



RELIGIO-ETHNIC IDENTITY AND THE RIGHT TO RETURN:  
THE CASE OF THE STATE OF ISRAEL

[ITA] *Identità etnico-religiosa e diritto di ritorno: il caso dello Stato di Israele*

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*Abstract:* Israel was created about 70 years ago in the shadow of the Holocaust for the survival of the Jewish nation. Since 1950, the Law of Return has granted the right to come back and settle in Israel to every Jew. But Israel has also been characterized by an opposite trend of movement of people: the creation of the State of Israel and the successive wars have originated the problem of Palestinian refugees, which also raises critical, albeit different, questions with regard to the right to return, recognized by international law. This article aims to examine – in a legal perspective – these two opposite trends, by focusing on the relationship between religio-ethnic identity and the right to return.

*Keywords:* religio-ethnic identity; right to return; Israel.

*Riassunto:* Lo Stato di Israele fu istituito nel 1948 come un asilo per la sopravvivenza della nazione ebraica dopo la lacerante esperienza dell'Olocausto. Dal 1950, la Legge del Ritorno ha garantito a ogni ebreo il diritto di tornare e stabilirsi in Israele. Ma il paese è stato caratterizzato anche da una tendenza opposta di movimento di persone: la nascita dello Stato di Israele e le guerre successive hanno originato il problema dei rifugiati palestinesi, il quale solleva differenti questioni critiche relative al diritto al ritorno, riconosciuto dal diritto internazionale. Questo articolo si propone di esaminare – in una prospettiva giuridica – queste due opposte tendenze, a partire dal rapporto tra identità etnico-religiosa e diritto al ritorno.

*Parole chiave:* identità etnico-religiosa; diritto al ritorno; Israele.

## 1. INTRODUCTION: LAW AND RELIGION IN THE STATE OF ISRAEL

The idea of the Jews' return has always been central in Israel's history. The Declaration of the Establishment of the State of Israel of 14 May 1948 did not only



refer to the Land of Israel as “*the birthplace of the Jewish people*”<sup>1</sup>, where “*their spiritual, religious and political identity was shaped*”, but expressly mentioned the Holocaust and the need for the Jews to have a refuge for their survival<sup>2</sup>. Scholars have widely noted that, at the height of the Jewish genocide, the British Mandate authorities implemented a very strict immigration policy, allowing entry to a tiny percentage of the Jews escaping death and seeking refuge<sup>3</sup>. Thus, it is not surprising that free immigration (for the Jews) has become a cornerstone of the newly established State of Israel<sup>4</sup>.

At the same time, the Declaration did not neglect the existence of other peoples in the territory: the State of Israel would “*foster the development of the country for the benefit of all its inhabitants*”, “*ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex*”, and “*guarantee freedom of religion, conscience, language, education and culture*”. Gavison has argued that this section has a democratic dimension, and constitutes the answer to the demands made by the UN General Assembly and restated by the

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<sup>1</sup> This and the following quotations are from the official English translation at [[http://knesset.gov.il/docs/eng/megilat\\_eng.htm](http://knesset.gov.il/docs/eng/megilat_eng.htm), accessed 18 September 2019]. For a detailed discussion on the notion of ‘Jewish people’ in international law, see MALLISON, W. T. Jr., «Zionist-Israeli Juridical Claims to Constitute the Jewish People Nationality Entity and to Confer Membership in It: Appraisal in Public International Law», in *George Washington Law Review* 32 (1964), pp. 983-1075.

<sup>2</sup> “*The catastrophe which recently befell the Jewish people - the massacre of millions of Jews in Europe - was another clear demonstration of the urgency of solving the problem of its homelessness by re-establishing in Eretz-Israel the Jewish State, which would open the gates of the homeland wide to every Jew and confer upon the Jewish people the status of a fully privileged member of the community of nations. [...]. The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; [...]. We appeal to the Jewish people throughout the Diaspora to rally round the Jews of Eretz-Israel in the tasks of immigration and upbuilding and to stand by them in the great struggle for the realization of the age-old dream - the redemption of Israel. [...]*”.

See also ALTSCHUL, M. J., «Israel's Law of Return and the Debate of Altering, Repealing, or Maintaining Its Present Language», in *University of Illinois Law Review* 5 (2002), p. 1349; RICHMOND, N. C., «Israel's Law of Return: Analysis of Its Evolution and Present Application», in *Dickinson Journal of International Law* 12 (1993), pp. 95-98.

