

Chapter Two

The Principle of Return: Presentation and Justification

A. Introduction

The Principle of Return states that in the framework of Israeli immigration policy, it is acceptable and correct 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 is eligible to make Aliyah". The principle of return is distinguished from the question of **specific formal arrangements** as they are currently stated in the Law of Return, the Law of Nationality, 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 the tension between the principle of return and a neutral policy of immigration have 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 in the world. Harsh criticisms of the law and even statements labeling it as a racist law were voiced in certain circles already in the 1960's. But in recent years both the justification (even if it is at times qualified) and the criticism have been the subject of a more systematic discussion.¹ I should say already now at the beginning 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.² Nonetheless concerns about a situation in which it will be declared that the Law of Return is 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 coming about.³

The main justification for the principle of return is based on its being part of the policy of immigration, which applies to foreigners seeking entrance into the country, and therefore it is not subject to the obligation of the state not to discriminate

¹ For up-to-date wordings of the support for the principle of return, see Gans 2006, 200-224; 2008a; 2008b; Carmi 2008. See also Yakobson and Rubinstein, 2003. Arguments against Jewish Aliyah and against the Law of Return appeared frequently in political and publicist 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 2003.

² HCJ 6698/95 Aadel Ka'adan v. Israel Land Administration, et al. PD 54(1), 258.

³ Klinghoffer 1997; 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 return. The Democratic Constitution composed by Adalah 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 Knesset, are quoted. The 17th Knesset held seven discussions on this topic: 20 February 2007, 6 March 2007, 14 March 2007, 7 May 2007, 20 May 2007, 30 June 2007, 2 July 2007. The proposals from the Constitution Committee from the 16th Knesset, background materials, many other proposals were laid on the table of the committee.

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 acknowledged that an Aliyah policy which grants systematic preference to Jews in favor of 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 part of the Arab minority in the population of the state to the point of being a majority. **Secondly**, 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 accepted wisdom in international law grants states almost unlimited authority to establish immigration policy even if it is morally debatable mostly on account of considerations of global justice and on account of a concern about inequality between potential immigrants.⁴

This discussion is divided into two parts: The first part will present the justifications which address the claims that ethics or international law prohibit a state from passing laws which give preference to the immigration of members of the majority community. In the second part will be presented those justifications which address 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, in virtue of whose sovereignty it is permissible to give preference to the members of the majority community living in it. This is especially if the Law of Return is accompanied by the refusal to permit Palestinians to return to their homeland and to recognize their "right of return". Dealing with this question requires a response not only with respect to the adoption of the principle of return in the state's legislation, which would be an expression of the Jews' right for self-determination in the place in which they are now living, but also with regard to the objection that Zionism, which brought Jews to Israel and made them a powerful ethnic factor here, is an "original sin" in ethical terms.

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

We have seen that the aspiration for the ingathering of the exiles and to encourage Jewish Aliyah stood at the center of the Declaration of Independence and has always had a central role in Zionist and Israeli policy. But is it a legitimate aspiration? It is a matter of agreement 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 usually 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 the country.

Despite this far-reaching principle, it is also generally admitted that laws of immigration cannot discriminate and that the reasons for decisions regarding immigration need to be substantive. 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) before the members of other groups a legitimate

⁴ For sources emphasizing the principle of sovereignty see Oppenheim 1992; Brownlie 1963. For criticisms of this approach see Chan 1991; Henkin 1995.

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 which are the basis of the right of 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 customs of many countries.⁵

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, a principle which is also accepted in international law. This principle recognizes the right to self-determination of groups and even recognizes 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 yolk of foreign power (whether power was colonial or the rule by another people who belong to the region, as was the case in Europe after the First World War). But the power of this argument against the resolve of the Jews to actualize their right to self-determination specifically in (part of) the Land of Israel, was especially strong in the first stages of the Zionist enterprise, when this argument was directed against the beginning of the Jewish Aliyah and against those decisions which assisted 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 specifically 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 the promise in scripture, but rather on **perpetual** historical and cultural connection of the People of Israel, even though it was dispersed in exile for several hundred years, on the fact that only in the Land of Israel does the people enjoy 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.⁶ 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.

