth in the Ministry of Education in June 2000, which dealt with youth making *Aliyah* from the FSU, provides the following statistics: 18.5% of the families of married *olim* are not recognized by Jewish *halachah*, and cannot prove their Jewish identity. Among 13% of them, one spouse is not Jewish, and in 2% of them both spouses are not Jewish. In accordance with the publications of the Central Bureau of Statistics (CBS) (1995), 8% of the *olim* from the FSU are not registered as Jews at the Ministry of the Interior.[142] It is important to note that out of the total number of *olim* from the FSU, 38,000 have left the country.[143] An indication of the broad extent of this phenomenon is the fact that the Central Bureau of Statistics has begun to categorize as a distinct group within the Israeli population, those who are "religion-less individuals" or "others," meaning people who are not identified as active members of a religious community but are not registered as Jews. This group today constitutes around 5% of the population of Israel.[144]

Up until 2006 72,800 *olim* arrived from Ethiopia. The statistics referring to the *Aliyah* from Ethiopia demonstrate the difficulties of absorption and integration in Israel. For instance, the number of criminal investigations in which Ethiopian youth are involved has steadily increased (from 1.2% of the cases in 1996 to 4.1% in 2004). In 2003-2004 the proportion of Ethiopian matriculation certificate recipients was 41%, compared to 61% in the total population of Jewish students. In 2002, 25% of Ethiopian 17-year-olds left school (compared to 15% in the total population of Jewish 17-year-olds). The causes for difficulty in absorption are varied and include cultural difference, damage to the traditional structure of the community and family, lack of education, and lack of experience in modern employment among the adult *olim*.[145]

An additional aspect worth mentioning in this context is the conversion process undergone by a small portion of the population of non-Jewish *olim*. It is estimated that the total population of potential conversion candidates in Israel today numbers between 200,000 and 250,000 people, the vast majority of whom are *olim* from the FSU. Between 2000-2007 only 8,000 *olim* from the FSU converted to Judaism. A survey conducted in 2003 among *olim* from the FSU indicates that 77% of the total number of non-Jewish *olim* have no intention of converting to Judaism. Two main reasons were given for this: 1) 41% replied "I have no need for a conversion"—that is, they believe that the conversion gives them no practical advantage; 2) 20% replied that "the process is difficult" (about one quarter of this group is not interested in converting). The leading response to the question "What, in your opinion, is the motivation of *olim* who are interested in converting?" was "fitting in socially" (26% of the respondents). Only much smaller numbers answered that the reason was religious (13%), nationalistic (12%) or for the purposes of marriage (12%).[146]

It should be noted that despite these facts, the absorption of the large waves of *Aliyah* in the past two decades has been successful, for the most part. This success is mainly due to the mechanisms of absorption and integration which were implemented for the individuals eligible for *Aliyah*, with an attempt to deal with the special characteristics of each group. It is also worthy of note that in recent years the extent of the *Aliyah*, of all types, is not very large and it is not expected that this situation will change significantly in the near future. Therefore the questions of bringing individuals eligible for *Aliyah* to Israel and their initial absorption do not receive much immediate political exposure (as opposed to questions such as the influence of the legal and social situation in Israel, with regard to the subjects of religion and state, on the continued absorption and integration of non-Jews eligible for *Aliyah*). As we have said, the question of encouraging the *Aliyah* of Jews on a large scale also receives relatively little attention. The main challenge today is the successful absorption of such communities already in Israel.

These facts do not diminish the fundamental importance of discussing the questions of the boundaries of the Jewish collective; the cultural identity of the State of Israel; the connection between these facts and the justification for the state and its perception as the place in which the Jewish people realizes its right to self-determination; and the manner in which all of these things are reflected in the Law of Return and its specific arrangements. The significance of the limited size of *aliyah* lies only in the fact that today less political attention is devoted to them in a society which is usually preoccupied with putting out fires and not with the systematic examination of the fundamental issues of its existence.

Therefore these reflections are a good point of transition to a normative discussion of the specific legal arrangements of return. This discussion, whose ideological importance is vast, deals with questions connected to the roots of the establishment and justification of the Zionist enterprise, even though its practical and immediate importance is presently limited. Although the normative discussion does not yield immediate recommendations—it is essential that we remember the close connection between this discussion and these fundamental questions and the need to deal with them and to recognize the controversies connected with them.

Chapter Four

A Critical Discussion of the Specific Arrangements for Return

A. Introduction

We have seen that it is impossible to examine the subject of *Aliyah* or of Jewish immigration to Israel exclusively on the basis of the Law of Return. One has to look at the Law of Return together with an examination of the provisions for naturalization in the Citizenship Law and of the practices connected to the *Aliyah* of Jews and other individuals who are eligible for *Aliyah*. Even if the ***principle*** of favoring Jews in immigration is justifiable, it is appropriate to re-examine—according to all of the justifications suggested in Chapter Two—not only the principle of return, but also the ***manner*** in which it is implemented in Israel today.

This critical examination is also necessary in light of the many developments in Israel and in the world—and in the specific arrangements for immigration themselves over the years. The main stages of development in the arrangements for *Aliyah* were examined in the previous chapter: a) the 1970 Amendment to the Law of Return, which defined "a Jew" for the purposes of return according to an almost religious definition, but expanded the extent of *Aliyah* eligibility to include the relatives of a Jew up to the third generation, even if the eligible individuals do not feel a connection to Judaism or to the Jewish people and are not even making *Aliyah* together with the person by virtue of whom they are eligible; b) the 1980 Amendment to the Citizenship Law, which annulled some of the practical implications of Article 4 of the Law of Return regarding the acquisition of citizenship, and to a certain extent made it easier for Arabs to acquire citizenship. Supreme

Court rulings have also influenced this situation, for instance in the ***Stamka*** case and with regard to conversion practices. All of these developments have been accompanied by political battles over immigration policy as it has been applied to Jews, to those who joined the Jewish people through conversion, to those who are eligible for *Aliyah* by the Law of Return, and to those whose eligibility by the Law of Return is open to debate. Struggles such as these were waged within the government itself and were also influenced by the ideological orientations of successive interior ministers. These dynamics transformed the Ministry of the Interior into an extremely important ministry and, not surprisingly, it became the object of political rivalries. Thus the slogan coined by "*Ascending Yisrael*" under the leadership of Natan Sharansky in the 1999 election campaign was "Shas in control of the Interior? No! The Interior is Ours!" (and Sharansky was indeed appointed Minister of the Interior); prime ministers are no longer always willing to place this central ministry in the hands of religious ministers.

No less important are changes in the global situation. When the Law of Return was passed, and even at the time of its amendment in 1970, Israel was not a preferred destination for immigration, and the assumption was that individuals willing to define themselves as Jews in order to come here certainly felt a real connection to Judaism and the State of Israel. This assumption is no longer valid. Israel is part of the developed world and is considered by many to be a desirable destination for immigration.[147] Not surprisingly, people are willing to make use of *Aliyah* rights according to the Law of Return through different avenues (through a family connection or through different kinds of conversion) or to take different steps (such as marrying citizens of the country)—the primary if not sole purpose of which is to achieve some official status or Israeli citizenship.[148]

Thus Israel has gone from being an *Aliyah* state to being an immigration state, and a large proportion of those who enter the country's ports and who receive an official status—some of them by virtue of the Law of Return itself—are not Jews and do not feel any connection to Judaism or to the project of building a national home for Jews in Israel.

The features of *Aliyah* according to the Law of Return also raise difficulties. Individuals who make *Aliyah* by the Law of Return—Jews and non-Jews alike—become Israeli citizens from the moment they make *Aliyah*, according to the Citizenship Law. As such they have all the civil and political rights of an Israeli citizen, including the right to participate in elections. Many believe that when an individual unfamiliar with the country, its language, its form of government, its history or its leaders is permitted to participate in the determination of its fate upon arrival, this creates an impoverishment of the civic tie between a person and his country. This problem is exacerbated when other individuals, who have been living in the country for a long period of time and are well informed about it, are not permitted the same participation because they are not citizens of the state.[149]

In light of these considerations, I subject some of the main specific arrangements pertaining to the Law of Return and to the contemporary *Aliyah* and immigration practices to a critical examination. I addressed this topic at length in the first chapter of the Gavison-Medan Covenant. The analysis which we suggested there served as the basis for the recommendations which we made in that document. I stand behind what I said there and behind the recommendations which we made. The purpose of this Position Paper is different, however. Moreover, it relates to important developments which have taken place since that discussion up to today. Accordingly, in this chapter the way I discuss issues and my recommendations will be different. Instead of advocating, I will discuss questions while examining the pros and cons of different positions, while pointing out the primary sources of tension between the legal arrangements pertaining to return (and Citizenship) today and the justifications for the principle of return which were presented in Chapter Two.

B. The principle of return: a right to make *Aliyah* or a consideration of preference?

We have said that the principle of return is a principle of ***preference*** for Jewish immigration, and that such a preference is morally justifiable, permitted

by international law, and recognized as legitimate when implemented by other countries. We also saw that the Law of Return establishes a ***right*** (even if this is subsequently qualified) and not just a preference. The difference between these two arrangements is enormous, since the granting of a right to an individual who is eligible for *Aliyah* imposes ***a corresponding obligation*** on the state, and thus denies it (at least on the face of it) any discretion on questions such as how many immigrants to take in, when, and according to what criteria. Therefore there are those who claim that the state must indeed retain its discretion regarding immigration and make decisions that are in its best interests, and that such a freedom to decide entails the reduction, as much as possible, or even the elimination, of the state's obligations with respect to the entry and settlement of groups of potential immigrants.[150] In other words, according to this argument, the state must restore to itself basic discretion even with regard to the *Aliyah* of Jews. While this conclusion can be consistent with different forms of the continued preference for Jews, it will not be through the bestowal of a ***categorical right*** for Jews and their families to be brought to Israel. This argument is of special force when the bestowal of such a right on Jews and members of their families coincides with an increased and systematic stringency regarding the immigration of others.[151] The difference between the granting of the right in the Law of Return and other legal arrangements for immigration is especially conspicuous when one compares it to the broad discretion given to the Minister of the Interior according to Article 5 of the Citizenship Law, which deals with the naturalization of individuals who do not acquire citizenship through the Law of Return. Moreover, the provisions of the law or the practices which prefer members of a certain ethnic group in the legal arrangements of other countries do not usually grant them an ***inherent*** or ***unlimited right*** to settle in their nation-state. Consequently, even if Israel has explicitly chosen to prefer Jewish *olim*, this preference need not take the form of a right.

Nevertheless, I do not believe that it would be right to recommend a change in the principle "every Jew has the right to come to this country as an *oleh*." One of the rationales of the explicit statement of this principle

in law was the desire to include in the laws of the country an unequivocal declaration that because of the establishment of the state there would never again be a situation in which the government would block the entrance into the country of Jews who had arrived at the border of their homeland. This assertion was a repetition of explicit statements made in the Proclamation of Statehood. In this sense, this declaration of the principle was part of the formative content of the founding of the state, and it meant that Israel would be open to Jewish *Aliyah*, especially of those individuals whom no other country wanted to accept. This formative content is still part of the rationale for the continued existence of Israel and the continued justification for the principle of return. The explicit abolition now of this ceremonial declaration would have a symbolic and political meaning that would be significantly different from a decision not to embrace it at the outset (a decision which, as we have seen, was considered by the legislators at the founding of the state). I do not see a justification for recommending such a step, unless Israel does decide that it is ready and willing to stand behind its symbolic meaning. It does not appear that such a position has any support among the country's political elites. Even the judicial system has justified this exceptionalism in the Jewishness of the state, as it is expressed in the wording of the principle of return in the law today.

This conclusion is reinforced by the fact that even the far-reaching phrasing of the Law of Return is not understood—and should not be understood—by policy makers as requiring the state to ***bring*** every single Jew to Israel (or to put at his disposal an absorption benefits package or other incentives). According to the narrow interpretation of the principle of return, there will not be a situation in which a Jew will arrive on Israel's shores and will knock at its gates without being permitted entry (qualified only by the narrow limits of the law). If we add this interpretation to the fact that today a significant portion of the Jewish *Aliyah* and even part of the immigration of individuals with disputed eligibility for *Aliyah* such as the *Falashmura*, who are not making *Aliyah* according to the Law of Return, are the result of ***government initiative*** or ***government policy***—then the practical results

stemming from the principle of return in and of itself are not far-reaching. It would seem to be preferable to focus on other aspects of the present legal arrangements, and not to undermine this simple, ceremonial, and powerful declaration according to which "every Jew has the right to come to this country as an *oleh*."[152]

C. Who should be "eligible for *Aliyah*"?

A more difficult question is: Who should be eligible for *Aliyah* according to the law? According to the Law of Return as it was amended in 1970, this question has two components. The first pertains to the question, who is the "Jew" who is eligible to make *Aliyah* according to Article 1 of the law, which is the heart of the original law. The second pertains to the extension of the right to bring family members of that "Jew" to Israel according to Article 4A of the law, which was added in 1970.

In my opinion the 1970 Amendment impaired the original rationale of the law and the principle of return. The existing legal arrangement, in terms of the wide range of non-Jews who are ***eligible*** for *Aliyah*, is difficult to justify in accordance with the principles that I presented in Chapter Two. The ideal situation is that which existed in the past, and in which most of the individuals who were directly eligible for *Aliyah* were "Jews", as stated in Article 1 of the law, while building on the vagueness of the word "Jew" so that its application in fact would better suit the rationale behind the principle of return. Individuals who are eligible for *Aliyah* for the purposes of the Law of Return are not supposed to be "Jewish" according to the *halachah*, but rather to share an interest with the state in their participation as full members in the undertaking of Jewish political independence in Israel, as a state which is both Jewish and democratic, due to their membership in the Jewish people.

The justifications for the principle of return which I presented in Chapter Two pertained both to the right of the Jewish collective to found a state

in which it will realize its right to self-determination and encourage Jewish *Aliyah* to this state, and to the right of the individual Jew to live a full life as a Jew in one's own nation-state. However, the widespread phenomenon of intermarriage indeed required a response to the question of mixed families. Up until 1970 the practical response to this question was a combination of turning a blind eye and the registration of all the family members as Jews, or the absorption of all the family members via different avenues: the Jew made *Aliyah* by virtue of the Law of Return, and the non-Jewish family members were naturalized by virtue of the Citizenship Law, without any particular problems or mishaps. No mixed family was banned from making *Aliyah* or being absorbed in the country just because it was mixed.[153] The 1970 Amendment, which was deemed necessary because of the Supreme Court ruling in the ***Shalit*** case, included in the law an ideological answer to the question "Who is a Jew?," which conveyed an exclusionary message to non-Jewish family members of Jews. The communication of such an exclusionary message—and perhaps also the ideological concession implied in it on the part of those who rejected the *halachic* concept of Jewishness—made it necessary to raise to the level of legislation the complementary message as well: the favorable and welcoming reception of the non-Jewish family members of Jews. The decision of the legislature to limit the definition of the "Jew" in accordance with the *halachah* and to grant family members independent rights, identical to those of Jews, up until the third generation, caused ideological and practical difficulties already at the time of the law's adoption. These problems have greatly intensified since the 1990s.[154]

I will not address here the fascinating question of who is eligible for *Aliyah* according to the Law of Return.[155] The fundamental question which comes up is this: Is it justifiable for the principle of return to be applied only to a person who is defined as Jewish by the *halachah*? The originators of the 1970 Amendment refrained from dealing with this question for reasons which were political, substantive or both. The pragmatic compromise which was achieved was to extend the eligibility for *Aliyah* according to Article 4A. But this attempt was not completely successful for a number of reasons:

First, one who ascribes importance to membership in the Jewish people will not be satisfied by receiving permission to live in the country as citizen of the state by virtue of the Law of Return, but rather will want the recognition of one's Jewish identity by the state and society. For such a person, this is not merely a question of a civic connection but also an ethnic and cultural one. ***Second***, in the State of Israel *halachic* or quasi-*halachic* characterizations of "Jewishness" have force in other practical and administrative areas such as registration and burial.[156] ***Third***, as we have said, the extension of independent *Aliyah* rights to individuals who are not defined as Jews by the *halachah*, takes in not only those who see themselves as Jews but even people who have no real connection to Jewish existence. ***Fourth***, while the number of those who feel themselves to be Jewish but are not Jews according to *halachah* and are not covered by Article 4A may not be large, it also is not negligible.[157]

It is also worth mentioning the category of *Nidhei Yisrael* ("the far-removed of Israel"), communities which may express a connection to Jewish tradition or Jewish customs, but whose members' status as Jews according to *halachah* is a matter of debate. Communities such as these also raise complicated questions, such as whether they are able to integrate into the State of Israel as a modern country. On such issues, it is better that decisions concerning the policy about their immigration to Israel, balancing the strength of their Jewish identity and the different implications of their absorption, should be made by elected political decision makers applying general policy considerations of the state, and not on the basis of the rulings, whatever they may be, of rabbinic authorities.[158]

What makes the intra-Jewish debate on these subjects unique is that it is not confined to religious circles. Many religions have intra-confessional debates pertaining to the rules of membership in the religious community or of becoming a member. In some religions this results in the creation of different, and even hostile, denominations of the same religion (as in Christianity or Islam). In Judaism as well there are different denominations which conduct a fierce debate among themselves on the question of whether all of these approaches constitute authentic expressions of Judaism, or perhaps

only one of them (the "Orthodox"). In such a situation, even the relatively simple principle that freedom of religion requires that membership in a religious community be determined by the religion itself, does not supply the state with an easy solution, as long as the religious identity of an individual has legal ramifications according to the laws of the state. The absence of a natural monopoly within the religion that reflects a religious consensus regarding the essence of Jewish identity or the ways in which one becomes a part of it creates a problem. As we have said, the debate remains unresolved from both the legal perspective and from the perspective of the government agencies, because the legislature did not state that a Jew is only one who "converted according to *halachah*." Furthermore, we have also seen that within Orthodoxy itself there is a fundamental debate over what should be considered "conversion according to *halachah*."