<sup>3</sup> See *inter alia* ERNST, D., «The Meaning and Liberal Justifications of Israel's Law of Return», in *Israel Law Review* 42 (2009), pp. 565-566; NESIS, L. S., «Who Is a Jew - Shalit v. Minister of Interior et al. - The Law of Return (Amendment No. 2), 1970», in *Manitoba Law Journal* 4 (1970), p. 58.

<sup>4</sup> See TOREN, N., «Return Migration to Israel», in *International Migration Review* 12 (1978), p. 39.



Partition Resolution. These provisions have attempted to link the particular character of the State of Israel to the universal human rights<sup>5</sup>.

Last but not least, the Declaration appealed “*to the Arab inhabitants of the State of Israel to preserve peace and participate in the upbuilding of the State on the basis of full and equal citizenship and due representation in all its provisional and permanent institutions*”. Sadly, as known, history has been characterized by a number of military conflicts between Israeli and various Arab forces, the most notable of which took place in 1948–49, 1956, 1967, 1973, 1982, and 2006.

The geo-political novelty represented by the creation of the State of Israel has not only been a thorny issue for Arabs and Muslims, but it has been characterized by an ideological divide within Judaism itself – between secularist and religious circles<sup>6</sup>. The Zionist project, grounded on the idea of the return to the land that was the birthplace of the Jewish people, was mostly animated by the former. The latter, by contrast, continued to see Judaism as a religion in exile, supported a political culture centered on passivity and saw the return as a form of ‘forcing the end’, which they had prohibited<sup>7</sup>. This contrast helps to explain why Judaism has never been proclaimed as the official religion of the State of Israel<sup>8</sup>. This clause would be typically included in the Constitution, but Israel has never adopted a written Constitution, which was opposed by both parties for different reasons. The Jewish religious establishment held that “*There is no place in Israel for any constitution created by man. If it contradicts the Torah – it is inadmissible, and if it is concurrent with the Torah – it is redundant*”<sup>9</sup>. The secular vision was represented by the first

<sup>5</sup> GAVISON, R., *The Law of Return at Sixty Years: History, Ideology, Justification*, Jerusalem 2010, p. 23.

<sup>6</sup> For a general discussion, see England, I., «Law and Religion in Israel», in *American Journal of Comparative Law* 35 (1987), pp. 185-208.

<sup>7</sup> HAIMAI, G., «Constitutionalism, Law and Religion in Israel a State’s Multiple Identities», in *Journal of Civil & Legal Sciences* 5 (2016), p. 1.

<sup>8</sup> RUBINSTEIN, A., «Law and Religion in Israel», in *Israel Law Review* 2 (1967), pp. 400 and 414.

<sup>9</sup> Quoted in HAIMAI, G., «Constitutionalism, Law and Religion», cit., p. 4. See also ALTSCHUL, M. J., «Israel’s Law of Return», cit., p. 1350.



Prime Minister of the State of Israel, David Ben-Gurion, who “*wanted the least restrictions on his power; most of Jews were abroad and it seemed unfair to entrench a constitution by a minority; the British experience was also an argument against adopting a constitution*”<sup>10</sup>. In the course of time, Israel has adopted 14 Basic Laws<sup>11</sup>, which have constitutional status<sup>12</sup>. The two Basic Laws on *Human Dignity and Liberty* (1992) and on *Freedom of Occupation* (1992, replaced in 1994) declare the State of Israel as “*a Jewish and democratic state*”<sup>13</sup>.

A characteristic of Israel’s system of law and religion is the regulation of some matters (typically, family and succession law) by the religious authorities of Judaism as well as the other recognized religious communities, according to their own religious rules. There exists no civil marriage or divorce: in these matters, the religious courts of the recognized religious communities have exclusive jurisdiction over their respective members. Disputed are also decided by the respective religious courts, and their decisions are recognized by civil authorities<sup>14</sup>. This arrangement has been inherited by the Ottoman *millet* system<sup>15</sup>, and maintained during the British Mandate<sup>16</sup>. When the State of Israel was established, this legal pluralistic structure was confirmed in order to find a compromise with the Jewish religious establishment, to preserve Jewish unity within the newly-founded country, and to

<sup>10</sup> HAIMAI, G., «Constitutionalism, Law and Religion», cit., p. 4

<sup>11</sup> [<https://m.knesset.gov.il/EN/activity/Pages/BasicLaws.aspx>, accessed 18 September 2019].

<sup>12</sup> See NAVOT, S., *Constitutional Law of Israel*, Alphen aan den Rijn 2007, pp. 38-50.