⁵ 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 belong to the people for which the immigration state is the place in which it realizes its right to self-determination.

⁶ 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 Jewish critical mass 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.

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 of Jews stems directly from the right of Jews for 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 complete 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 completely 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 a person's identity in his home and on his way; and only in Israel do Jews as Jews need to deal with the problems of war and peace and the application of political power for the sake of 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 framework which the State of Israel has created is important mostly with respect to non-religious Jewish identity. Secular Jewish identity, which until only one hundred years ago was seen by some as short-term and "vapid" alternative to a rich religious heritage, has received an actual space 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 observation of 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 institutions of religion. While secular Jews living in other countries are subject to a real danger of assimilation, secular Jews living in Israel are experience a flourishing of culture, literature, art, thinking, and Hebrew-secular creativity.⁷

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 were 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 will recognize and respect it – this is a universal right, even if it pertains to the importance of an individual's belonging to a 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 concept 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 about 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.

⁷ Ibid. This matter demonstrates that even if the Law of Return is indeed a main characteristic of the Jewish-ness 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 Jewish right 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.

We have seen, therefore, that the right of the Jewish people to self-determination is the right of Jews to live a complete existence in national-cultural terms. These two rights – the collective right and the right of individuals – are likely to influence the creation of an immigration policy which gives preference to Jews and to permit a state to institute preferences such as these despite the presumption that even immigration policy should maintain the principle of non-discrimination. This is true, both because of the need of the Jewish collective in Israel to continue to be a majority in its own country,⁸ and because the Jewish individual has a distinct need live in his national home and to contribute to its establishment.⁹ 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.¹⁰

In contemporary political philosophy there is a debate over the question of the preference for the immigration of members of the state's community not only with regards to "ethnic" nation-states, in which a people with the features of a unique ethnic community realizes its right to self-determination, but also with regard to "civil" countries such as the United States.¹¹ According to this argument every country, and every country's population, has a legitimate interest to preserve its cultural unity, and to enable its citizens to bring to their country their relatives and people who share with them a common origin.¹² Accordingly an immigration policy, by this argument, is a legitimate mechanism to protect such interests.¹³

2. Affirmative action

A more narrow justification for the principle of return is based on the principle of **affirmative action** to benefit Jews who in the past suffered from a situation which did not grant them a place in which they could realize national independence or defend themselves from the pressures of assimilation or from persecution, deportation, or extermination. The advantage of this principle as a justification is that it is accepted as a justifiable or even compulsory deviation, in certain circumstances, from the demand for equality.¹⁴ The State of Israel therefore, with its special connection to the Jewish people, is permitted to employ a policy which ensures a favorable attitude towards Jews living in distress or subject to persecution on account of their Jewish identity.¹⁵

This kind of justification is relevant first and foremost regarding Jewish refugees, who in the past knocked at the gates of different countries and did not receive sanctuary. 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

⁸ Ibid. In order to justify the realization of the right to self-determination, in order to establish what the ruling public culture is, and in order to control the formal arrangements 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 sufficient for a full existence and for a bequest for future generations. This is true even in contexts of sub-state self-determination.

⁹ Gans expands these points. See Gans 2003, 135-141. Likewise, see Gans 2006.

¹⁰ Knesset Proceedings, 160th Session (3 July 1950), pp. 2035-2037.

¹¹ See for instance Miller 2005; Walzer 1983.

¹² For a discussion about preference on this basis, see Ganz 1998. For a criticism which emphasizes the differences between the population of the country and a family, see Carmi 2003, 68.

¹³ See the treatment of this subject in the position paper which deals with Israeli immigration policy, Avineri, et al. 2009.

¹⁴ Gans argues against the possibility of using affirmative action as a justification for the Law of Return; see for instance Gans 2008b, 111-124.