In addition to this intra-religious debate, we have also seen that there is disagreement about whether Judaism today is a religion, a people, or a combination of the two. There are those who believe that the Jewish community of faith and the Jewish people are one collective, and therefore the rules for entering it and becoming a part of it need to be consistent and *halachic*. There are those who believe that Judaism is only a religion and therefore the other components of Jewish existence are not even relevant to the Jewish identity of an individual (or to the rights of Jews). Others believe that while the Jewish people was characterized, and even preserved, in the past through its being defined by the Jewish religion and by the ways of life which the religion required, in recent years Judaism is going through complex processes of identity change. Accordingly, by their way of thinking a Jewish-national identity is being formed today which does not involve religious characteristics—or, obviously, of ritual observance—and whose connection to Jewish religion is only historical and cultural.[159]

These kinds of debates are found within many modern identity groups, and usually there is no need to decide these questions one way or another. When need to decide does arise, the decision is context-sensitive. Thus it goes without saying that rabbinic courts which see themselves as

subject to *halachah* will rule on the Jewish identity of an individual in the contexts of conversion and marriage in accordance with *halachah* as they understand it.[160]

Regarding the Law of Return, on the one hand there is a distinct need to make a decision on who is eligible for *Aliyah*, because the question has far-reaching impact both for individuals and for the state and its identity, and on the other hand it is difficult to separate the legal answer from the ideological and religious controversies between the different parts of the Israeli and world-Jewish communities.

The Law of Return in its original wording and the practices which were in effect in the state's first years reflected an interesting approach to this dilemma. The declaration in Article 1 of the law granted the right to "every Jew," without defining the term, and the definitions were provided in formal arrangements on a lower level, with low visibility, and in an attempt to bypass the ideological controversies. The majority ruling in the ***Shalit*** case gave the legislature the (unjustified) feeling that it had to intervene. The result was a change in attitude which was expressed in the 1970 Amendment. It was precisely the high visibility and statutory level of the new arrangement which made it difficult to adjust the legal arrangements to a changing reality.[161]

If we return to first principles, it would seem that the rationale behind the principle of return and behind its justification is based on two reasons: the first, the desire to allow persons, who see themselves as part of the Jewish people, to become part of the nation-state of the Jewish people; the second, to enable the nation-state to promote processes that will facilitate *kibbutz galuyot* and the preservation of a stable Jewish majority in the country. The legal definition of *Aliyah* eligibility and the rights it entails should be optimal in meeting these goals while making as minimal an intrusion as possible into issues which are so fraught with ideological controversy among different sectors of the Jewish public. The state, or its courts, should not offer "essentialist" answers to controversial questions such as "Who is a Jew?" In any event, proposed resolutions to such questions by the state will not

resolve the actual controversies. At the same time, the state must provide a mechanism that will enable it to give transparent and fair answers to the question, Who is eligible to settle in the country and become a citizen according to its laws and rationale. The difficult question is, of course, how to respond to the question of *Aliyah* eligibility without taking a stand on ideological controversies.

The current characterization of the Law of Return, of who is eligible for *Aliyah*, is—or is likely to be, too broad—while the characterization of a "Jew" is too narrow. The identification of the eligible group starts with the *halachic* definition: Jews according to the *halachah* are eligible to make *Aliyah*. This definition leaves out people who see themselves as members of the Jewish people, who live a Jewish life-style, and might wish to make *Aliyah* and to tie their fates with that of the State of Israel. Thus, for instance, the children of Jewish fathers, who live in the Diaspora in a Jewish community of whatever denomination, live a Jewish existence and even bequeath it to their children, will not be included in this definition.[162] According to the rationale of the Law of Return and the approach seeing Judaism as a nation, the law should include them as eligible for *Aliyah*. The law in fact does permit this to a certain—although insufficient—extent, when it expands eligibility to include relatives up to the third generation.

But in many respects, and particularly on the symbolic level, the solution of a narrow *halachic* definition of "a Jew," combined with an extension of *Aliyah* eligibility, is not a good one. This solution undermines the inclusive concept of the Jewish people and of mutual responsibility within it, because it exclusively adopts a *halachic* definition of the boundaries of the Jewish people, in a social and political situation in which a large portion of the population—both Jewish and non-Jewish—does not view those boundaries in the same way. Such a solution has caused in the past, and is also likely to cause in the future, an abundance of bad results. As we have said, even from the perspective of state institutions, this is an extremely problematic solution. Attaching legal consequences to an individual's "Jewishness" by the laws of the state obligates the state institutions, which are

not *halachic*, to interpret this term and to give it a practical meaning. Such a situation is likely to lead to a direct confrontation between the *halachic* establishment on the one hand and the state political institutions and the courts on the other.[163]

The current arrangement also covers a large group of individuals who are eligible for *Aliyah*, by virtue of their being the family members of Jews, but are not themselves Jews according to any definition or any denomination and do not necessarily have any sense of belonging, or wishing to belong, to the Jewish people. Some of the people in this group may use the right of return just in order to pass through Israel on the way to another destination. Nonetheless, the *Aliyah* of a large non-Jewish population which will remain in Israel may hinder the goal of maintaining in Israel a Jewish majority, which supports a Hebrew public-cultural space. The inclusion of three generations and their spouses within *Aliyah* eligibility, together with their definition as eligible for *Aliyah* even if their Jewish relative is not coming to Israel himself, is likely to lead to a large-scale immigration of non-Jews who do not have an interest in connecting their fate with that of the Jewish people in its country.[164]

Therefore it would seem that preserving the original text of the law would have been preferable to the existing legal situation, since it would have permitted greater flexibility in adjusting the legal arrangements in order to promote the desirable situation. ***This desirable situation is one in which only someone with a demonstrated connection to the Jewish people will be able to make* Aliyah*, together with their immediate families who make* Aliyah *with them.*** The legal arrangements should seek to diminish the concern that people who do not fit this description will make *Aliyah*. This is the right thing to do, both in terms of the rationale of the principle of return, and in terms of the wish to limit the costs that *Aliyah* may impose on the welfare of the country's residents, Jewish and non-Jewish alike. That being said, the characterization of who has a connection to the Jewish people needs to be inclusive. The intention is to exclude people who do not view themselves as Jews, but not to reject those who see themselves

as Jews, even if their conceptions of Judaism are different from the *halachic* determination according to the Orthodox interpretation. This is the case if such people appear to be Jewish not only in their own eyes but also in the eyes of their Jewish and non-Jewish environment.

According to this rationale, the operative characterization of "a Jew" according to Article 1 of the Law of Return needs to be more inclusive than the existing definition in Article 4B of the law, but less inclusive than the subjective definition according to which a Jew is anyone who defines himself as a Jew. Against the background of the conditions noted above, it would certainly be impossible today to rely on such a "self-definition" as a decisive and final demonstration of a person's Jewishness. The rejection of the principle of a "subjective self-definition" is extremely important with respect to the very presumption that there is something objectively distinctive about the boundaries of the Jewish public, which is not just a matter of the sincere statements of someone who views himself as belonging to it or wishes to belong to it.[165]

But even if it is easy ***in principle*** to establish what the optimal boundaries of Jewish identity should be for the purposes of return, ***legal arrangements*** need also to be clear and easy to apply.

In the Gavison-Medan Covenant we proposed an approach composed of several elements: ***First***, there is no need to distinguish between someone born to a Jewish ***father*** and someone born to a Jewish ***mother***. Anyone born to a Jewish parent should be eligible for *Aliyah* by virtue of their connection to the Jewish people. This extension is appropriate according to the *halachah*'s principles of solidarity, and it is certainly appropriate for those who do not accept the *halachic* definition itself. For the determination of identity in fact, there is no significance to the question of which of a person's parents was Jewish. On the contrary, it is actually possible that the child of a Jewish father grew up as a Jew while the child of a Jewish mother grew up agnostic or as an active believer in a different religion.[166] ***Second***, "a son of the Jewish people," should include anyone who joined the Jewish people, whether by Orthodox conversion or by some other recognized conversion, or even

by some other method of becoming a member which is not conversion but will be recognized by the state. In order to avoid conversion for the sake of immigration, every convert, or every person who has joined the Jewish people in a different way, irrespective of the nature of the process of joining undertaken, will be required to demonstrate significant aspects of his/her way of life that testify to the fact that his/her acquired membership in the Jewish people is sincere and steady.[167] Moreover, such joining processes entitle individuals to make *Aliyah* according to the Law of Return only if they reside abroad prior to their joining the Jewish people. One who is already in Israel and chooses to join the Jewish people will of course be accepted with open arms, but this will not entitle one to rights of ***return***. These rights are granted only to one who does not live in Israel and wishes to make *Aliyah*.[168] ***Third***, individuals who are persecuted for their Judaism will be eligible to make *Aliyah*, even if the *halachah* does not recognize them as Jews.

The advantage of this proposal is that it both exempts the state from *halachic* quandaries and also allows the state to fulfill its designated role vis-à-vis the Jews and their communities in the Diaspora. The proposed definition of eligibility for *Aliyah* is in no sense an attempt to answer the *halachic* question, "Who is a Jew?" Therefore, on the one hand, such an arrangement will preserve freedom of religion and the freedom of the Orthodox to define Jewish identity according to their belief. On the other hand, the state is permitted to expand the framework of *Aliyah* absorption and to take in as citizens whomever it considers to be part of the Jewish people. An arrangement such as this recognizes the problem of mixed marriages which is so common among Diaspora Jews and permits the law better to fulfill one of its important purposes: to allow Jews who wish to make *Aliyah* to their nation-state to confer legal status in Israel on the members of their nuclear family who are making *Aliyah* together with them. The law will likewise recognize conversions by all the main denominations of Judaism and even non-religious ways of joining, as long as the conversion process is appropriate, recognized and reliable, and as long as the act of joining is accompanied by additional signs indicating the real intention of the

persons joining to tie their fate with that of the Jewish people.[169] We should clarify that this expanded concept of "a member of the Jewish people" for the purposes of ***return*** does not automatically determine the recognition of the individual, living in Israel, as a Jew, for all purposes. Regarding some of aspects of life, especially matters of personal status, there is at present in Israel a religious-Orthodox monopoly. Therefore, if Israel wishes not only to admit those who have a connection to the Jewish people but also desires their successful and complete absorption in the Jewish public in Israel—it is important to change these exclusionary laws or at least to create a socio-cultural space in which there will be a strong connection between Jewish "cultural" and "ethnic" identity and complete integration into Jewish Israeli society.

I should repeat that the arrangement suggested in the Gavison-Medan covenant refrained from accepting a subjective definition of "a Jew" as one who views himself as a Jew. Such a definition would be too broad and is likely to include various groups which present themselves as in some sense Jewish (such as Messianic Jews, the Black Hebrews from the United States, and African tribes).[170] Nonetheless the proposed arrangement recognizes the importance of the subjective element expressed through the investment of practical efforts on the part of one who seeks to join the ranks of the Jewish people (and is not satisfied with merely a formal "conversion"). Thus, the Jewish tradition remains a primary element in an individual's feeling of membership in the Jewish people. Nonetheless, it is important to expand the definition so as to grant eligibility to make *Aliyah* even to someone who is not Jewish by *halachah*, by virtue of their serious connection to the Jewish people.

It goes without saying that separating the *halachic* requirements from eligibility to make *Aliyah* by virtue of the Law of Return is not intended to cast doubt on the profound historical connection between the Jewish people and the Jewish religion and tradition.

Another matter of importance is the attitude toward people persecuted for their Judaism. One of the most important rationales of the law was to

provide a safe haven for those Jews throughout the world, who were persecuted because of their Jewish identity. This matter deserves to be treated separately, apart from the description of individuals who are eligible for *Aliyah*, because it is possible that there will be people who are persecuted for their Judaism even if they do not meet even one of the criteria that we have proposed (that is, they are not Jews according to the *halachah*, they are not the children of Jewish fathers, and they have not gone through any kind of conversion or in any way joined the Jewish people). Thus for instance the grandchild of a Jew, who will not be considered eligible for *Aliyah* by right of ancestry according to the proposal, may well be persecuted for his Jewish origins in different places in the world. Indeed, this sort of claim is sometimes made regarding the members of the *Falashmura* community who have converted to Christianity and therefore are not eligible for return (neither by the existing law nor by the proposals outlined above). Nevertheless, one of the reasons why they wish to make *Aliyah* is because they are persecuted as "Jews" by their neighbors. It would seem that including those who are persecuted for their Judaism even if they do not qualify as 'members of the Jewish people' is justified, and that it is not likely to bring about far-reaching practical consequences or mass *Aliyah*.

The Gavison-Medan covenant met with a mixed reaction, as one might expect.[171] Some thought that it represented an interesting and important breakthrough. Others– both religious and non-religious—believed, just like the overwhelming majority of the sages (even the non-Orthodox ones) who responded at the time to Ben-Gurion's letter—that it was a very bad idea to expand the criteria for membership in the Jewish people beyond those established in *halachah*. In evaluating these responses it is important to distinguish between ideological implications and practical implications of the proposal. The extension of the definition of "Who is a Jew" in a manner that also includes the son of a Jewish father alters the narrow *halachic* basis of the definition that was provided in the 1970 amendment. It does not extend at all the category of those eligible for *Aliyah*, since the son of a Jew is in any case eligible for *Aliyah* according to the present law. On the contrary,

when the proposed characterization of "son of the Jewish people" is read together with the proposal in the Gavison-Medan covenant to restrict the eligibility for *Aliyah* of those who are not Jews, the proposal overall ***reduces*** the number of those eligible for *Aliyah*, because it does not cover the third generation of grandchildren.

Reservations were also voiced regarding the "burdensome" proposal according to which individuals who converted according to *halachah* would be required to demonstrate that the conversion was sincere by leading a life containing elements of Jewish identity (although, as we have said, there are those who claim that there is no such thing as a *halachic* conversion without the actual observance of ritual commandments), and especially regarding the suggestion to recognize non-Orthodox conversions.

Interestingly, even those who wish to expand the recognition of non-Orthodox conversions were altogether opposed to expanding the recognized ways of joining the Jewish people to include ways that involved no religious conversion at all. Apparently, this opposition is based on a combination of profound and significant perceived tenets of Judaism together with the claim that recognition of a non-religious process of joining the Jewish people does not meet the standard which we ourselves had suggested: a criterion which is relatively easy to apply without recourse to ideological questions. A great deal of skepticism was expressed regarding the possibility of establishing criteria for identifying when an individual has joined the Jewish people without a conversion. I agree that a great deal of thought should be devoted to this subject. I also concede that the inclusion of this track was indeed important to me precisely because of principled and ideological reasons—in order to support the claim that membership in the Jewish people should not be exclusively a religious matter, and therefore does not have to be achieved only through birth or conversion. In all probability, there will not be many people who will seek to join the Jewish people in this "innovative" way. Thus, I expect that criteria for determining the acceptability of this process can be formulated without any real danger that the gates will be flooded. But it would seem that we're dealing here with an objection which is itself

ideological. I grant that this proposal raises fascinating questions of principle, with enormous ideological and theological importance for the concept of Jewish identity and membership in the Jewish people in our time.

There is no practical need to resolve these very important questions for the purposes of this position paper, since the paper does not recommend a legislative change in the Law of Return itself, and this on the basis of second-order considerations. As we have said, if the Law of Return had not been amended in 1970, it would have been possible to make the said changes with relative ease and without legislation (assuming that a political consensus would be formed that they were in fact desirable). The 1970 Amendment means that implementing these proposals requires a change in the Law of Return itself.[172] But in our political reality even those who believe that such changes (in whole or in part) are called for, might resist attempts to change the law. There is no need to go into an evaluation of these claims. The purpose of this position paper is to point to fundamental questions and to give focused recommendations. The fear of tampering with the Law of Return appears to be well founded. As we have said, the practical aspects of the size and nature of *Aliyah* according to the Law of Return are at present not very significant, and the issues do not call for an urgent response. It would certainly be possible to find a reasonable practical solution for most of them in the framework of *Aliyah* policy.