<sup>13</sup> Respectively Art. 1 and Art. 2. According to Smootha, Israel in an ethnic democracy. See SMOOHA, S., «The model of ethnic democracy: Israel as a Jewish and democratic state», in *Nations and Nationalism* 8 (2002), pp. 475-503.

<sup>14</sup> MAOZ, A., «The Application of Religious Law in a Multi-Religion Nation State: the Israeli Model», in *Religious Rules, State Law and Normative Pluralism – A Comparative Overview*, ed. BOTTONI, R., CRISTOFORI, R., FERRARI, S. Berlin 2016, pp. 212 and 217; RABELLO, A. M., *Introduzione al diritto ebraico. Fonti, matrimonio e divorzio, bioetica*, Torino 2002, pp. 133-136; BOTTONI, R., «State-enforced religious family law systems and prospects of reform: The issue of get in Israel», in *Il diritto ecclesiastico*, 3-4 (2017), pp. 642-643.

<sup>15</sup> See BOTTONI, R., *Il principio di laicità in Turchia. Profili storico-giuridici*, Vita e Pensiero 2012, *passim*.

<sup>16</sup> RUBINSTEIN, A., «Law and Religion in Israel», cit., pp. 384-399.



gain support for the political project of the State of Israel among the Jews of the diaspora<sup>17</sup>.

A relevant consequence is the distinction between citizenship and nationality. In the Western legal experience, the two terms are basically synonyms. By contrast Israel<sup>18</sup> distinguishes between an Israeli citizenship, on the one side, and Jewish, Arab, Circassian, Druze, and so on, nationalities, on the other side<sup>19</sup>. In October 2013, the Supreme Court rejected the petition to recognize 'Israeli' as a nationality, which was presented by a number of citizens in order to overcome the discrimination between Jews and Arabs, as well as to address the demands of some segments of the Jewish population<sup>20</sup>.

## 2. THE RIGHT TO RETURN FROM THE JEWISH PERSPECTIVE(S)

Since its establishment, Israel has linked sovereignty and immigration in a way that is unusual to other State experiences. Especially nowadays, States typically see the power to control immigration as a tool to affirm their sovereignty, and the immigrant's settlement in the national territory as a concession they grant. By contrast, Israel has always conceived of the Jews' free immigration as a natural right prior and above the establishment of the State. The purpose of Israel's existence is immigration, and sovereignty is the means serving this end<sup>21</sup>: the State's legitimacy and authority rests on its role of guarantor of the right, to which every Jew is entitled, to return and settle in Israel<sup>22</sup>. Thus, the first measure adopted by the newly

<sup>17</sup> HAIMAI, G., «Constitutionalism, Law and Religion», cit., p. 2.

<sup>18</sup> Like other countries in different parts of the world, incidentally.

<sup>19</sup> See ALTSCHUL, M. J., «Israel's Law of Return», cit., p. 1352.

<sup>20</sup> [<https://en.idi.org.il/articles/6516>, accessed 18 September 2019]. In fact, the petition was presented by Jews, who wanted their identity documents “to reflect their citizenship and belonging to the Israeli State, rather than ‘Jewish’, which reflects their ethno-religious affiliation”. MCGONIGLE, I. V., HERMAN, L. W., «Genetic citizenship: DNA testing and the Israeli Law of Return», in *Journal of Law and the Biosciences* 2 (2015), p. 472.

<sup>21</sup> See NESIS, L. S., «Who Is a Jew», cit., p. 58.

<sup>22</sup> ERNST, D., «The Meaning and Liberal Justifications», cit., pp. 566-567 and 574.



established State was the abolishment of the limitations imposed on immigration by the British Mandate authorities<sup>23</sup>. The approval of the Law of Return was next.

#### a. THE 1950 LAW OF RETURN

The Law of Return was approved unanimously on 5 July 1950, on the anniversary of the death of Theodor Herzl, who had envisioned the State of Israel<sup>24</sup>. Although it has not been defined a Basic Law by the Knesset (Parliament)<sup>25</sup>, it is regarded as “*the raison d’être of the State of Israel*”<sup>26</sup>. In Ben-Gurion’s words, it “*encompasses the central mission of our country, the ingathering of exiles. This law determines that it is not the state which accords the Jews of the Diaspora the right to settle here, but that this right belongs to every Jew by virtue of the fact that he is Jewish*”<sup>27</sup>.