¹⁵ Kasher 200, 80-81.

also an aspect of compensation in the fact that a Jewish state permits Jews, even if they are not refugees, to compensate 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 applied this extension to the situation of **founding** a nation-state. Kasher referred to this particular instance as "a 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 against the Jews, and the fact that they are a minority in several countries, proves the necessity for creating an independent political entity for the Jewish people. This justification does not have to be based exclusively on the compensation for the state of the individual's rights and on his 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 will be given a practical opportunity to realize their right to self-determination, not only will the inequality from which they suffer be corrected, but the general good will increase as well.¹⁶ One question regarding this argument is, when does the period of "foundation" 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 timeliness 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 activity of the state 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 unique conditions for the generation and stabilization of the nation-state. This is the case both in regular circumstances in which a significant core of the relevant ethnic-group resides in the territory in which it intends to raise up and lay the foundations for its state, and also in the situation in which the ethnic-group was dispersed in exile and there was a need to begin the national enterprise with the collection of the group in the given territory. At this stage the basis is one of "medicinal justice". This is also the time to discuss the question of the location of the self-determination of the Jews and to justify not only their demand for autonomy in the place of their dwelling but also their efforts to bring large numbers of Jews to the Land of Israel in order to create specifically there the basis for political independence for the Jews. As we have said this effort requires a special justification on account of the potential damage to the status of the indigenous population, which is likely to become a minority in its own country. Part of the justification for this is the need of the members of the Jewish people for a place in which they can avoid paying the price which was levied from the Jews in the past, in the form of persecutions and the pressures of assimilation in the absence of such a country.

After a nation-state has been founded, the needs which stemmed from the lack of the state already find in it an answer. At the basis of the application of the principle of return there lies, from that stage, only the justification for the preference of the members of the community. This preference is needed in order to perpetuate its ability to conduct a complete existence of self-determination. This justification, even though

¹⁶ Carmi 2003, 44. See also Gans 1995.

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.

This argument of compensation 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 core of Jews in the Land of Israel. Nonetheless it can play a role also in the stages of founding the state, as long as the realization of the right to self-determination is not ensured in another way. Therefore I will return to discuss it again at a later stage.

3. International law

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

The accepted wisdom is that international law recognizes 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.¹⁷

Against this basic concept there are those who claim 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 motion seriously, then a state is not permitted to prevent an individual or group of individuals from crossing its borders and settling there. It would seem that this claim does not hold in terms of ethics,¹⁸ but it is also clear that it is not valid in terms of international law. An accepted interpretation of the provisions for freedom of movement in international human rights treaties limits the right of **entrance** 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.¹⁹ This ambiguity certainly also makes possible a broader interpretation of an individual's connection to a *country* and not to the *state* in control of it.²⁰ In any event it is clear

¹⁷ Zilbershats 2000, 125, note 3.

¹⁸ See for instance Miller 2005. See also Gans (forthcoming).

¹⁹ Note 27 of the Human Rights Committee's commentary on this article explains 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.

²⁰ This vagueness is relevant to the claims of the Palestinians for the 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 for freedom of movement, because the treaties only prohibit the "arbitrary" denial of entry, and it is not clear if the Israeli refusal to certify entrance is indeed arbitrary. On this topic, see Zilbershats (forthcoming).

that the term **does not enable the entrance 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 is in 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 the 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 principle basis for claims that the principle of return is in contradiction with 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: Firstly, 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 rest 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 nationality.

The accepted 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.²¹ This exception was inserted into the document precisely because its framers were very aware of the considerations at the basis of such preferences and wanted to exclude them from the broad phrasing 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 result from the **ethical** analysis of implications of the right of 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

²¹ Yakobson and Rubinstein, 2003.

suggested, it is difficult to imagine that international law would grant individuals rights of entrance beyond those recognized in the accepted ethical analysis.