Nonetheless, thinking about these issues and the candid assessment of fundamental claims are important for several reasons: ***First of all***, as we have said, these issues touch on the essence of the existential questions of identity and the meaning of the Jewish people and of the State of Israel as the state of the Jewish people. ***Second***, these issues go well beyond the scope of the narrow question of eligibility for *Aliyah* according to the Law of Return. The disagreements and also areas of consensus should be examined and clarified. ***Third***, and most importantly, the awareness on the part of policy makers of the importance of the required changes can yield, even without a change in the law, changes in policy which will diminish the practical problems stemming from the text of the existing law. Therefore, a candid and clear

discussion, about both the elements of eligibility for *Aliyah* and the normative premises underlying them, is inestimably important even to someone who is not suggesting immediate changes in legislation.

D. What should be the rights of a "member of the Jewish people"?

1. Immediate and automatic citizenship or naturalization with conditions?

The claim that the principle of return is justified and therefore opening the gates of the country to ***Jewish immigration*** is warranted, does not ***necessitate*** a bestowal of ***citizenship which is automatic*** (with no additional conditions apart from making *Aliyah*) and ***immediate*** (immediately upon making *Aliyah*), such as is granted today to *olim* by virtue of the Citizenship Law. We should mention that for most of the non-Jewish immigrants, naturalization in Israel (as in most of the countries in the world) requires both a relatively long prior period of living in the country and not a few conditions demonstrating the integration of the persons being naturalized into their new country as well as their loyalty and their attachment to it. In terms of *kibbutz galuyot*, it is sufficient to grant Jews the right to enter the country and settle in it, and perhaps to be granted permanent residence. Is it really justified also to create such a vast difference between them and other immigrants regarding the timing and conditions of naturalization?[173]

For the purposes of this discussion, we can introduce a theoretical distinction between basing citizenship on a ***past-based affinity*** and basing it on a ***future-based affinity.*** Past-based affinity is based on the totality of an individual's connection to the state, or to one of the groups living in it, on the basis of a common history, language, culture, religion, or other innate, non-voluntary features. The Law of Return rests partly on such a past-based affinity, when Jewish origin or Jewish identification are the touchstones for a potential immigrant. Future-based affinity is based on the principles of a shared existence, which the immigrants are prepared to undertake and thus to link their future with that of the nation which they are joining. The

United States is the best example of such an affinity, since it is a civic nation-state, based on immigration, in which the primary connection of people to the country is their citizenship. American immigration law establishes a utilitarian immigration regime, based in part on the professions needed in the economy. But immigrants receive citizenship only after five years, after they have become involved in American society and culture, learned the language, become familiar with American history and the American Constitution, and sworn allegiance to the country.[174] Careful reflection on the two kinds of affinity shows that the difference between them is not sharp and clear. Even in countries which emphasize elements connected to past-based affiliations, the arrangements include requirements such as the loyalty of the immigrant to the state and integration in society, and such requirements are indeed justified. On the other hand, even in civic states, which emphasize the future-based affinities, the immigration policies are not devoid of an aspiration for social homogeneity.[175] In many cases an important point of contact between the past-based and the future-based affinities is the distinction between entry into the country and naturalization, the latter requiring additional conditions such as residency and integration in the country.

We saw there was a long discussion of the (limited) reasons for precluding a Jew from ***entry*** into Israel and from ***settling in the country*** by virtue of the Law of Return. Interestingly, I have found no informed and systematic discussion of the question of the conditions for receiving citizenship for a person who has made *Aliyah* by the Law of Return.[176] Citizenship is acquired immediately and automatically by anyone who has made *Aliyah* by the Law of Return, as if they were entitled to it from birth. It is possible that in the state's first years a great deal of importance was placed on this because there was a need not only to create a Jewish majority among the country's residents but also among its citizens, and there was also a symbolic significance to the fact that any Jew, by his choice, is not only a resident of the country but also a citizen like any of its citizens. It would seem that the rationale in this was that Jews "acquire" citizenship by making *Aliyah*, and therefore they resemble one who receives citizenship by birth. We have seen

that not only is one who makes *Aliyah* by the Law of Return regarded as one who acquired citizenship by birth, but a Jew who is born in Israel was considered like one who received his citizenship by virtue of the Law of Return! Today, however, this issue deserves a renewed and informed discussion. This is certainly true since the rationale of an identity in terms of the basis of citizenship between those who make *Aliyah* and Jews born in Israel has been abolished by the state itself, in legislation and in judicial ruling.[177]

My fundamental claim (also expressed in the agreements in the Gavison-Medan Covenant) is that the bestowal of a right on Jews to make *Aliyah*, on account of their ethnic/religious identity, is justified. But there is not a similar justification for the automatic and immediate citizenship which *olim* receive. A number of years of residency in the country, while becoming integrated in the culture, economy and society, will provide a stronger and more credible basis for the Israeli citizenship ultimately granted to the *oleh*. The automatic and immediate bestowal of citizenship upon a certain kind of immigrant, whatever the defining criterion, makes it very difficult for the state to control the identity of those who receive its citizenship. Immediate citizenship also enables *olim* to participate in elections before they have integrated themselves into the life of the state and come to understand its character and its special problems. Simplicity, elegance and considerations of fairness indicate that one who makes *Aliyah* by the Law of Return should receive citizenship only after meeting conditions similar to the naturalization conditions of others, rather than receive citizenship as if one had been born in the country.[178]

The point of departure should be the general conditions for naturalization established in Article 5 of the Citizenship Law. Of course those who make *Aliyah* by the Law of Return will also be exempt from the conditions for naturalization required by Article 5 in appropriate cases.[179] A few differences between those who make *Aliyah* by the Law of Return and "standard" immigrants may be pointed out: ***First of all***, their naturalization will not depend on the discretion of the minister. Every *oleh* who meets the requirements established in the law will receive citizenship.

Second, the legislature of the Law of Return sought to enable Jews to acquire Israeli citizenship without forfeiting their other citizenship. This arrangement should be preserved also for those who make *Aliyah* by means of the Law of Return in the future.[180] At the same time, there is no reason not to impose requirements of being in the country, a certain period of residency, eligibility for permanent residence, a certain knowledge of the Hebrew language, and also the requirement for a declaration of loyalty to the state according to Article 5(c), on those who make *Aliyah* by means of the Law of Return as well.[181]

This proposal was also challenged. Some of the doubts stemmed from a reluctance to alter the existing legal arrangements for return. But precisely here, because of the historical separation between the Law of Return and the Citizenship Law, the alteration of the law—which is in fact necessary—is not a change in the Law of Return itself. Moreover, it is quite likely that a change in the Citizenship Law with respect to the acquisition of citizenship by virtue of the Law of Return can and should be added to a long series of important changes which are intended to adapt the Israeli Citizenship Law to new realities.

But some of the opposition was based on principle and sought to continue to grant individuals eligible for *Aliyah* immediate and automatic citizenship. According to this position, the connection between the Jews and the Land of Israel and the State of Israel is one of sovereignty, and such sovereignty is meaningless if persons do not immediately become full citizens in their own country.

This claim could be founded on the justification of the principle of return for Jews based on the principle of self-determination, according to which they have the right to live in a place in which their people fulfills its right to self-determination. Only citizenship creates a full partnership in the fulfillment of this right. On the other hand, the claim of the safe haven, which also stood at the basis of the principle of return, can be realized in merely making *Aliyah* and in the right to enter and settle in Israel.

Nonetheless, I prefer the distinction—even for *olim*—between the right to enter the country and the right to acquire citizenship. From most of the people who enter the country, including those who immigrate because of family unification, we—and all the countries in the world –demand prior stages of integration in society and requirements such as a declaration of loyalty, from which only those born in the country are exempt. This claim points, once again, at the close connection between the principles of the Law of Return and the premises on which it is based and the most fundamental arguments regarding the identity of the Jewish people and its right to political state-level self-determination in (part of) its historical homeland. To be sure, the claim to self-determination is that which justifies the principle of return both with respect to individual Jews and to the Jewish people as a whole. Nevertheless, this statement is certainly consistent with the demand that ***citizenship*** in the State of Israel—as opposed to living in it—must be equal and shared by all of its citizens, irrespective of differences in origin, religion or ethnicity. A Jewish citizen is not different from a non-Jewish citizen and is not superior to him. There is a considerable difference between one who is born in Israel to an Israel citizen, and who is a citizen of the state by virtue of being born in it, and a Jew or someone eligible for *Aliyah* who chooses to tie his future to the nation-state of the Jewish people in Israel. I applaud such a choice and am happy that the existence of the state, including the Law of Return, allows Jews to make that choice freely, but I do not see a reason to grant individuals eligible for *Aliyah* automatic and immediate citizenship. Such fictions—just like that of Article 4 of the Law of Return—are not desirable and may add confusion to the question of the relations between belonging to the Jewish people and citizenship in the State of Israel. These must be kept distinct, even if Israel is the state in which the Jewish People realizes its right to self-determination.

2. The right to pass on status to family members

Before the 1970 Amendment, the problem of registering mixed families was solved in one of two ways: all the family members were registered as Jews

and brought to Israel by the Law of Return, or the naturalization process of the family members was made easier by Article 7 of the Citizenship Law, by virtue of the Jewish family member who acquired citizenship under the Law of Return. Either way, Jews who made *Aliyah* with their non-Jewish family members did not encounter a practical difficulty. This practice did not raise a problem in terms of justification either, since these arrangements applied to the mixed families of non-Jews who made *Aliyah* because they wanted to connect their destiny with that of a Jewish family member in the State of Israel.

As stated above, Article 4A of the Law of Return was supposed to supply an explicit statutory response to this issue following the limitation of the definition of "a Jew" in Article 4B, but its applicability is in fact much broader than such an amended response to the problem of mixed families. It grants non-Jewish family members eligibility to acquire status not only when they are accompanying a Jewish *oleh*; rather, it grants the family members of Jews for three generations an independent right to be considered eligible for *Aliyah*. This is regardless of whether the family member in virtue of whom they are making *Aliyah* is alive or arrives with them, and regardless of what is their own connection to the Jewish people or to the vision of political independence in the Jewish homeland.

In my opinion there is no justification for this sweeping inclusiveness under current conditions. The correct principle is that distant relatives of Jews—even if they are not Jews according to *halachah* or according to the wider definition suggested here—will receive preferential treatment only if they meet additional conditions which attach them personally to the Jewish people and to the vision of its restoration. Additionally, these people need to meet the requirements of naturalization established in law (although in appropriate cases these requirements may be relaxed). Likewise the existing condition in the Law of Return—that an individual working against the interests of the Jewish people will not be allowed to make *Aliyah*—needs to be considered in these cases.[182] An examination of the discussions in the Knesset which took place at the time that the

amendment to the Law of Return was passed reveals that the legislators did not consider, at the time of legislation, a situation in which the article would make it possible for large numbers of non-Jewish *olim* to arrive, some of whom actively practice another religion and have no cultural or ethnic connection to the Jewish people, and are not interested in such a connection.

I will begin with a consideration of ***the legal arrangement*** for mixed families making *Aliyah*. In this case, the reason and the justification for deviating from general immigration laws is the interest in allowing Jewish *olim* to come to Israel and to live a full Jewish existence here, without requiring them to give up family connections which they formed before they made *Aliyah*. This interest is legitimate and justifiable, and it complements the desire to permit Jews themselves to live a full Jewish existence in their nation-state. This rationale clearly applies to ***the immediate members of the*** **oleh**'***s family, who make*** **Aliyah** ***together***. It may be appropriate to grant such family members even the right to be eligible for *Aliyah* by virtue of the Law of Return. The fact that conditions of naturalization will also apply to Jewish *olim*, as suggested above, will make it easier to apply the same conditions, in a manner which is neither exclusionary nor discriminatory, to non-Jewish family members. In my opinion, the immigration of other family members of the *oleh* (or of an Israeli citizen, Jewish or non-Jewish), such as his children from a previous marriage, or a new spouse subsequent to his *Aliyah*, or that spouse's children, should be dealt with in the framework of the general family immigration laws of the State of Israel.

But here is a different question: What is the ***appropriate policy*** regarding the other family members of Jews, such as those mentioned in Article 4A of the Law of Return? It is certainly possible that the State of Israel would be interested in encouraging immigration of this kind, for a variety of reasons. A state is entitled to maintain an immigration policy which suits its needs, as long as it does not violate rights and does not discriminate. I tend to agree with the assessment that despite the fact that some of the *olim* from the countries of the FSU—and recently the majority of them—are not

Jews (neither according to *halachah* nor according to any other standard), nonetheless the economic contribution of this wave of *Aliyah* to the state is positive and very great. However, discussion of the optimal state of affairs is called for because we should not only think about what has happened in the past, but also about assessments of the future and about future-oriented policy. Such policy should examine the justifications at the basis of those legal arrangements which favor Jews and their families. It is advisable that the examination of such a policy should not be linked to the examination of the *Aliyah* policy for Jews, since it is likely to be more controversial than the policy favoring Jews and those of their immediate families who make *Aliyah* with them.

Such an examination should take into account, in addition to considerations relating to the justification for the preference in immigration of individuals with no actual connection to the Jewish people, considerations relating to the identity and purposes of the State of Israel as the nation-state of the Jewish people. One of the advantages of the Jewish nation-state is that it has unique conditions which reverse the direction of the pressures of assimilation. In every place in which Jews are a minority there are pressures for them to assimilate into the society around them, including through intermarriage. The Jewish majority in Israel—and the considerable separation practically and culturally speaking between the Jewish majority and the Arab minority—have led to a situation in which such "natural" pressures were minimal. As the numbers of non-Jews continue to grow in comparison to the Jewish population, so too will grow the fears of intermarriage and of a cultural existence which will weaken the Jewish identity of the residents of the country, especially of the non-religious ones.

On the face of it, this could be seen as a great opportunity. Israel is the only place in the world in which the Jewish people can absorb others. Foreigners will not weaken the Jewish identity, but rather will join the Jewish society, will enrich it and reinforce it. In many ways this is exactly what has happened. But one can react to this in three different ways: ***First***, the *Aliyah* of non-Jews who are eligible for *Aliyah* includes individuals and

groups who are not interested in being absorbed, and even creates islands of foreign culture. ***Second***, there is in this extension of *Aliyah* eligibility a certain injustice with respect to other potential immigrants who would also be happy to be absorbed into Israeli society. ***Third***, even in the opinions of those who reject—as I do—the complete identity of religion with ethnicity, and do not believe that the only way to join the Jewish people is through an Orthodox conversion requiring a lifestyle of observing ritual commandments, seeing this absorption into "Israeliness" as a kind of absorption into "Judaism" is likely to be a trend which may endanger, to a great extent, the Jewish character of the country. The fear of increased assimilation among Jews or the weakening of their Jewish identity and their desire to preserve it and pass it on are not a reason to violate the rights of other people, but they may certainly justify a policy that does not expand preferences in immigration for those who are not affiliated with the nation who exercise their right to self determination in this state.

A contrary argument which is raised in this context is that absorption into Israeliness is in fact like absorption into Jewishness. This will certainly be true if there is a relaxation of the laws of conversion, coupled with real and effective encouragement of those non-Jews who seek to become fully integrated to join the Jewish people also by way of conversion. The Jewish people, which is quite small, cannot afford to give up the opportunity to grow by way of absorption, just as it has done in other periods of flourishing or political independence. Reflection on this question of the future of the Jewish people and the manner of joining it is indeed a matter of decisive importance, but it is beyond the scope of this position paper. A detailed examination of the question of the influence of the mass immigration of non-Jews to Israel on life within the state and its cultural identity is also beyond the purview of this discussion. Suffice it to say that a decision on this subject will depend to a large extent on a series of premises, arguments and beliefs, both factual and normative, which are all subject to profound and ineluctable controversy.

The ***principle*** is generally accepted: Eligibility for *Aliyah* should be granted only to someone who has a real connection to the Jewish people and who wishes to participate in the enterprise of Jewish national renewal in Israel. But we have seen that "a meaningful connection" and "a desire to participate in an enterprise" are not unambiguous criteria and therefore they are likely to be improperly applied. In light of this, it is possible that the criterion of familial relation is indeed the best standard for attaining the desired goal. But today the law establishes *Aliyah* eligibility as a substantive fact without requiring any evidential basis, and thus does not leave an opening for refuting the presumption of a connection to the Jewish people on account of familial relation. In any event, even in the absence of changes in the law itself, it is possible to limit the policy of encouraging *Aliyah* in the future so that it will attach greater importance to the sincere and proven connection of the *Aliyah* candidate to the Jewish people and to Jewish life.

I, for my part, as we recommended in the Gavison-Medan Covenant, would limit the ***right to make*** *Aliyah* of the family members of Jews according to Article 4A. In my opinion, the goals and rationale of the law require that the circle of *Aliyah* eligibility be narrow and relevant to the basic situation which we are trying to encourage: allowing an individual directly eligible for *Aliyah* due to being a member of the Jewish people, who desires to make *Aliyah* and is married to someone who is not a Jew, to bring along spouse and minor children. Further expansion of family immigration should be undertaken within the framework of the Law of Entry to Israel and the Citizenship Law. The son of a Jew will in any event be eligible for *Aliyah*. The grandson of a Jew, under the proposal, will not be permitted to make *Aliyah* unless s/he falls in the category of those who "joined the Jewish people."

However, as mentioned above, there are reasons against changing the law, and some of these proposals may be implemented without changing the law, through decisions related to *Aliyah* and immigration ***policy***. I will now turn to this subject.

E. Legal principles and immigration policy

As we have seen, it is not possible to analyze the actual practices governing the immigration of Jews and their relatives to Israel, on the basis of the provisions of the law alone. The reality has been determined to a great extent not by means of the law but by means of policy. As no recommendation to alter the provisions of the Law of Return themselves is made, the focus on issues of policy, and the range of questions which it may address, is of particular importance.

The first question is, what must the country do, or what is permissible for it to do, within the framework of encouraging *Aliyah* among Jews or those who are considered eligible for *Aliyah*, or in the framework of encouraging the immigration to Israel of those whom the state wishes to privilege. This is in addition to its legal obligation not to close its doors in the face of individuals eligible for *Aliyah* who wish to enter the country. It is important to emphasize that on this subject a state is entitled to a fairly wide discretion. Nonetheless this discretion is limited by the legal principle prohibiting discrimination. That is, the distinctions at the basis of the policy must be relevant and to be applicable to everyone under consideration. The discretion is also limited by social and political factors, which can diminish the political ability of the government to form or to enforce the policy which it chooses.

The questions pertain both to giving economic incentives for *Aliyah* or preferred immigration (an absorption benefits package? of what kind? what will it include? what processes of assistance are offered to *olim*? how long should absorption benefits last?), and to the initiatives of the state or of agencies acting in cooperation with it with regard to deliberate encouragement of *Aliyah* through the activities of envoys or bodies such as the *Nativ* organization. We have seen that in the first years of the state there were significant discussions of the question of selective prioritization of *Aliyah* according to a variety of criteria, including the ability of the country to absorb immigrants, and the relevant economic and social constraints, although such selective prioritization was quite controversial. In recent years we have witnessed political influences both on the extent of deliberate

Aliyah activity or the encouragement of the immigration of individuals eligible for *Aliyah* and other groups (for instance, the *Falashmura*, who do not make *Aliyah* by the Law of Return but rather by the Law of Entry into Israel), and on the extent of control over the Jewish identity of *olim* and over the method of conversion which they have chosen. Nevertheless we have seen that there is a tendency to privatize *Aliyah* and to lower the profile of the ideal of encouraging *Aliyah* in the work plans of Israeli governments and the Jewish Agency.

In this paper it is not my intention to offer policy guidelines on these subjects. The crux of the discussion, in the final analysis, is the Law of Return itself. I want to emphasize that there are many important questions of policy involved here, and that answers to them ***are not determined clearly by the wording of the law***, even in its existing form. Neither the existing law nor the general principle of return and the justifications for it require a single and solitary policy. On the contrary, governments may choose from a plethora of policy guidelines that are in harmony with the law and are consistent with the national goal of *kibbutz galuyot*. In this sense, there is—and there should continue to be—flexibility in responding to the challenges which the different groups applying for *Aliyah* can pose for the State of Israel. It is not the role of the law to foresee such future contingencies or to descend to such a detailed level of regulation. It should be emphasized that in reality, even though these questions are controversial and very sensitive, many of the decisions are made and implemented by the Minister of the Interior, or even by civil servants in his ministry, without appropriate supervision on the part of the entire government. This situation, which Warhaftig warned of in the initial debate over the Law of Return, does in fact raise concerns that the attempt to deal with so sensitive a subject will not admit of transparency or consistency.

A special challenge arises regarding groups of people eligible for *Aliyah* according to Article 4A, or of the distant relatives of *olim*, whose Jewish culture is questionable, weak, or very different from the kinds of Jewish culture common in Israel. Cultural, social and economic differences

between such individuals and other residents of the country greatly impair their ability to integrate well into the country and society. Such groups are very different from one another.[183] It is not advisable to treat them in the same way. There are ongoing debates as to whether each of these groups has a history of distinctly Jewish characteristics or perhaps went through conversion processes (like the *Subbotniki*). The question of numbers is also relevant here. There is a great difference between relatively small communities, which have distinctly Jewish characteristics and are persecuted on account of them, and fairly large communities—or communities the size of which is not clear—and which did not have any real connection with the mainstream of Judaism for hundreds and thousands of years. It is commendable to view positively the continued realization of the ideal of "*kibbutz galuyot*" also with respect to communities such as these, if they have distinctly Jewish characteristics and if there is a real need on the part of their members to lend a full signficance to their Judaism in the framework of a Jewish nation-state. Nonetheless cultural differences constitute a real obstacle to their successful absorption in a modern and developed society, one that is likely to frustrate the realization of these advantages for them and for the state and society. A state dealing with residents and citizens who are themselves having difficulty integrating into a modern and developed society,[184] needs to think carefully before it "volunteers" to take on itself additional immigrants who will have difficulty integrating into Israeli society and whose Jewish characteristics are not such so as to facilitate this integration.

The conclusion is that policy decisions in this sensitive area should be made in an informed and transparent way, following an open and well-founded public discussion, by the government as a whole. They cannot be the half-accidental results of the inclinations of ministers or officials, however worthy or high-ranking they may be.

Chapter Five

Summary, Conclusions and Recommendations

In this final chapter I will discuss several topics: ***First***, I will summarize the justification for the Principle of Return. ***Second***, I will review the practices of return in light of how well the State of Israel has fulfilled the promises regarding Jewish *Aliyah* contained in its Proclamation of Statehood. ***Third***, I will assemble the conclusions and recommendations resulting from the critical discussion of the arrangements for implementing the Law of Return. ***Fourth***, I will address the question, which has been alluded to occasionally in the text, regarding the optimal level of regulation of the proposed policy.

I repeat that this paper does not include recommendations for legislative changes, but it does contain an invitation to review the basic issues in a manner that is likely to have immediate impact on *Aliyah* policy, and to bring about a reconsideration of the legal arrangements when an appropriate opportunity arises (for instance, at the time of the framing of a constitution or of the enactment of basic laws on these issues).

A. The Principle of Return

This position paper has presented a justification for the Principle of Return based on the right of the Jewish People to self-determination in a state which is the expression of that right. The right of political self-determination rests on the fact that there exists in Israel today a large Jewish community whose members have a right to political self-determination. This right cannot be realized in a sub-state manner since this would not ensure the rights of these

individuals to protect their own security and identity and would not ensure the right of Jewish individuals to immigrate to this community. Only a state with a Jewish majority, in which there is a Jewish-Hebrew public culture, and which controls security and immigration policy, can ensure the realization of these rights.

The Principle of Return will be justified as long as these conditions exist and as long as there is a need for a state whose immigration policy will enable interested Jews to become part of it and to live in it full Jewish lives, including an aspect of controlling their fate, or to find shelter in it from being persecuted as Jews.

The Principle of Return is therefore justified morally, and is consistent with the provisions of international law and the practices of other nation-states. That being said, the validity of the ***principle*** of return does not exempt us from the critical examination of the specific ***arrangements*** for return in light of its justifications.

B. To what extent has Israel fulfilled the promises included in the Proclamation of Statehood?

In principle Israel has fulfilled its promise to be open to Jewish *Aliyah*. *Kibbutz galuyot* has been accomplished not only in the sense that it has put an end to the reality imposed by the British Mandate before the establishment of the state, which limited Jewish immigration to the Land of Israel, but also through large-scale operations which encouraged individuals and even whole communities to make *Aliyah* to Israel. This policy was also generous in its treatment of the immediate families of Jews who wished to make *Aliyah*. Thus the concerns of the opposition parties that the governments which came to power would exploit their discretion and refrain from bringing individuals and groups not associated with them to Israel did not prove to be warranted. It would seem that this was not due to the law or to the level of the legal arrangement, but was rather the result of internal and external political pressures on Israel's governments.

To this general conclusion, as we have seen, there are two main qualifications to be made. ***First***, there are individuals who view themselves as Jews but which the State of Israel does not recognize as Jewish for the purposes of return. Even if most of them are eligible to make *Aliyah* according to the law, this situation raises complex problems regarding the contemporary concept of Jewish identity and the legitimate role of the state and its laws in taking a position in the debate on identity. ***Second***, Israel has a policy of encouraging *Aliyah* among eligible individuals (and even among non-eligible individuals), even if their connection to Judaism, by any standard, is either weak or non-existent. This situation stems in part from the 1970 amendment, following the **Shalit** case, and more importantly from policy decisions of the Israeli government or even of particular Ministers of the Interior. A large portion of the resulting *Aliyah* has been assimilated into Israeli-Jewish society.

Promoting the immigration of Jews to Israel and *kibbutz galuyot* were major objectives for Israel in the initial years of its existence. The struggle for these goals was the basis of the "national institutions" policy before the founding of the state. These facts found clear expression in Israel's Proclamation of Statehood. Even during the first years of the state, however, and today as well, there rage passionate debates within the different Jewish communities about the importance and centrality of Zionism in general, and of the aspiration for *Aliyah* in particular, within Jewish life. The "negation of exile" as a way of thinking and the concept that there is something fundamentally defective in Jewish existence outside Israel were gradually replaced over the years by a different approach according to which a vibrant Jewish life is critical to the welfare and prospects of the Jewish people whether it is found in Israel or in the Diaspora. This development has also led to a change in emphasis regarding *Aliyah*, both in government institutions and in the Jewish Agency.

A thorough discussion of these subjects is beyond the scope of this position paper, but I would nonetheless say that it is regrettable that the treatment of these issues—and of their practical ramifications—is not the focus

of public debate in Israel, in national institutions, or in Jewish communities abroad, but rather is determined by politically motivated decisions of the government or the Jewish Agency, or even of the different ministries, which tend to receive minimal exposure and are not subject to extensive public debate. I believe that this provides a rather shallow basis of thought and action on these fundamental issues and it would be worthwhile to attempt to bring about a fundamental change in this situation.

We should note that currently there is not a great deal of *Aliyah*, and there are no pressing disputes that require urgent action without due deliberation. From the predicament of limited *Aliyah* it is possible to derive some advantage. Even if in these circumstances it is unreasonable to expect that this subject will be dealt with by an overburdened Israeli government, it would certainly be possible to find forums which could give priority to these issues and conduct informed debate with experts and the representatives of different communities.

C. Specific arrangements pertaining to return and immigration policy

The basic declaration of the Law of Return, that "every Jew has the right to come to this country as an *oleh*" is a constitutional expression of the principle of return, and as such it is justifiable. This principle, as well as the provisions of the Law of Return, should not prevent the informed consideration of the principles of immigration policy and the timing of their implementation with respect to initiating the *Aliyah* of those eligible for *Aliyah,* Jews and non-Jews alike, in light of the valid justifications for the Law of Return, in light of immigration arrangements for non-Jews in Israel, and in light of the political, social and economic circumstances of the time.

As we have said, the rationale of preference for Jews in *Aliyah* to Israel is based on the interest of the Jewish people in founding a nation-state and in national life, and on the interests of Jews who wish to live a full Jewish existence in their own homeland and to find in it a safe haven from being

persecuted as Jews. This rationale should serve as the basis for immigration policy and the varieties of preference for Jews and their families within the framework of that policy. One should remember that the preference for one group in immigration is suspect, even if it is justified, and therefore it is appropriate to examine thoroughly the extent of this preference so that it will remain directly and firmly connected to its justification.

Within the framework of the existing provisions of the law, Israel needs to examine the policy of encouraging and initiating *Aliyah* which it practices in an informed manner, on the basis of its goals and needs and on the basis of the needs of its inhabitants. The Law of Return currently includes a declaration of the fundamental principle alongside of particular arrangements. Other arrangements related to the immigration of Jews and their families to Israel are found in other laws (such as the Citizenship Law) and in the regulations and practices of many bodies. The fundamental and symbolically significant questions which the Law of Return raises are numerous, profound and deeply controversial for the different parts of the Jewish people. A great many of the practical concerns connected with the law stem from issues pertaining to the absorption of non-Jews, individuals whose Jewish identity is disputed, and their families. Thus, for example, there are the problems of integration into Israeli society and conversion.

The rationale behind the Principle of Return and its justification is based on the desire to enable those who view themselves as part of the Jewish people to join the nation-state of the Jewish people, and to allow the nation-state to promote measures which will facilitate *kibbutz galuyot* and the preservation of a stable Jewish majority in the country. The policy of encouraging *Aliyah* needs to reflect these goals in the best way possible, and to require the minimal possible attempted resolution of issues which are controversial for different parts of the public. The state, or its courts, should not aspire to provide "essentialist" answers to controversial questions such as "Who is a Jew?" Decisions such as these, if made by the state, would in any event not resolve the actual controversies. Nevertheless the state must

develop a mechanism that will enable it to give transparent and fair answers to the question of who is eligible to settle in the country and become a citizen.

In the framework of this policy it is possible to permit, and even to encourage, the immigration of individuals whose connection to the Jewish people is insufficient to grant them actual eligibility for *Aliyah*. As with any policy, this one may reflect the exercise of discretion by the proper authorities, but it must never be contaminated by discrimination or ulterior reasons. The distinctions at the basis of the policy need to be relevant and to be equally applicable to everyone under consideration. Likewise, it is important to emphasize that, independent of the content of arrangements for *Aliyah* and immigration to Israel, the state has a responsibility not to abuse and harass those living under its jurisdiction. It may be permissible to create a policy regarding entry into Israel under the Law of Return or in the framework of general immigration arrangements, but it is essential that this be done with due process and while treating the individuals concerned fairly and with dignity.

D. The Level of Legal Regulation: Constitution, law, administrative directives and administrative discretion

To conclude, one final question: What should be the level of the legal arrangements regarding the *Aliyah* and naturalization of individuals eligible to make *Aliyah*? This question has recently been the subject of intense discussions in the framework of the extensive efforts made by the Constitution, Law and Justice Committee in the 16th Knesset, led by MK Michael Eitan (Likud) and in the 17th Knesset, led by MK Menachem Ben-Sasson (Kadima), in order to draft a complete constitution for Israel. Both efforts sought to include general declarations concerning Return and Citizenship in a Chapter of General Principles. Additionally, a number of NGOs have placed on the table of the Knesset either proposals for a complete constitution, which deal with these subjects, or recommendations for special

constitutional arrangements pertaining to the subjects of citizenship and return.[185]

We have seen that today these subjects are regulated in a combination of primary laws (the Law of Return, the Law of Entry into Israel, and the Citizenship Law), and in an abundance of directives and guidelines, and of court rulings. We have also seen that court rulings have no small impact on the interpretation and application both with respect to the laws and to the guidelines. The main discretion today is in the forming of guidelines, in their implementation and application. In certain cases court rulings have resulted in the "moving up" of an arrangement from administrative guidelines to the statutory level. An obvious case is the 1970 Amendment to the Law of Return, which followed Supreme Court rulings in the **Rufeisen** and **Shalit** cases. With hindsight, the Supreme Court ruling in the **Benjamin Shalit** case, and the 1970 Amendment which followed it, seem unfortunate. It would have been preferable to accept the minority opinion in **Shalit**—that of judicial restraint as stated by President Agranat and Judge Landau—and thus avoid both the need to amend the law and difficulties which occurred following the amendment. The vagueness of the original law, which did not include a definition of "a Jew," might have extended flexibility to decision-makers and facilitated the adaptation of those decisions to suit the political and cultural balance of power in the general public. In the shadow of the principles of the original law, it had been quite easy to shape an *Aliyah* policy for Jews and their relatives without sharpening the ideological divides. It would have been wise to obscure the differences as much as possible and thus to prevent the backlash and the counter-backlash which would result from them, as did indeed occur in the wake of the adoption of the 1970 amendment and following the key rulings afterwards (mostly on the subject of conversion).