We should also mention that 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."²² 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.²³

It would seem therefore that international law is consistent in that it grants a wide prerogative to a given state in shaping its own immigration policy. Of course this fact does not confer legitimacy on any immigration policy no matter what. But the Law of Return, according to this analysis, is the kind of policy decision which belongs to the area of decisions which a sovereign state can make in its immigration policy.²⁴ A state is entitled to weigh a variety of considerations for the public benefit, and is sovereign to shape 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 on it an obligation. This obligation can change or be annulled in subsequent legislation.²⁵

This analysis demonstrates that there is no illegitimate differential treatment among potential immigrants to Israel in the preference established by the Law of Return. Even the principled 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 preference of Jews – can in fact have an impact on the welfare and status of the Arab minority, but this does not constitute illegitimate differential treatment. Israel is **entitled** to annul the principle of return, but **is not so required** on these grounds.²⁶

²² See International Covenant on Civil and Political Rights, Article 26.

²³ 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.

²⁴ Yakobson and Rubinstein, 2003.

²⁵ It is important to emphasize this subject on the background of the fact that many have remarked in discussions on the Law of Return that the right of a Jew to make Aliyah is a natural right, prior to the state, and that the realization of this right is the purpose of the state, and not something that the state grants. It is possible to understand the rhetorical significance of these statements in terms of the Zionist narrative and the narrative of the state – but from a legal standpoint it is inexact. 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 will be altered at this point.

²⁶ For these arguments, see for instance the Adalah Constitution. I will not address the question of whether the Arabs are an “aboriginal” 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 aboriginal minority is based on the concept of the new Zionist settlement as a colonial expression. See also Gavison (forthcoming).

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, or civil basis are accepted. It is possible of course to claim that the application 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 accepted practices, but rather practices which international bodies, including those concerned with human rights, have authorized. Immigration policy or naturalization policy which favors the members of the national Diaspora is a common occurrence in European democracies.²⁷ Immigration laws which clearly favor immigrants from the ethnicity of the destination country are common in a variety of formats in Europe, in countries such as: Germany, Finland, Greece, Ireland, Poland, Hungary, Bulgaria, Slovakia, the Czech Republic, Slovenia, Turkey, and Croatia.²⁸ Tensions related to the desire to preserve an ethnic majority in one country, at least when the second ethnicity has their own adjacent country, are not unique to Israel and to the Jewish-Arab conflict.²⁹ As we have said, the idea that there would be two nation-states, in which each of them 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 coincidence 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 the same level of criticism against the similar formal arrangements of other countries. It is somewhat infuriating that Zionism is the only national movement which is described by so many as a kind of racism, and thus racism is ascribed only to the principle of return.

For this reason, the objections against the principle of return would earn more sympathy 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

²⁷ Yakobson and Rubinstein 2003. 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, next to the European Council. The committee's decision explicitly recognizes a connection between an ethno-cultural community and its kin state as a legitimate phenomenon and even desirable 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.

²⁸ We should mention that we are dealing here only with the **principle** of preference for the members of an ethnicity, and this is indeed accepted in many countries. The **formal arrangements** of preference which are established in Israel are broader than those practiced in most of the other countries. See Gans 2008b, chapt. 5.

²⁹ 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.

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.³⁰ A systematic and comprehensive treatment of these claims would of course go beyond the scope of this position paper, but for the sake of a thorough discussion 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 the resistance to returning 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, on account of the injury to the status of 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. Facing 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 where there was "a country with no people" here waiting for "a people with no country" 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 leadership 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. As for the fact of the depreciation of their status when they would stop being a majority and become 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.

But things being what they are, the Palestinian Arabs did not believe that these claims were particularly valid. It was natural for them to resist becoming a minority in their own country and to refuse to accept those processes which would bring this about. Ultimately 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 way which was likely to upset the sense of belonging and ownership of Arab residents of

³⁰ For a convincing academic argument in this spirit, see Zreik 2008. See also Azmi Basara's statements in an interview with Ari Shavit, "The Citizen Azmi", *Haaretz* Supplement

the country. This action was justifiable if it was done with a real effort to minimize this degradation so that it would not exceed that which was necessary in order to realize the right of Jews to political independence in their homeland.³¹

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. I do not accept the claims which 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 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 would be possible to justify their right to self-determination in part of their historical homeland as well.³²

We should mention as well that the right of the Jewish people to a national existence in its own country and its historical connection to the land did not only find 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 phrasing of the document of the mandate which Britain received from the League of Nations over Palestine 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."³³ 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 represents a recognition of the entire Jewish people as fulfilling its right to self-determination, and not only in virtue of the Jewish public dwelling 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 the sufferance."³⁴ 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.³⁵

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", this certainly was not a colonial appearance of a belligerent collective, which arrived lacking any recognized claim and expelled another people from its land.