But, as we have seen, the question of the level of regulation for the *Aliyah* of Jews arose even before this crisis, immediately upon the founding of the state, in the period leading up to the legislation of the Law of Return. Even if the arrangement of the original law, which combined a

dministrative discretion or internal guidelines with a vague, basic declaration, was preferable to a law which included a quasi-*halachic* definition of "a Jew" and a "compensation" in the form of the expansion of *Aliyah* eligibility—it is difficult to imagine that today we could turn the clock back and take matters regulated by statutory provisions of the Law of Return and relegate them again to the realm of administrative directives. There is a wide consensus that it would not be advisable to touch the Law of Return by means of legislation. Moreover, there are those who claim that even the provisions of the Citizenship Law which apply to individuals eligible for *Aliyah* cannot and should not be changed. The restoration of immigration arrangements pertaining to these subjects to the level of administrative guidelines is likely to face criticism, not only for substantive reasons of transparency and rule of law, but also because of the scope of the judicial review.

We have seen that even during the deliberations over the Law of Return there were those who sought to entrench it, and that Ben-Gurion objected to this suggestion because he did not want to create a hierarchy of laws. At the same time Ben-Gurion never imagined that there would be an actual demand in the Knesset to annul, or at least to curtail, the original Law of Return. Even though the Supreme Court has hinted in an aside that the Law of Return would pass the constitutional test on the basis of a distinction between "the keys to the house" and full equality "in the house," the fear that the principle of return may possibly be revoked by a court as unconstitutional is seriously troubling for many lawmakers.[186]

It is therefore proposed that, if there is to be a constitution or new legislation on the subject of return, the principle expressed in Article 1 of the law: "Every Jew [member of the Jewish people] has the right to come to this country as an *oleh*"[187] be transformed into a constitutional principle. This principle, in and of itself, does not determine the extent of the right of an individual who is eligible for *Aliyah*. Most of these issues should be regulated at the level of a regular statute or even at the level of administrative directives.

The elevation of the status of the principle of return by itself to the constitutional level would, in a certain sense, restore the legal situation to

what it was before the 1970 Amendment, since the constitutional principle would remain vague, while the definition of a Jew and the expansion of *Aliyah* eligibility to include non-Jews would be inferred and re-examined in light of the constitutional principle and on the basis of its justifications.[188]

It has been suggested that on the level of ordinary legislation (which can remain within the framework of the Law of Return or be combined with the Law of Entry into Israel)[189] the arrangements covered today in Article 2 of the Law of Return ought to be established, as well as the principle that persons who are eligible for *Aliyah* may confer the right to make *Aliyah* to their spouse and minor children who are making *Aliyah* with them as well. If any change is to be made in the Law of Return, it would be advisable to abolish the provision of Article 4. For today all concede that it has no practical significance, and that its symbolic meaning is likely to be misleading, so that it has no place in a law of the Knesset.

Principles of immigration policy such as incentives for encouraging *Aliyah* or deliberate actions for encouraging *Aliyah* from a particular place will be made on the level of policy decisions. It is suggested that it be established in law that these decisions will be made by the entire government at the proposal of the Minister of the Interior. The smooth and transparent application of the constitutional and statutory principles will require guidelines which will establish what "a Jewish way of life" is, how to determine that an individual leads such a way of life, and which are the "recognized denominations of Judaism." Moreover, it is possible that the criteria for answering these questions will change to suit the different Jewish communities and the different denominations.[190] Nonetheless, because of the sensitive character of these decisions, it is possible to require that the directives be published and authorized by the government as a whole or by one of the Knesset committees.

The provisions pertaining to the acquisition of citizenship for individuals eligible for *Aliyah* will continue to be included in the Citizenship Law, supplemented by directives and regulations as needed. If there is a decision to separate entry and settlement in the country according to the Law of

Return from the acquisition of citizenship, there will be no choice other than to alter Article 2 of the Citizenship Law (which grants citizenship by virtue of return). I assume, however, that a change in the Citizenship Law is not as highly charged as a change in the Law of Return, and that in any case there will be a need for a fairly broad change in the Citizenship Law. Regarding the conditions for naturalization of *olim*, they should be adapted to provisions which reflect the ideal immigration policy for Israel rather than duplicating the existing requirements under Articles 5 and 7.[191]

We need to consider the level of legal regulation, and not just the content of the norms, also on the subject of immigration policy—both on the level of entry into Israel and on the level of naturalization—with regard to the relatives of Jews who are not directly eligible for *Aliyah* by virtue of the *oleh* himself. Here too there is no one right answer. It is clear that if there is no change in the Law of Return, the formal arrangements contained in it will remain at the level of legislation. In any event, policy decisions in these areas of the *Aliyah* of Jews and their family members and of encouraging their *Aliyah* and absorption in Israel should not be made only by the relevant minister, and certainly not only on the administrative level. There should be effective supervision of the guidelines—and over their enforcement—by the government and the Knesset.[192]

Epilogue

The principle of return is a formative principle of the State of Israel and it is important to preserve it as such and to place it above controversy. It is important that Israelis and Jews in the Diaspora be familiar with the justifications for this important law, and that it be for them more than a matter of rote learning; that they should know what answers can be given to those who oppose the law.

The Law of Return, which reflects this principle, is one of the "bedrock laws" of the State of Israel, as Ben-Gurion declared when bringing it before the Knesset. The part of the law which reflects this principle does indeed enjoy the greatest consensus among Jews in Israel. On the other hand, the more specific arrangements of return are subject to considerable disagreements, both in principle and in practice. The Law of Return brought to the surface the most profound contemporary questions about Jewish identity. With issues such as these, the discussions of the Law of Return are only a short chapter in a set of fundamental debates, which will not be resolved, and cannot and need not be resolved, especially not by the state. But law and policy are practical matters, which the state makes and enforces, and with regard to them decisions must be made.

The Law of Return illustrates the fact that it is at times important to distinguish between ideological issues that are intractable and are better left alone, and practical issues which it is essential to resolve. Hence practical decisions need to be made without aspiring to "resolve" or to "end" the ideological debates. The more general discussions will continue in multiple and varied forms; they will concern ideological matters and practical ones; they will touch on cultural subjects; and they may form a basis for Jewish identities and communities. These dialogues, which are at times penetrating and divisive, are the form in which the Jewish People deals with the will to

preserve its long-lived historical continuity and to preserve the continually regenerating conditions of its existence. With all of the difficulties, the Law of Return and the legal arrangements which it created have performed this complex mission in an impressive way.

The principle of return should be protected with the utmost care. The specific arrangements can and should be examined and improved. The policy needs to be weighed in light of the needs and changes of the times. The complex whole of principle, legal arrangements and policies together constitutes a primary instrument for the foundation and preservation of the revived political independence of the Jewish people, with all of its diversity, in (part of) the Land of Israel.

Notes

1. A preliminary clarification of terms: The Proclamation of Statehood refers to "Jewish *Aliyah*," but this term contains a redundancy since "*Aliyah*" is the immigration of Jews to Israel. Therefore in this essay I will use either "*Aliyah*" or "Jewish immigration" according to the context. Of course the selection of terms is an ideologically sensitive issue. "*Aliyah*" is a value-laden word with pre-Zionist Jewish religious roots. "Jewish immigration" is a neutral term. This paper is written from a Zionist point of view.

2. The positions expressed on these subject are an expansion and modification of those formulated in the first chapter of the Gavison-Medan Covenant 2003.

3. Two general comments: ***First***, we should mention that this position paper is being published shortly after the publication of an additional position paper from the Metzilah Center, which was written by Shlomo Avineri, Liav Orgad and Amnon Rubinstein and dealt with general principles of Israeli immigration policy (except for the unique aspects pertaining to the immigration of Jews and other individuals eligible for *Aliyah* by the Law of Return). On this subject see Avineri et al., 2009. This position paper focuses solely on the question of the entry and naturalization in Israel of Jews and others eligible for *Aliyah*. ***Second***, there is no doubt that when we discuss *Aliyah* we need to discuss the absorption of *Aliyah* as well: both Israel's very impressive successes in this field over the years of its existence, and the difficulties of absorption which preoccupied (and to some extent still preoccupy) the State of Israel. A treatment of these questions is beyond the scope of this position paper.

4. "*Brit Shalom*" and later "*Ichud*," which both belonged to the Zionist camp, although they were a small minority within it, aimed for a level of Jewish immigration that would enable a large and robust Jewish presence that would not be subject to rule by an Arab majority, but were prepared to aim for "many, but not a majority" in order to assuage Arab fears of Jewish domination. They therefore agreed that Jewish immigration should be permitted only up to the point where the Jews were half of the country's population.

5. These disagreements disappeared almost completely during the war, and especially after the extent of the Holocaust became clear. But it is important to mention that all along the need for a Jewish state (or a state for the Jews) also rested to a large extent on the feeling that the existence of the Jews of Europe was not secure and that it was necessary to prepare a safe haven for them. See for instance Don-Yehiya 1998; Fund 1998.

6. Halamish 2000; see also Weitz 1998.

7. Stein-Ashkenazy 1998. This was a profound ideological debate, of which there were other expressions as well (for instance, Jabotinsky's position on the character of the Hebrew University and its students). We should mention that during this entire period Jabotinsky was a thinker active in the opposition and was not required to reconcile his ideological positions with political, social and economic realities.

8. This principle was also acceptable to the Zionist leadership. It was expressed, for instance, in the differentiation between the free *Aliyah* of wealthy individuals (Category A of the Mandate *Aliyah* visas) and "the workers' *Aliyah*" which was limited by semi-annual quotas (Category C). See Halamish 1998.

9. Ben-Gurion's statements in the Protocols of the Provisional State Council, May 14, 1948.

10. For a critical discussion of this aspect of the Proclamation of Statehood, see Kamir 1999.

11. Bein 1982, 46.

12. Carmi 2003, 22-23.

13. Warhaftig 1988, 39-40.

14. Ibid., 135-141.

15. To understand this point we need to recall the Hebrew original: כל יהודי זכאי לעלות ארצה. The location of exercising the right is the country, not the state. This subject is important even beyond the fact that Israel's borders have never been established in law. Nonetheless it is not clear whether this was actually intended to have a practical meaning. The assumption is that a state does not presume to legislate arrangements beyond its own borders. It is possible that the choice of the words "Every Jew has the right to come ***to this country*** as an *oleh*" has a purely ceremonial aspect. But the wording "Every Jew has the right to come to the State of Israel as an *oleh*" could have been just as powerful as "Every Jew has the right to come to this country as an *oleh*." We should note that there are Jews who made *Aliyah* and settled directly in the territories that were occupied in 1967. In general, Israel's stance toward the territories and in particular to their Jewish residents is similar to its stance toward the other inhabitants of the state. For indications that even today this distinction has practical importance, see the discussion which took place in the Constitution Committee and addressed proposals regarding return on June 3, 2007.

16. The original referred to the "Minister of *Aliyah*".

17. There is no question that with regard to someone who has already arrived and seeks to enter the country the discretion is limited only to the (fairly narrow) considerations mentioned in the law. But, as we have said, the Law of Return does

not preclude a policy which initiates the process of bringing *olim* to Israel. On this question it seems that the discretion, which is exercised in the decision whether to grant a visa to an *oleh* who is still located in his country of origin, is wider.

18. Knesset Proceedings, 160th Session (July 3, 1950), p. 2044.

19. Knesset Proceedings, 162nd Session (July 5, 1950), p. 2099.

20. MK Eri Jabotinsky (the Herut Movement) stated at the podium of the Knesset: "The question of preventing the *Aliyah* of Jews to Israel for the reason that they are likely to endanger the public health or safety, is a highly problematic question. For who determines that a certain Jew is likely to endanger the public safety? There were times when there were among us people who wished to prevent the *Aliyah* of Revisionists to Israel. It is likely that there will come a time when there will be those who shall wish to prevent the *Aliyah* of communists or the *Aliyah* of religious fanatics to Israel," (Knesset Proceedings, 160th Session [July 3,1950], p. 2047).

21. For a rationale such as this, which sees in the fiction of article 4 a mere declaration, see for instance Cohn 1997, 496, 504-511.

22. See his statements in the Knesset Proceedings, 162nd Session (July 5, 1950), pp. 2106-2107, and Yosef Lamm's unconvincing response in the name of the Constitution Committee. This fiction lost some of its practical meaning with the 1980 Amendment to the Citizenship Law, and it was reduced to almost nothing in the interpretation given to it in the ruling of Justice Cheshin in the ***Stamka*** case. See below Chapter 3, section C3. For an exhaustive discussion see Carmi 2006.

23. Knesset Proceedings, 162nd Session (5 July 1950), p. 2096.

24. The interpretation that citizenship is immediate is supported by the statement in Article 2 that citizenship by virtue of return is conveyed to the *oleh* from the day that he makes *Aliyah*.

25. Today this is the clause by which citizenship is granted to anyone who was born in Israel to an Israeli citizen. Up until the 1980 Amendment, this route was available exclusively to non-Jews (mostly Arabs), since Jews received citizenship by virtue of return according to a combination of Article 4 of the Law of Return with Article 2 of the Citizenship Law.

26. See Avineri et al. 2009.

27. Bein 1982, 46-47.

28. Hacohen 1994, 19-22. Trade agreements were for the most part secret, since none of the parties were interested in having their part in the agreement revealed. The American Jews who funded the Joint were concerned about the enormous amounts of money which were being passed from the West to communist regimes at the height of the Cold War. Since direct trade with communist states was

prohibited, Israel served as a middleman in transferring these goods, and therefore was also careful not to expose its actions.

29. At first this was a continuation of the waves of *Aliyah* which arrived between 1946 and 1947, in which most of the *olim* came against the will of the British authorities, by illegal means and with the assistance of *Ha'apalah* agents from Palestine. These methods continued to be used even after the Proclamation of Statehood, since even though there was free *Aliyah* to Israel, it nonetheless suffered from delays and from difficulties created by the authorities of the countries of origin or in the countries in which the *olim* were temporarily located. Some of the *olim* were even delayed en route by the British who, even after the end of the Mandate and their departure from the country, continued to detain them in camps in Cyprus. It was only in March 1949 that the refugee camps were completely emptied.

30. Most of the Bulgarian Jews made *Aliyah* (40,000 people), as well as most of the Jews of Yugoslavia. In November 1948 the exit was permitted of 5,500 Jews from Yemen, who had been held in a camp in Aden since 1945. In January 1949 the *Aliyah* of the Jews of Turkey was permitted, bringing 25,000 people. In March 1949 the legal departure of the Libyan community, numbering 32,000 Jews, began with the consent of the authorities. The same month the stream of *olim* from Czechoslovakia increased, after an agreement was reached with the authorities to permit the exit of 20,000 Jews in the space of a year. In May 1949, Operation "Magic Carpet" began, flying the vast majority of Yemenite Jewry—45,000 Jews. 5,000 Jews made *Aliyah* from China at the beginning of 1949, having arrived there to escape the Nazis. From North Africa—Morocco, Tunisia and Algeria—came more than 35,000 Jews in the first two years of the state. At the end of 1949 the governments of Romania and Poland permitted the *Aliyah* of Jews to Israel. By February 1950, 28,000 Jews had made *Aliyah* from Poland. By 1952, 85,000 Jews made *Aliyah* from Romania. In Operation "Ezra and Nehemiah," 56,000 Jews made *Aliyah* from Iraq, through Teheran.

31. Bein 1982, 49-58.

32. Hacohen 1998, 288-289. For an updated systematic discussion, see Halamish 2008.

33. Hacohen 1998, 292.

34. At the end of 1951 there began a decrease—to the point of an almost complete freeze of *Aliyah*. But in 1954 the *Aliyah* from Morocco picked up, following a wave of nationalism which arose in the country as part of the struggle to be liberated from French control. Therefore, between 1954-1956 65,000 Jews made *Aliyah* from Morocco. In 1956 and after (following the Sinai campaign) an additional wave of *Aliyah* began, mostly from North Africa. In 1957 almost 12,000 Jews made *Aliyah* from Egypt, and the stream from Morocco was renewed with full force. During these years there was also a large wave from Poland, which had opened its gates,

and in 1958 there was also an increased *Aliyah* from Romania, which reached its height in 1964, with 23,000 *olim* over the course of a year.

35. Bein 1982, 152-153.

36. Hacohen 1998, 294-295.

37. Ibid., 315-316.

38. Halamish 1995, 115-117.

39. For up-to-date reiterations of the support for the principle of return, see Gans 2006, 200-224; 2008a; 2008b; Carmi 2008. See also Yakobson and Rubinstein, 2009. Arguments against Jewish *Aliyah* and against the Law of Return appeared frequently in political and polemical documents. For a sophisticated academic argument which is critical of the Law of Return and of the rationales of those who support it from a liberal point of view such as that of Gans and Carmi, see Zreik 2008.

40. HCJ 6698/95 ***Aadel Ka'adan v. Israel Lands Administration, et al.*** PD 54(1), 258.

41. Klinghoffer 1963; for the Israel Democracy Institute's proposal, see http://www.idi.org.il/PublicationsCatalog/Pages/BOOK_7060A/Publications_Catalog_7060A.aspx. Needless to say, the Arab resistance to the Law of Return, as well as to the definition of Israel as a Jewish state, is expressed also in the fact that the vision statements do not include the principle of (Jewish) return. The Democratic Constitution composed by Adalah (http://www.adalah.org/eng/democratic_constitution-e.pdf) includes an article which discusses citizenship, and it takes a completely neutral tone (while expressing a preference for one who is born in the country to a parent born in the country—the negation of automatic citizenship for "*olim*" and even for their children born in the country, and including recognition of the right of return). On the Knesset website discussions of the Constitution Committee on these subjects, in the 16th and 17th Knessets, are recorded. The 17th Knesset held seven discussions on this topic: February 20, 2007; March 6, 2007; March 14, 2007; May 7, 2007; May 20, 2007; June 30, 2007; and July 2, 2007. In addition, proposals from the Constitution Committee of the 16th Knesset, background materials, and many other proposals were laid on the table of the committee. See http://www.knesset.gov.il/protocols/heb/protocol_search.aspx.

42. For sources emphasizing the principle of sovereignty see Oppenheim 1992; Brownlie 1963. For criticisms of this approach see Chan 1991; Henkin 1995.

43. I do not wish to address the complicated and sensitive subject of universal moral considerations regarding immigration policy. I am focusing on special aspects of the justification for preference of the immigration of Jews to Israel. In a more general way, I discuss the case in which a national community grants preference to

immigrants who are members of the people which realizes its right to state-level self-determination in the immigration state.

44. For a systematic discussion, see Gans 1998, 345-348, 358-360. Gans clearly distinguishes between the argument for the justification of Jewish *Aliyah* for the purposes of creating a critical mass of Jews on the one hand, and the continuation of the preference in immigration to Israel on the other. On this subject see Gans 2008b. For a survey of the distinction see Gavison 2003.

45. Ibid. This matter demonstrates that even if the Law of Return is indeed a main feature of the Jewishness of the state, it does not exhaust it. On the contrary, the ability of the state to serve as a base for the realization of the right of Jews to self-determination—that is expressed in the features of the lives of Jews in the country and in its cultural character—is the justifying basis of the Law of Return.

46. Ibid. In order to justify the realization of the right to self-determination, in order to establish what the dominant public culture is, and in order to control the regulation of immigration and security, a majority is needed. But considerations such as these can be valid even regarding the need of a certain community to maintain a size permitting a full existence and transmitting the culture to future generations. This applies in contexts of sub-state self-determination as well.

47. Gans expands these points. See Gans 2003, 135-141. Likewise, see Gans 2006.

48. Knesset Proceedings, 160th Session (3 July 1950), pp. 2035-2037.

49. See for instance Miller 2005; Walzer 1983.

50. For a discussion about preference on this basis, see Gans 1998. For a criticism which emphasizes the differences between the population of the country and a family, see Carmi 2003, 68.

51. See the treatment of this subject in the position paper which deals with Israeli immigration policy, Avineri, et al. 2010.

52. Gans argues against the possibility of using affirmative action as a justification for the Law of Return; see for instance Gans 2008b, 111-124.

53. Kasher 2000, 80-81.

54. Carmi 2003, 44. See also Gans 1995.

55. Zilbershats 2000, 125, note 3.

56. See for instance Miller 2005. See also Gans (forthcoming).

57. Note 27 of the Human Rights Committee's commentary on this article states that this refers not only to citizens but to other individuals who feel a real connection to the country in question, such as permanent residents.

58. This vagueness is relevant to the claims of the Palestinians in support of their "right" of return, because one of their claims is that the place where their houses were is "their country" according to this article. Even if we accept this claim, this does not in and of itself substantiate the statement that the right of return can be based on the right to freedom of movement, because the treaties only prohibit the "arbitrary" denial of entry, and it is not clear that the Israeli refusal to allow their entrance is indeed arbitrary. On this topic, see Zilbershats and Goren (forthcoming).

59. Yakobson and Rubinstein, 2009.

60. See International Covenant on Civil and Political Rights, 1966, Article 26.

61. Zilbershats 2000, 124-125; Carmi 2003, 72. International law regarding citizenship is in a process of formation and there is a tendency to include in it provisions which limit a situation of lack of citizenship. Part of the problem is that the principles of acquisition of citizenship which are in effect in different countries can be different from each other and thus a situation can arise in which a child is born who is not eligible for citizenship in any country. Take for instance the case of a child born in the territory of a country which grants citizenship on the basis of blood-ties (*jus sanguinis*), but the child's parents are citizens of a country in which citizenship is acquired on the basis of birth-location (*jus soli*). Indeed, the American Convention on Human Rights grants a right to citizenship corresponding to the obligation of states to grant citizenship in certain circumstances (Article 20 of the Convention). There is also an interpretation of the Convention on the Rights of the Child which grants children a right of citizenship which corresponds to the obligation of states to grant them citizenship in particular circumstances (especially if they do not have any other citizenship). This important topic extends beyond the limits of our present discussion.

62. Yakobson and Rubinstein, 2009.

63. It is important to emphasize this point, since many have remarked in discussions of the Law of Return that the right of a Jew to make *Aliyah* is a natural right, pre-existing the state, and that the realization of this right is the purpose of the state, and not something that the state grants. The rhetorical significance of these statements in terms of the Zionist narrative and the narrative of the state is easy to understand—but from a legal standpoint they are inaccurate. Jews did not have a ***legal*** right to make Aliyah before the Law of Return (the struggle for free *Aliyah* was a political struggle, not a legal one); and they will not have such a right if the Law of Return is altered with respect to this point.

64. For these arguments, see for instance the *Adalah* Constitution. I will not address the question of whether the Arabs are an "indigenous" minority in Israel or merely a "homeland" minority in it. The question does not impact on the claim in this position paper, and the claim for the status of indigenous minority is based

on the concept of the new Zionist settlement as a manifestation of colonialism. See also Gavison (forthcoming).

65. Yakobson and Rubinstein 2009. This norm is expressed in the decision which was made in October 2001 by the committee for "Democracy through Law" ("the Venice Committee")—a committee of jurists, expert in the subject of human rights, affiliated with the European Council. The Committee's decision explicitly recognizes a connection between an ethno-cultural community and its kin state as a legitimate and even desirable phenomenon in terms of European norms. I will not address here the practices of many countries which affirm the legitimacy of a continued connection between nation-states and their diasporas, which live in other countries.

66. We should mention that we are dealing here only with the ***principle*** of preference for the members of an ethnic group, and this is indeed common in many countries. The ***specific arrangements*** for preference which are established in Israel are broader than those practiced in most of the other countries. See Gans 2008b, chap. 5.

67. Thus for instance the Indian constitution explicitly states that Muslims who fled to Pakistan during its partition from India will not be permitted to return to India. See also the complex relations between the Macedonians and the Albanians in Macedonia, and between the Albanians and the Serbs in Kosovo.

68. For a powerful academic argument in this spirit, see Zreik 2008. See also Azmi Bishara's statements in an interview with Ari Shavit, "The Citizen Azmi," *Haaretz* Supplement http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=234509.

69. See for instance Katznelson 1946, especially 33-35, 36-42; Shimoni 2001, 326-329.

70. Gavison 2003.

71. Feinberg 1967, 19-20.

72. Feinberg 1980, 130.

73. Yakobson and Rubinstein 2009.

74. Israel was accepted to the UN on May 11, 1949. There are those who claim that Israel committed itself to implement Resolution 194 when it was accepted as a member of the UN, and the General Assembly conditioned this acceptance on it. Resolution 194: "[The General Assembly] resolves that the refugees wishing to return to their homes and live at peace with their neighbors should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property for those choosing not to return, and for loss of or damage to property which, under principles of international law or in equity, should be made

good by the Governments or authorities responsible." On the other hand, there are commentators who beg to differ on this claim. On the status and significance of Resolution 194 see Zilbershats and Goren (forthcoming).

75. See for instance Zreik 2008.

76. See Zilbershats and Goren-Amitai (forthcoming).

77. I will not address here the argument that it is sufficient for Israel to recognize the existence in principle of the right of return for the Palestinian refugees (and their descendants), but that the details of the implementation of this right should be settled in negotiations between the parties in such a way that there were no demographic threat to the Jewish majority. Let it suffice to say that according to an ordinary analysis of "right," it refers to the fact that the state has an obligation. Israel is of course permitted to decide what the ideal policy is for it with respect to the question of absorbing Palestinian refugees within its borders. Thus it is ***permitted*** to recognize their right of return, but it ***is not required*** to do so—for the reasons which I have explained at length above. For reasons connected to the nature of the discourse on rights it is recommended that Israel ***not*** recognize the ***right*** of return.

78. Morris 2009. The continued justification for the fact that self-determination for Jews will be on the state level is based on the persistence of the conflict and on the manifest and consistent religious and cultural differences between the two communities. See also Gans 2006.

79. While Kasher (2000, 82-85) does base the Law of Return on affirmative action, he nonetheless believes that the formative stage of the state has still not come to an end. But the idea of limiting the Law of Return has been raised, for instance, by Hanoch Marmari (*Ha'aretz* Supplement, November 11, 1994). One could say that this idea is a prominent characteristic of "post-Zionism" which is not necessarily anti-Zionist. See also Berent 2009, 45-52.

80. Kasher 2000, 82-85. Kasher does not explicitly state that after a certain period of time, in which the right of self-determination will be realized, the state will necessarily become a "state of all its citizens," but he states that the claim of affirmative action as a justification for preference in immigration does not apply after the members of the people whose right of self-determination is being realized have become the decisive majority in the state, and if such a majority will ensure its existence as "a democracy in the strict sense of the term."

81. Gans describes this distinction clearly in his book; see Gans 2008b. In chapter two Gans deals with the "remedial" justifications of establishing a nation-state. In chapter five he discusses the preferences for the immigration of Jews in more general terms of distributive justice in migration between different nation-states.

82. It is not clear how the court would react to the annulment of the law, coupled with a continued policy of a similar nature.

83. Concerning individuals, it is possible to see this in the frameworks which offer conversion and sometimes even in an "industry" of documents testifying, apparently, to Jewish identity. A few such isolated cases have even made their way into court. See for instance ***HCJ 1031/93 Alian (Hava) Pessaro (Goldstein) v. Minister of the Interior***, PD 49(4) 661. This fact has led non-Orthodox conversion institutions in Israel not to accept students who do not have a right of residency in Israel.

84. Minister Yitzhak-Meir Levin, the representative of *Agudat Yisrael*, requested that "a person's Judaism be determined according to Jewish law," but the Ben-Gurion government rejected the proposal and decided that "the question of whether or not a person is Jewish should be considered a factual question, and the correct answer to it depends on the particular circumstances of each case" Negbi 1991 (based on Warhaftig 1988, 153).

85. A survey of the historical developments in this area can be found in the remarks of the Minister of the Interior, Chaim Moshe Shapira, when he presented the proposal for the 1970 Amendment for the first reading in the Knesset: Knesset Proceedings, 37th Session (February 9, 1970), pp. 723-726.

86. Feinberg 1967, 28.

87. Zerah Warhaftig recounts in his book how the issue caused a bitter controversy in the Knesset and in the government, and even he, who was serving as the Minister of Religions, vehemently opposed these provisions (for instance, his statements in the budgetary discussion from March 12, 1958 that "the People of Israel are both a nation and a religion. In this is our strength—that there should be no separation between nation and religion"). See Warhaftig 1988, 156.

88. Part of the dispute pertained to the question of separation between nationality and religion. But even the new directive did not distinguish between them, and perhaps for this reason the following question did not come up: Why should the declaration of an individual that he is a Jew in ***his ethnic/national identity*** be negated, simply because he is ***a member of a different religion***? I will return to this important subject later on.

89. Warhaftig 1988, 157.

90. The Committee of Three (the Prime Minister, the Minister of the Interior, and the Minister of Justice) stated that it would "listen to opinion statements from the sages of Israel in the country and outside it regarding this subject, and would compose registration provisions which would suit both the accepted tradition in all the circles of Judaism, orthodox and liberal, in all of their denominations, as well as the conditions unique to Israel as a sovereign Jewish state, in which freedom of

conscience and religion are protected, and as a center for *kibbutz galuyot*" (from the Prime Minister's statement, 15 July 1958), Warhaftig 1988, 161.

91. For Ben-Gurion's letter see Ben Rafael 2002, 139-141. Ben-Gurion did not recommend making a distinction between the registration of religion and that of nationality, and explained that considerations of security prevented the abolition of these entries. Ben-Gurion explained the need to establish the Jewishness of an individual for purposes pertaining to eligibility for return and matters of personal status (even though there is in Israel no discrimination against residents on account of their religion or ethnicity). Ben-Gurion noted that in Israel there is complete freedom of religion, there is no assimilation into a foreign majority community, and that the Jewish community in Israel sees itself as part of the worldwide Jewish people and not as a separate nation.

92. For a collection of the responses and an analysis of their meaning see Ben Rafael 2002.

93. To understand just how deep the controversy was already in 1958, see for instance Gershom Schocken's letter of August 1959, when the responses from the Jewish sages were received. Schocken noted that in the same issue of "*Ha-Boker*," which had stated that in light of the responses "Jewish" would be defined according to *halachah* and not in accordance with the public perception shared by many Jews and non-Jews alike, there also appeared an item about "the Jewish hero in *Ulysses*," even though it was completely clear that the hero, Leopold Blum, was the son of a Jewish father and did not grow up as a Jew. On this matter see Gorny 2002.

94. ***HCJ 72/62 Rufeisen v. Minister of the Interior***, PD 16(4) 2428 [Hebrew]. Eventually Rufeisen himself said that Israel had not been ready at the time to deal with the challenge that he presented to it. While the dispute over the relationship between religion and nationality in the Jewish people has certainly sharpened since those days, it is not clear whether the Jewish community in Israel and in the world is better prepared for it today than it was in the past.

95. ***HCJ 58/68 Shalit v. Minister of the Interior***, PD 23(2) 477 [Hebrew].

96. An amendment ***to the law*** was required because only in that way was it possible to overcome the court ruling which interpreted the authority of the registration official under the Registry Law against the directives of the minister in charge. Additionally, the Registry Law applied to all of the religious and national identities in Israel. An amendment to the Law of Return appeared more appropriate when the amendment pertained solely to the question of the definition of "a Jew." At the same time the Registry Law was also amended.

97. The law did not clearly address the question whether a Jewish citizen of the country—by virtue of birth or by virtue of having made *Aliyah*—is entitled to grant the right of citizenship to the relatives listed in the article extending *Aliyah* eligibility. On this topic see below, sub-section C3.

98. The law adopted the majority opinion in the ***Rufeisen*** case, that one who belongs to another religion cannot be considered a Jew in terms of his nationality (even though the *halachah* may view him as a Jew), and rejected the majority opinion in the ***Shalit*** case, according to which the children are in fact without religion—but nonetheless Jews by nationality. Apart from the problem concerning conversion to Judaism, this definition means that according to the laws of the state only someone viewed as a Jew according to *halachah* in the religion entry can be seen as a Jew by nationality.

99. Thus, for instance, MK Yishayahu (*Ma'arach*) said: "But if they wish to be registered and considered Jews in every respect, how can they do so without the consent of the Jewish people, according to tradition?" (Knesset Proceedings, 37th Session (February 9, 1970), pp. 729-731 [Hebrew]). Similarly on this subject Minister Menachem Begin said: "The rabbinate can find an easy and dignified way to convert spouses in mixed marriages, if they understand that this is the public necessity of our time" (ibid.)

100. See the statement of MK Uzi Feinerman, ibid., pp. 752-754.

101. See for instance the statement of MK Nissim Eliad (the Independent Liberal Party), ibid., pp. 740-741.

102. And indeed, when the Shalit family had an additional child, the Supreme Court, in a brief ruling by a panel of three judges, rejected their petition to register the child in the same way as the previous children. See ***HCJ 18/72 Shalit v. Minister of the Interior***, PD 26(1) 334 [Hebrew]. The amendment to the law also yielded a new kind of appeal: petitions by Jews to remove their registration as "Jewish" in their nationality entry and to change it to "Israeli": CA 630/70 ***Tamarin v. State of Israel***, PD 26(1) 197 [Hebrew]. While this matter is not connected to the subject of this position paper, it is relevant to the question of the identity of the collective that enjoys the right to self-determination in Israel. Tamarin's petition was rejected, but the debate has not come to an end. For a comprehensive argument in favor of recognizing "Israeli" as a nationality, see Berent 2009. Recently a similar petition by Uzi Ornan et al. was rejected by the Jerusalem District Court; see HP (Jerusalem) 6092/07 ***Ornan, et al. v. Ministry of the Interior***, Tak-Meh 2008(3), 2080 [Hebrew].

103. See for instance the discussion in Berent's book; Berent 2009. Similarly see Shaham 2005; Yehoshua 2005.

104. ***HCJ 230/86 Miller v. Minister of the Interior***, PD 40(4) 436 [Hebrew].