³¹ See for instance Katznelson 1946, especially 33-35, 36-42; Shimoni 2001, 326-329.

³² Gavison 2003.

³³ Feinberg 1967, 19-20.

³⁴ Feinberg 1980, 130.

³⁵ Yakobson and Rubinstein 2003.

But my purpose here is not to reiterate these claims, but rather 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 out to war endangers himself. 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.³⁶ In the framework of a peace agreement between Israel and its neighbors, including the Palestinians, it is important to try to resolve the open 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 "right" of repatriation

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 enables 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 descendents have the **right** to return to their homes by virtue of international law.³⁷ The subject of the Palestinian claim to the existence of a "right" of return to Israel is of course beyond the scope of this position paper and we shall devote to this a separate discussion.³⁸

But it is important to make two things clear: **Firstly**, there is in fact an essential similarity (and also some substantial differences) between the Jewish demand for return and the Palestinian petitions or dreams. It would be a mistake on the part of the Jews in Israel to belittle the importance of the emotional and national validity of hopes for return as a part of the seminal identity of the Palestinian collective. But the right of 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"

³⁶ Israel was accepted to the UN on 11 May 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. With respect to the status and significance of Resolution 194 see Zilbershats and Goren (forthcoming).

³⁷ See for instance Zreik 2008.

³⁸ See Zilbershats and Goren (forthcoming).

rhetoric of the state's leaders at the time the law was passed). The Palestinian State which will be established can, if it so chooses, recognize the right of return of Palestinian refugees and their descendents 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. **Secondly**, the claim for a right of Palestinian refugees to return to Israel returns us to the problem of the conflict between the peoples, to the circumstances of the War of Independence, and to the management or resolution of the conflict. The State of Israel rose 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, specifically because of its victory, should lose its control over immigration and be forced to receive into its borders so many Palestinians that they would become the majority. 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 that were rooted in the painful remnants of the past.³⁹

We should go back and mention 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 meet the needs of the complicated political situation. These basic givens have not changed. The inclusion or acceptance of a justification for the principle of return in an Israeli agreement to recognize the Palestinian "right of return" would be paramount to expecting Israel to relinquish the ability of the Jews to fulfill in it their right to political self-determination.⁴⁰

D. The time limit for the principle of return

We have seen that one of the main differences between the case for self-determination or cultural preservation and the case for affirmative action is that the latter is by nature limited in time. The principle of equality is the accepted principle, and affirmative action is justified or necessary only as long as the results of the inequality which it is supposed to redress are active and visible. In terms of a continued

³⁹ I will not address here the argument that it is sufficient for Israel to recognize the existence of the right of return for the Palestinian refugees (and their descendents), but that the details of the realization of this right should be settled in negotiations between the parties in such a way that there were not be a 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 on the subject of absorbing Palestinian refugees within its borders. Thus it is **permitted** to declare a right of return, but it is **not required** to do so – for the reasons which I have explained at length above. For reasons connection to the nature of the discussion on rights it is recommended that Israel not recognize the right of return.

⁴⁰ Morris 2009.

justification for the principle of return, this difference is one of the advantages in the claim of self-determination. On the one hand, if a nation-state is created where there is a stable majority of members of one group, then the will of the collective to secure its continued existence does not warrant 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 which is in the nation-state's recognition of the right of an individual of the group to live a complete national existence in his historical homeland by means of his preference in immigration policy.