105. ***HCJ 2859/99 Tais Rodriguez-Tushbein, et al. v. Minister of the Interior, et al.*** PD 59(6), 721 [Hebrew]; ***HCJ 2901/97 Na'amat, et al. v. Minister of the Interior, et al.*** Takdin (Elyon) 634 (1) 2002 [Hebrew].

106. ***HCJ 1031/93 Alian (Hava) Pessaro (Goldstein) v. Minister of the Interior***, PD 49(4) 661 [Hebrew].

107. Gavison and Medan 2003, 131. For the recommendations of the committee see http://www.knesset.gov.il/docs/heb/neeman.htm.

108. Incidentally, the possibility of distinguishing between the religion entry and the nationality entry may not satisfy the demands of the Reform and Conservative movements, since they seek recognition of their conversions as signifying the acquisition of Jewish religious identity, and not just a national one.

109. The matter is beyond the scope of this paper. Suffice it to say that despite the serious ramifications of this ruling, a satisfactory way to deal with the fundamental and practical problems that this ruling has raised has not yet been found. See *Eretz Acheret* 2008.

110. ***HCJ 11585/05 The Movement for Progressive Judaism v. Ministry of Immigration and Absorption***, (not yet published—May 19, 2009). One should note the institutional aspects of this continuing debate: It does not consist solely of the question about what decisions are the right ones for the State of Israel, but rather goes beyond this to the question of who is supposed to decide them: the institutions of religion or the institutions of the state? If it is the institutions of state, should it be the representative legislature or the court invoking the discourse of constitutional rights and principles? See below.

111. We should mention that Ben-Gurion himself referred to this subject in his letter to "the sages of Israel." For the intra-Orthodox debate at that time see for instance Brandes 2008; Abraham 2009.

112. See for instance the arrangement regarding the great-grandchild of a Jew who wishes to make *Aliyah* with his parents, one of whom is the grandchild of a Jew. "The consular protocol for dealing with *Aliyah* candidates" regulated this subject in the framework of the 1952 Law of Entry into Israel: "A non-Jewish minor, who is the great-grandchild of a Jew, will receive a permanent residency visa according to the Law of Entry into Israel on the condition that he departs with his parent or his parent has already made *Aliyah* […]" (Article 11). We should note that this protocol addresses the "procedure for *Aliyah* candidates from countries in the former Soviet Union." The protocol also states that "the divorcée of a Jew who requests an *Aliyah* visa in order to join her children from her ex-husband is not eligible for an *Aliyah* visa" (Article 13). This means that the familial right of return transfers only from parents to children and not from children to parents. That is to say, a gentile parent of a Jewish child is not eligible for *Aliyah*. Of course it is possible to permit such people to enter and even to settle in the country according to the general laws. The principle that the right of return of those eligible does not confer rights on their parents was also established in ***HCJ 758/88 Richard Kendall, et al. v. Minister of the Interior***, PD 46(4), 505 [Hebrew].

113. Shamgar, in his directive, stated: "According to the purpose of Article 4A of the law—the term 'child […] of a Jew' should be interpreted as if it were composed of these two levels: the person in question is the offspring of the individual with the rights; and in order to completely satisfy the requirement of the law, it is sufficient that the individual with rights be Jewish at the time that he makes *Aliyah*. If you would like a formal basis for the interpretation, I would point to the difference between the term 'one who is born to a Jewish mother' and the term 'the child of a Jew': while the first expression refers to the day of birth, the second expression does not necessarily refer to the same day," see Corinaldi 2001, 213-214.

114. See below, chapter C2, on *Beta Yisrael*.

115. Corinaldi 2001, 215.

116. Ibid., 99-100.

117. Ibid., 151-153.

118. Corinaldi 1998.

119. Waldman 1989, 2.

120. Ibid., 3.

121. Corinaldi 2001, 152-155.

122. Waldman 1989, 2-3.

123. Corinaldi 1998.

124. On September 13, 1992, the Ministers Committee for Matters of *Aliyah* Absorption decided to approve bringing individuals of the *Falashmura* to Israel for humanitarian reasons, on the basis of family reunification. On September 30 the government formed a special committee of ministers to deal with the subject of the *Falashmura*. The government accepted the recommendations on February 7, 1993 and in its decision fixed an additional amount of time to enable family reunification for humanitarian reasons; it was further emphasized that the State of Israel would not be involved in conversion activities in Ethiopia. In the meeting of the committee on July 7, 1993, a division of labor in terms of budgeting was decided upon—the Jewish Agency would take responsibility for bringing them to Israel, and the Ministry of *Aliyah* Absorption would be responsible for absorbing them from the moment they arrived in Israel. In the decision it was also determined that the treatment of all those coming from Ethiopia would be equal, regardless of whether they arrived by virtue of the Law of Return or the Law of Entry into Israel. On May 13, 1996, the Ministers Committee met for an additional session and once again charged the Minister of the Interior with executing the previous decision. On June 8, 1997, the Ministers Committee for Diaspora Affairs decided once again that the compound in Addis Ababa would be closed and that the *Aliyah* would take place according to law and according to the relevant decisions. On November 16, 2003,

the Ministers Committee for coordinating the activities between the Government on the one hand and the World Zionist Organization and the Jewish Agency on the other, met in order to discuss the matter of the *Falashmura*. The chairman of the Jewish Agency updated the committee that 20,000 people were involved, and that at that time an exact list was being put together of the names of eligible individuals for the purpose of initiating the *Aliyah* operation. On November 17, 2004, the Ministers Committee for Matters Regarding the Remnant of Ethiopian Jewry met and decided to bring a group of 300 people every month.

125. Corinaldi 1998; ***HCJ 6563/94 Inchobedink v. Minister for Aliyah Absorption***, Tak-El 95(3) 393.

126. ***HCJ 3648/97 Stamka, et al., v. Minister of the Interior, et al.*** PD 53(2) 728 [Hebrew].

127. Ibid., especially sections 1-27. We should add that Judge Cheshin remarked that Article 4 of the Law of Return does not grant rights and that the article is merely declarative. For a detailed discussion see Carmi 2006.

128. Corinaldi 2001, 179-181, 245-254. As stated above in note 112, the procedure also established that a (minor) great-grandchild will receive a visa for permanent residence according to the Law of Entry into Israel on the condition that he departs with his parent or that his parent had already made *Aliyah*. Regarding the parent of an individual who is eligible for return, the procedure states that out of humanitarian considerations it is possible to approve permanent residence for a [non-Jewish] parent in Israel according to the Law of Entry into Israel if the parent is elderly and solitary.

129. Corinaldi 2001, 243-244. *Kesim* are the religious leaders of Ethiopian Jews.

130. See for instance Government Resolution 4417 of 20 November 2005; Government Resolution 2385 of 23 September 2007.

131. Thus for instance one of the last decisions made by the Israeli government on this issue (Resolution no. 4135 of September 23, 2008) was the formation of a committee for coordinating activities between the Israeli government and the Jewish Agency. A breakdown of the roles of the steering committee reveals a clear picture which emphasizes the creation of a plan for reinforcing Jewish identity in the Diaspora communities and strengthening the connection between the Diaspora communities and the State of Israel. Encouraging *Aliyah* was not mentioned even once in these decisions. A few weeks before this government meeting, the Jewish Agency signed an agreement with the "*Nefesh B'Nefesh*" organization, which assists *olim* from North America before and after their arrival in Israel. This agreement established that the organization would be responsible for encouraging *Aliyah* from the United States and Canada, and that the Jewish Agency would maintain only the authority to check the eligibility of *Aliyah* candidates. The Jewish Agency, so it

would seem, will focus on educational activity and on reinforcing the Jewish identity of these communities. Anshel Pfeffer reported in *Haaretz* on the agreement and stated that the encouragement of *Aliyah* is no longer a national project; see Pfeffer 2008.

132. For a general description, see Hacohen 2008. The activity of the *Nativ* organization began in a semi-clandestine way in the 1950s, aiming to establish connections with Jews in the Soviet Union and to cultivate their connection to Zionism and to the State of Israel. This coincided with the actions of bodies and organizations,—governmental and otherwise—throughout the world, to change the policies of the Soviet Union, which denied Jews the right to religious, spiritual and national freedom, and to open the gates of *Aliyah*. *Nativ* was established in 1952 and was directly accountable to the Prime Minister, based on the understanding of the unique difficulty in maintaining a connection between Israel and the millions of Jews in the Soviet Union. In those years, because of the unconventional ways in which it operated, *Nativ* was considered one of the organs of the intelligence community.

133. For instance, the Dekel Committee in 1991; the Hoffi Committee in 1992; and the Vardi team which operated in 1996.

134. Government Resolution no. 142, March 25, 2003.

135. See Government Resolution no. 2070, July 22, 2007. The decision charged *Nativ* to operate in Germany, where 200,000 Jews from the former Soviet Union live, as well.

136. Protocol 226, the *Aliyah*, Absorption, and Diaspora Committee meeting, Wednesday, July 23, 2008.

137. Announcement of the Secretary of the Government at the end of the government meeting, July 6, 2008.

138. On this matter see Avraham Poraz's article, which describes his attempts as Minister of the Interior to change the policy of the Population Administration and the built-in difficulties in the field, http://news.walla.co.il/?w=/2071/1290877.

139. See for instance ***HCJ 6847/02 Zarini v. Minister of the Interior***, Tak-El 2002(3) 106 [Hebrew]. In August 2002 an appeal was made to the Supreme Court on the grounds that the Population Administration applies a policy (which is expressed in protocol 1.2.2001) according to which the department refrains from giving services to citizens suspected of acquiring their status in Israel illegally. In the petition it was claimed that a woman made *Aliyah* from the SU and received an identity card which stated that she was a Jew. After a number of years she applied to renew the document. At that point the personnel of the Ministry of the Interior informed her that they had discovered that in the past she had signed a document in which she had declared that she was a Christian. The woman denied that she

had signed such a document. In response the ministry refrained from granting her services such as the renewal of passport or identity card, but did not explain the reason for this conduct, and did not even openly reveal the existence of the protocol. The lawsuit was closed in an agreement between the parties: the Ministry of the Interior abolished the protocol, and the petition was withdrawn. An additional case involved a woman who made *Aliyah* from Uzbekistan and produced her mother's birth certificate as proof of her Jewish identity. After several years the woman's mother arrived in Israel and also requested Israeli citizenship by virtue of the Law of Return, on the basis of her Jewish identity. After investigating her request, the Ministry of the Interior determined that the mother's documents were forged, and therefore not only did they reject her application, but they also retroactively rescinded the daughter's registration as a Jew. The mother and daughter petitioned the Supreme Court. The Court stated that while the Law of Return did not address the question of the basis on which the Jewishness of the *Aliyah* applicant's mother would be recognized, the ministry was expected to apply rules of "administrative evidence." This means that the initial burden of proof of the applicant's Jewish identity lies with the applicants. If they satisfy this requirement, then a "presumption of eligibility" holds for them. In order to disprove this presumption the ministry must produce convincing administrative evidence. In this situation of retroactive nullification of status, and due to the serious infringement of the daughter's reliance interest, particularly strong administrative evidence is required; see ***HCJ 394/99 Maximov v. Ministry of the Interior,*** Tak-El 2003(4) 497 [Hebrew].

140. The Knesset Center for Research and Information 2008.

141. Corinaldi 2001, 181.

142. Report from the Administration of Society and Youth of June 2000, http://noar.education.gov.il. In the Constitution Committee's discussion of the subject of return held on 3 June 2007, it was reported that the percentage of non-Jews in the *Aliyah* from the FSU countries from 1980-1989 was 12%, and that in 2000 it was already 56% and has continued to rise since then.

143. Protocol 226 from the *Aliyah*, Absorption, and Diaspora Committee meeting, Wednesday, 23 July 2008.

144. See Rebhun and Malach 2009.

145. For a comprehensive discussion on the problems of absorbing the members of the Ethiopian population in Israel, see the special issue of *Eretz Acheret* devoted to the subject (*Eretz Acheret* 2005).

146. The Knesset Center for Research and Information 2008.

147. See the discussion of this subject in Avineri et al. 2009.

148. We have not found statistics on the extent of this phenomenon, but the problems of fictitious marriages for the purpose of acquiring a status have been

discussed in courts, and the phenomena of fictitious marriages for the purpose of trafficking in women have been discussed in the Knesset committees. Aliyah for the purpose of receiving a "passport of convenience," such as the ability to travel to European countries without a visa, a possibility denied to holders of Russian passports for instance, is a fairly well-known phenomenon. This becomes possible because the applicant for an Israeli passport only needs to demonstrate his residence in Israel over the course of the first year after Aliyah. In practice, there are many who use their Israeli passport for travel even though they do not live in Israel. A "piquant" example of another kind is the fact that the basketball player, Sue Bird, acquired Israeli citizenship in 2008 by virtue of the right of return (her father is Jewish) in order to play basketball in Russia without being an American foreigner. At the same time, it is worth noting that guest athletes whom Israeli teams are interested in adding to their ranks enjoy a preferred, easy immigration track in Israel, without having any connection to Judaism.

149. This does not refer, of course, to those who have chosen to settle down in Israel without receiving citizenship. This also does not refer to the residents of East Jerusalem who are not usually citizens of the country. In addition to these, there are not a few people living in Israel who do not have permanent residence, such as refugees or guest workers who have been in the country for many years, as well as permanent residents who are not citizens of the country. Indeed, the Metzilah position paper dealing with Israeli immigration policy suggests permitting individuals who legally reside in the country for an extended period of time to enter a naturalization track; See Avineri et al. 2009, 29-31.

150. Gans 1998, 353-356.

151. Carmi 2003, 32.

152. This entire paragraph raises important questions regarding the human rights discourse and especially the applicability of this discourse to the subject of immigration. One of the important questions is: What are the obligations imposed by the Law of Return and on whom are they imposed? We have said that in a certain way the answer is a matter of interpretation. The statement: "Every Jew has the right to come to this country as an *oleh*," certainly grants a Jew the freedom to make *Aliyah*. If this is a constitutional provision, it may also impose an obligation on the state not to legislate a law which will prohibit Jewish *Aliyah* (beyond the relatively narrow limitations which are included in the law itself). But this obligation, as important as it is conceptually and historically, is a negative one. It is not at all clear if the Law of Return imposes on the state positive legal obligations with regard to Jews (or individuals eligible for *Aliyah*). There is no doubt that Israeli governments have often seen themselves as subject to such obligations, but we have seen that there were also those who believed that the state was permitted to establish an *Aliyah* policy in accordance with considerations of the state's absorption ability and the skills of potential *olim*. This emerges very clearly when it is a matter of encouraging

Aliyah by means of assistance in realizing *Aliyah* and absorption. The State of Israel in fact invests substantial resources in the absorption of *Aliyah*. Where a support system by the state operates, it must be applied equally. But beyond the general obligation of the state to ensure the basic rights of all of its residents—both *olim* and non-*olim*—it is not clear that the Law of Return imposes an obligation on the state to assist *olim* in their absorption. I should note only that it is possible to answer this question by way of interpretation of the legal text, but it is also possible to approach it by means of a "conceptual analysis" of the very discourse on rights. Sometimes there is a tendency—in my opinion mistaken—to give the expression "right" a stronger and wider meaning than is necessary or desirable. When the discourse on rights is an important component in the political discussion, such expansive tendencies are likely to raise tensions both on the substantive political level and on the level of the institutional relations between the political system and the courts. For a general discussion of the connection between the human rights discourse and the problems of immigration, see Gavison (forthcoming).

153. This approach characterized a general tendency of the Israeli establishment in the first years of the state to prefer pragmatic solutions over the direct confrontation of ideological controversies.

154. Weiss 2002, Halamish 2008b.

155. For a comprehensive discussion see Corinaldi 2002.

156. I do not address here the fact that one who is not recognized as a Jew by the *halachah* cannot marry a Jew and as a Jew, according to Israeli law. This is an extremely important subject, but it will not be resolved by an extended definition of a "Jew" or of one who is "eligible for *Aliyah*" according to the Law of Return, as long as Orthodox rabbinic courts tending toward a stringent interpretation have a monopoly on marriage and conversion in Israel. In the Gavison-Medan Covenant it was indeed suggested that the Orthodox monopoly over these subjects be abolished. We shall devote a separate position paper to this important topic.

157. This situation can arise regarding the great-grandchild of a Jew, whose connection to Judaism is only through his ancestors, but who nonetheless maintains a Jewish lifestyle and feels himself to be Jewish, or with regard to one whose connection to Judaism was formed through a non-Orthodox conversion which was not a recognized conversion—his or that of his mother or his grandmother.