On the other hand, there are those who believe that the Law of Return should only fill a temporary role in the history of the state, and that there should be a date set after which Jews should be permitted to settle in Israel only in the framework of its standard immigration laws (based on the principle of affirmative action or without any connection to it).⁴¹ 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 compensate for the injustices of the past (even if this period might continue). 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 connect, eventually, the idea that the State of Israel was founded in order to permit the **Jewish people** to fulfill their right to self-determination, but at a certain point it must become a "state of all its citizens", and the collective which will enjoy the right to self-determination will only be the Israeli collective (the adherents to this opinion differ regarding whether the collective should be Jewish-Israeli or perhaps Israeli-civil).⁴²

At least some of the claims 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: **Firstly**, 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. **Secondly**, Jews are continually being born and reaching their majority 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 exploit 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 they 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. **Thirdly**, many Jews have extended family in Israel who are not closely enough related to justify "ordinary" preference in

⁴¹ 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 Hanoeh Marmari (*Haaretz* Supplement, 11 November 1994). One could say that this idea is a prominent characteristic of "post-Zionism" which is not necessarily anti-Zionist. See also Berent 2009, pp. 45-52.

⁴² 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 naturalization 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."

immigration, and even this is a consideration for the general preference of Jews in the immigration to the nation-state of their people without a time-limit. The aspiration to enable Jews to live alongside of their extended families in their nation-state is a part of the aspiration to enable them to realize a complete national and cultural existence. But beyond this, the collective itself has a continual right to act in order to reinforce and preserve the conditions which will make self-determination in its homeland possible. All of this is in the framework of the limitations imposed by international law and human rights. As we have seen, the first condition for such a preservation is to ensure a stable Jewish majority in the State of Israel. This is not, in and of itself, a claim based on corrective justice, since the State of Israel exists, it has a Jewish majority, and the Jewish people realize in it their right to self-determination. But the preservation of the Law of Return is also required in order to prevent processes which will lead to the actual danger that we will return to a situation in which Jews will not enjoy effective self-determination, even where they do so currently.

In other words, the claims in favor of the principle of return as founded on the principle of self-determination can therefore apply even after the validity of the claim of corrective justice or of "affirmative action" will be 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 which wish to preserve their cultural character without such a revolutionary historical transition period.⁴³

E. Conclusion

It is worth emphasizing that this continued justification of 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 "Jewish-ness" of the state. Nonetheless, the Law of Return in and of itself does not grant rights in Israel to a Jew who is not an Israeli citizen. It only grants him 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 collection of its citizens, both Jews and non-Jews. But as we have seen continued relationships between ethnic nation-states and their cultural Diasporas are an important aspect of modern life. There is no contradiction between the fact on the one hand that in Israel there is a "civil nation" made up of the collection of Israeli citizens, and the fact on the other hand that members of several separate ethno-cultural nations live here, and that the only people which enjoys political self-determination in Israel is the Jewish people.

In either case, the question of whether it is necessary to annul the Law of Return or the declaration of the principle of return 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 annul the Law of

⁴³ Gans describes this distinction clearly in his book; see Gans 2008b. In chapter two Gans deals with the "compensating" 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 the migration between different nation-states.

Return is not only, or even mostly, a matter of a demand to change immigration policy or the formal arrangements of return. We have seen that Israel could maintain a policy of "openness to Jewish Aliyah" without such a law and this is even what it did before the law was passed. Therefore it is possible that the nullification of the Law of Return will not lead to a significant change in Israel's immigration policy for Jews.⁴⁴ But on account of the enormous symbolic importance of the law, the fact of its nullification or even the fact of a declaration in principle that the principle of return is subject to a time-limit are 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 complete Jewish existence, in which there is no need to "be a Jew at home and a citizen of the country outside", and which his "default culture" is Jewish and Hebrew; a place which will serve as a refuge for every Jew who is persecuted for his Judaism; a state in which every Jew can be certain that he has a right to enter and live there and that he will not be a guest but rather a member of the household. The State of Israel is entitled to decide that this is what it wants to do. If there will be a majority that so chooses – so it will be. 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.

⁴⁴ It is not clear how the court would react to the annulment of the law, but with the simultaneous perpetuation of the immigration policy which is based on it.