158. This discussion needs to be held with regard to communities such as tribes which claim Jewishness in Asia or Latin America or with regard to the Subbotniki. A *halachic* ruling regarding their Jewish identity should be neither a necessary nor a sufficient condition regarding the question of the State's obligation to bring them to Israel. As we have said, such an obligation must stem from the considerations of Israeli policy based on the degree of the connection that these communities have with the Jewish people and tradition and on their absorption potential in modern

Israeli society. Either way, the fact that decisions regarding such an *Aliyah* do not receive attention needs to be corrected. Thus, for instance, in the arrangements law proposal which accompanies the 2009-2010 budget it was proposed to stop bringing the *Falashmura* to Israel—a reversal of the government's previous decision.

159. I am not addressing here the claim that Judaism today is in fact merely a religion, since Diaspora Jews are counted among the nations in which they live, while Israeli Jews belong to "the Israeli people," which does have a connection to "the historical Jewish people," justifying preferences such as the Law of Return, but that today it is incorrect to speak of a "Jewish people." For a claim such as this in a Zionist framework, see Berent 2009. For a post-Zionist or perhaps even anti-Zionist claim, which denies the existence of the Jewish people, see Sand 2009. We have seen the way in which these debates were reflected in the 1958 controversy, in the judicial rulings in the ***Rufeisen*** and ***Shalit*** cases and in the argument surrounding the definition of "Jew" in the 1970 amendment to the Law of Return.

160. As we have said, the subject of conversion (and a few other key topics) can be extremely controversial even within the Orthodox community itself. The question of the state monopoly which is subject to interpretation within this denomination is a serious and fascinating question, and today it also has enormous practical significance. But the question of conversion in Israel is mostly connected to the question of absorption and to the shaping of Israeli society, and less so to questions concerning return. Therefore, even in the Gavison-Medan Covenant we treated the subject of conversion only incidentally, since we completely ruled out conversion for a person living in Israel as a route for acquiring status or citizenship by virtue of return. There are those who believe that the practical significance of the issue of conversion is greater than that of the debate about return, because of the influence that widespread conversion of non-Jews living in Israel and assimilating into its society could have on the nation's character. Nonetheless, both as a matter of principle and because of the reality of the continued Orthodox monopoly on marriage and divorce (about which it is not clear if and when it will ever change), it seems as if the solution to the problem of the intergration of non-Jews must be found not only through conversion but rather also through the creation of a real social space where joining by means of a "sociological conversion" (to borrow the apt phrase coined by Asher Cohen 2004) will become meaningful in social terms and will make possible a real legal or social bypass of the Orthodox monopoly.

161. Although we should mention again that such changes took place, and that some of them even received the approval of the Supreme Court, as with the ***Stamka*** case.

162. Thus for instance one whose relation to the Jewish people is through three continuous generations of Jewish ***fathers*** is not eligible for *Aliyah*, even if (s)he lives as a Jew and is a member of a Jewish congregation, and is considered a Jew by themselves and others.

163. Gavison-Medan 2003, 135.

164. Later on we will address the question of whether or not the State of Israel has an interest in encouraging such *Aliyah*, even if these immigrants are not Jews in any sense, in light of the successful patterns of absorption and integration of non-Jewish *olim* such as these. This question emphasizes once again the important distinction between principles of return and immigration policy. It is possible that it would be appropriate to maintain a welcoming immigration policy for people such as these, without basing it on the provisions of the Law of Return itself. This distinction is expressed clearly in the discussions of the Constitution Committee on the principles of return and citizenship in the 17th Knesset. See for instance the discussions that took place on 3 June 2007 and 2 July 2007.

165. As we have said, this "definition" has been suggested in the past only in those contexts in which it was reasonable to assume, practically speaking, that only one who actually deeply felt Jewish would choose to identify as a Jew and to tie his/her fate to that of the Jewish people. Haim Cohn, for instance, qualified the proposal in that an individual's declaration of his Jewishness would be considered as evidence for his identity only if it were made "in good faith". The requirement of good faith injects into the process a series of fascinating problems of evidence, but for our purposes here it implies that behind the self-identification as a Jew there is nonetheless something other than mere whim or the interests of the person making the declaration. For Haim Cohn's position, his rulings in the ***Rufeisen*** and ***Shalit*** cases, his response to Ben-Gurion's question, and his explanation of the "good faith" which was needed in order to provide a basis for a person's declaration regarding his Jewishness, see the articles in the second section of Cohn 2006.

166. Moreover, it is not entirely clear when the matrilineal descent rule was established in Jewish law. During the biblical period a child's lineage was determined according to the father. It is customary to ascribe the change to matrilineal descent to the Talmudic period. The change began, apparently, at the decree of Ezra the Scribe (5th century BCE). The reasons for this are not clear, but it is customary to ascribe them to the biological certainty of the identity of the infant's mother. For a discussion, see Corinaldi 2002. For the significance of using matrilineal descent in our time, see the disagreement between Justices Silberg and Berinson in the ***Shalit*** case. Berinson stated that it was not reasonable that Shalit's children would be viewed as Jews while the son of a Jewish mother and a Muslim father who had joined with the enemies of Israel would be considered to be a Jew. Silberg responded that the terrorist is a wicked Jew and that while the ***Shalit*** children might be innocent children, they nonetheless were not Jews.

167. Gavison and Medan 2003, 128.

168. At the basis of this statement there is the principle which was approved by the Supreme Court in the ***Stamka*** affair, according to which Jewish citizens of the country cannot naturalize or grant a status in Israel to their foreign spouse as

a matter of return, since with respect to such Jews there is no reason for granting them preference for immigration to their own country. In this sense there is no difference between Jewish and non-Jewish citizens of the state—nor should there be. This argument also reinforces the statement that the determination of Article 4 of the law is indeed a fiction, the purpose of which is declarative, and that no rights should be granted on its basis. As we have mentioned, this is the way that Judge Cheshin ruled on the same subject. See Carmi 2006, 152-155.

169. Gavison and Medan 2003, 139.

170. Ibid., 159; see also ***HCJ 265/87 Gary Lee Beresford, et al. v. Ministry of the Interior.***

171. There have been not a few mixed reactions to the proposals of Gavison-Medan, and not a few criticisms. In this position paper I address principally the reservations which were voiced in the many constructive comments that I received from the participants in an internal discussion of the draft of this paper.

172. The minimal change which is required is the abolition (or change) of Article 4A (eligibility for family members) and Article 4B (the definition of "Jewish"). As explained above, it would be advisable to also abolish Article 4 of the law, even though in light of the interpretation which it has received and in light of the 1980 change in the Citizenship Law, such a change will not have practical implications.

173. The immediacy is established explicitly in the law, since Article 2(b)2 reads: "Citizenship by virtue of return is acquired by a person having come to Israel as an *'oleh'* after the establishment of the State—in effect from the day of his *'aliyah*'." The fact that the naturalization of a Jew is not conditioned on stipulations similar to those which are established in Article 5 of the Citizenship Law is implied in a less direct way. First of all, if citizenship is granted from the day of *Aliyah*—it does not seem that there is sufficient time to examine additional conditions such as those required in Article 5 (and which include a continued residence in Israel). Second, in light of the explicit discussion of the conditions which make it permissible to prevent the entrance of a Jew into the country, it seems that the legislators were not prepared to grant the Minister of the Interior extensive discretion in demanding conditions for naturalization. Nonetheless the structure which was adopted—a structure which distinguishes between entrance and settling in the country on the one hand and naturalization on the other—has an internal logic. There does not seem to be a conceptual or logical requirement that citizenship by virtue of return will be granted without additional conditions, as long as the right of the Jew to enter the country and live in it is not infringed upon. On this subject see also the discussions of the Constitution Committee on the principles of return and citizenship in 2007.

174. Along with this, American law recognizes immigration of family members, which is based on the connection between the immigrant and someone who is already a citizen or resident in the United States.

175. Zilbershats 2000, 143-148.

176. Although it would seem that even in the discussion of the Citizenship Law the hidden assumption was that individuals eligible for naturalization or family reunification would be for the most part the family members of Jews, and therefore the tendency was toward great leniency in the naturalization process relative to the laws of immigration in other countries. For this reason the Citizenship Law itself is fairly liberal and does not contain a framework adequate for the contemporary immigration needs of Israel. On this subject see Avineri et al. 2009.

177. Moreover, for the first two years in which there was a Law of Return there still was no Citizenship Law!

178. This proposal received wide approval both in the advisory group which accompanied the composition of the Gavison-Medan Covenant and in the discussions of the Constitution Committee on the subjects of return and citizenship in the 17th Knesset. In these discussions it was proposed to leave the details for legislative discretion, but at the same time to establish in the constitution itself the clear possibility of separating the right of return from the timing and conditions for acquiring citizenship. Most of the participants in the discussions preferred this option. See especially the discussions which took place in the final meetings on 3 June 2007 and 2 July 2007.

179. In this there is a response to the claim which was voiced against the idea of separating the acquisition of citizenship from entrance into Israel for *olim*, on the grounds that many *olim* are drafted into the army and even sometimes sacrifice their lives for the country. First, in Israel the obligation to serve in the army does not apply to citizens but rather to residents. One who makes *Aliyah* and receives the status of permanent resident must serve in the army. Second, the Citizenship Law exempts individuals who served in recognized forms of national service from some conditions for naturalization; Article 6(a).

180. As opposed to Article 5(a)6 of the Citizenship Law, which states that a condition for naturalization is the forfeit of previous citizenship.

181. If the conditions of naturalization regarding those who are not *olim* according to the Law of Return are altered so as to include such things as immigration quotas or economic thresholds, these are not likely to affect individuals making *Aliyah* by the Law of Return since *olim* are allowed to enter the country and be its residents without them. In any event, restrictions such as these will be more effective if they are applied at the stage of entry and especially at the stage of granting permanent residence. Thus the question is not expected to arise as a condition for naturalization.

182. This condition is not included in those mentioned in Articles 5 and 7 of the Citizenship Law. It would seem that the assumption is that if they apply, naturalization will be denied within the discretion of the Minister of the Interior.

183. Corinaldi 2001.

184. On this subject see Rebhun and Malach 2009, who note that the relative size of groups such as these, Jewish as well as Arab, is on the rise in Israeli society and that Israel needs to be prepared to deal with this fact.

185. See the discussions of the Constitution, Law and Justice Committee in the past two Knessets on the different parts of the constitution proposals. Complete constitution proposals were placed on the table of the Knesset by the Israel Democracy Institute (2005) and by the Institute for Zionist Strategies (2007). Proposals dealing with the subjects of return and citizenship were presented by the Israel Religious Action Center (the Center for Jewish Pluralism). See the materials which were appended to the discussions of the Constitution Committee of the 17th Knesset.

186. Earlier (note 40 above) we mentioned the reference to the Law of Return by President A. Barak in the ***Ka'adan*** affair. The Law of Return itself was never subject to a direct constitutional review, and given the situation in Israel it is difficult to imagine that anyone would present such a challenge. If this were to occur, it is hard to believe that the law would be overturned. Nonetheless, a discussion of this sort might raise difficult questions which the court might well prefer to avoid. In any event, in the current legal situation, the Law of Return cannot be subjected to such a constitutional review (although it is possible to seek a limited interpretation of it) on account of the "Validity of laws" clause in Basic Law: Human Dignity and Liberty. This fact is an additional reason for the reluctance to make legislative changes in the Law of Return, since even if a new law improves the protection of human rights, the court is authorized to overturn it, constitutionally speaking, on account of the fact that the "Validity of laws" protection no longer applies to it.

187. The original proposal preserves the exact powerful phrasing of the Law of Return. But my vaguer formulation seeks to avoid the need to decide—or to involve those who implement the law or the courts in deciding—the seemingly religious question "who is a Jew?" The rationale of our proposal expands the category of *Aliyah* eligibility so that it will include in it those who belong to the Jewish people even if they are not recognized as Jewish by the *halachah*. The alternative phrasing—"a member of the Jewish people"—emphasizes the difference between the identification of one who is eligible for *Aliyah* according to the Law of Return and one who is "just Jewish." On this issue too the proposal follows the Gavison-Medan Covenant.

188. Therefore it is not surprising that some of the members of Knesset from the religious factions refused to discuss the articles of the constitution which pertained to citizenship and especially to return before a parallel re-legislation of the

provisions of the Law of Return, in order to ensure that they would be able to avoid a change in the detailed definition of "a Jew" under the newly enacted law. See the discussion of 2 July 2007. This position in fact renders highly doubtful the possibility that the Knesset would frame a constitution in the foreseeable future, since it does not appear that a consensus on these basic questions is taking shape. This fact reinforces the practical conclusion that it would not be appropriate at this time to begin processes of deliberate change in the Law of Return itself, and that it would be preferable to make progress by way of policy decisions.

189. Including these provisions in the ***Law of Entry into Israel*** has a few advantages, among them the emphasis on the fact that the principle of return itself is part of the constitutional foundation of the state, while specific arrangements are inserted into the legislation that apply to the subject generally. Such relocation would also facilitate avoiding the re-legislation of Article 4 of the Law of Return, which as we have said is misleading and in any event does not grant additional practical advantages to Jews. Also, the abolition of the broad family provisions of Article 4A and enacting the change proposed regarding the definition of "a Jew" can be made easier if the discussion about them takes place in the context of granting a constitutional status to some of these norms.

190. Thus, for instance, the evidence regarding the Jewish identity of an individual in the FSU is very different from that which exists for the members of *Beta Yisrael* or for the Jewish communities in Western Europe.

191. See for instance the proposals in Avineri et al. 2009.

192. This matter is valid not only with respect to matters of *Aliyah* and the immigration of Jews and their relatives, but also with regard to general immigration issues. It seems that a large part of the judicial rulings on matters of immigration is based on the fact that judges object to the illegitimate practices of and arbitrariness of the officials of the Population Administration. I should stress that while such abuse of citizens and immigration applicants on the part of officials is indeed unacceptable, it is important not to create a judges-made immigration policy solely out of the desire to rectify abuses of such an illegitimate policy.

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Appendix

The Law of Return of 1950

Source: Laws *of the State of Israel: Authorized Translation from the Hebrew,* Government Printer, Jerusalem, Israel (1948-1987), Volume 4, p. 114 and Volume 24, pp. 28-29.

Also available on the Knesset website: http://www.knesset.gov.il/laws/special/eng/return.htm

*Right of aliyah**

1. Every Jew has the right to come to this country as an *oleh*.

Oleh's visa
(Amendment No. 1) 5714-1954

2. (a) Aliyah shall be by *oleh*'s visa.

(b) An *oleh*'s visa shall be granted to every Jew who has expressed his desire to settle in Israel, unless the Minister of the Interior is satisfied that the applicant

(1) is engaged in an activity directed against the Jewish people; or

(Amendment No. 1) 5714-1954

(2) is likely to endanger public health or the security of the State; or

(Amendment No. 1) 5714-1954

(3) is a person with a criminal past, likely to endanger public welfare.

Oleh's certificate

3. (a) A Jew who has come to Israel and subsequent to his arrival has expressed his desire to settle in

* Translator's Note: *Aliyah* means immigration of Jews, and *oleh* (plural: *olim*) means a Jew immigrating into Israel.

Israel may, while still in Israel, receive an oleh's certificate.

(b) The restrictions specified in section 2(b) shall apply also to the grant of an oleh's certificate, but a person shall not be regarded as endangering public health on account of an illness contracted after his arrival in Israel.

Residents and persons born in this country

4. Every Jew who has immigrated into this country before the coming into force of this Law, and every Jew who was born in this country, whether before or after the coming into force of this Law, shall be deemed to be a person who has come to this country as an oleh under this Law.

Rights of members of family (Amendment No. 2) 5730-1970

4A. (a) The rights of a Jew under this Law and the rights of an oleh under the Nationality Law, 5712-1952, as well as the rights of an oleh under any other enactment, are also vested in a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child of a Jew and the spouse of a grandchild of a Jew, except for a person who has been a Jew and has voluntarily changed his religion.

(b) It shall be immaterial whether or not a Jew by whose right a right under subsection (a) is claimed is still alive and whether or not he has immigrated to Israel.

(c) The restrictions and conditions prescribed in respect of a Jew or an oleh by or under this Law or by the enactments referred to in subsection (a) shall also apply to a person who claims a right under subsection (a).

Definition (Amendment No. 2) 5730-1970

4B. For the purposes of this Law, "Jew" means a person who was born of a Jewish mother or has

become converted to Judaism and who is not a member of another religion.

Implementation and regulations (Amendment No. 1) 5714-1954

5. The Minister of the Interior is charged with the implementation of this Law and may make regulations as to any matter relating to such implementation and also as to the grant of oleh's visas and oleh's certificates to minors up to the age of 18 years.

(Amendment No. 2) 5730-1970

Regulations for the purposes of sections 4A and 4B require the approval of the Constitution, Legislation and Juridical Committee of the Knesset.

YOSEF SPRINZAK	DAVID BEN-GURION	MOSHE SHAPIRA
Acting President of the State	Prime Minister	Minister of Immigration
Chairman of the Knesset		

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