Art. 1 guarantees the right of *aliyah*: “*Every Jew has the right to come to this country as an *oleh**”<sup>28</sup>. *Aliyah* is usually translated as immigration of Jews, but literally it means ‘ascent’. It has been argued that a better English translation of Art. 1 would be: “*Every Jew has the right to ascend to the Land of Israel*”<sup>29</sup> and, thus, to the historical territory of the Jewish people (rather than the State of Israel’s legal jurisdiction)<sup>30</sup>. *Aliyah* is a biblical and religious term, to which Zionism has added a national dimension: the ascent is understood not only in spiritual terms, but also as the act of “*joining the Israeli national collective and showing willingness to*

<sup>23</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 23-24.

<sup>24</sup> *Ibi*, pp. 24 and 30; HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, June 2018, p. 2 [<http://globalcit.eu/new-report-on-citizenship-law-israel>, accessed 18 September 2019].

<sup>25</sup> ALTSCHUL, M. J., «Israel’s Law of Return», cit., p. 1350; GAVISON, R., *The Law of Return at Sixty Years*, cit., p. 30; KLEIN, C., «The Right of Return in Israeli Law», in *Tel Aviv University Studies in Law* 13 (1997), p. 53.

<sup>26</sup> ERNST, D., «The Meaning and Liberal Justifications», cit., p. 565.

<sup>27</sup> Quoted in HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, cit., p. 2.

<sup>28</sup> This and the following quotations are from the official English translation at [<http://knesset.gov.il/laws/special/eng/return.htm>, accessed 18 September 2019].

<sup>29</sup> ERNST, D., «The Meaning and Liberal Justifications», cit., p. 576.

<sup>30</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., p. 26.



contribute to it”<sup>31</sup>. Consequently, Art. 2 (b) stipulates that “*An oleh's visa shall be granted to every Jew who has expressed his desire to settle in Israel*”<sup>32</sup>. *Oleh* (plural: *olim*) is usually translated as a Jew immigrating into Israel<sup>33</sup>. However, the legal treatment of Jews moving to Israel is that of repatriates rather than immigrants. They are not regarded “*as potential members of the nation (as immigrants are usually treated) but as persons who ‘already’ belong*”<sup>34</sup>. In fact, under Art. 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*”. In other words, the Law of Return makes no distinction amongst Jews, and it regards indistinctly three different categories as *olim*: Jews who have returned; those who are already resident; those who will be born in the State of Israel<sup>35</sup>. This further confirms that the Jews who return are not like immigrants, who change their status upon acquisition of citizenship.

Accordingly, the 1952 Citizenship Law confers citizenship to ‘ascending Jews’ virtually in an immediate and automatic way<sup>36</sup>, whereas non-Jews have to go through a lengthier naturalization process<sup>37</sup>. It is worth noting that, at the beginning,

<sup>31</sup> HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, cit., p. 2.

<sup>32</sup> With the exception of applicants «engaged in an activity directed against the Jewish people» or «likely to endanger public health or the security of the State» (Art. 2 (b) (1) and (2)). For a detailed discussion, see GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 27-29.

<sup>33</sup> The opposites of *aliyah* (ascent)/*olim* (‘those who come up’) are *yeridah* (descent)/*yordim* (‘those who go down’), referred to Israeli Jews who have moved abroad or resided outside the country for a long time. HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, cit., p. 10; TOREN, N., «Return Migration to Israel», cit., p. 41.

<sup>34</sup> HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, cit., p. 3.

<sup>35</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., p. 570.

<sup>36</sup> See *ibi*, p. 30; KLEIN, C., «The Right of Return in Israeli Law», cit., pp. 60-61; RICHMOND, N. C., «Israel's Law of Return», cit., p. 99; RUBINSTEIN, A., «Law and Religion in Israel», cit., p. 413; SHAVA, M., «Comments on the Law of Return (Amendment No. 2), 5730-1970 (Who Is a Jew)», in *Tel Aviv University Studies in Law* 3 (1977), p. 141; TOREN, N., «Return Migration to Israel», cit., p. 39.

<sup>37</sup> This distinction has raised a heated debate on the discriminatory nature of Israeli legislation on citizenship. The Israeli position (denying discrimination) is justified by KAPLAN, Y. S., «Immigration Policy of Israel: The Unique Perspective of a Jewish State», in *Touro Law Review* 31 (2015), pp.



the idea prevailed to encourage the Jews' return by means of immigration policy, and to approve a citizenship law that would not make any express distinction between Jews and non-Jews. A different solution – promoted by the director of the Institute for the Study of Jewish Law at the Ministry of Justice, Zerah Warhaftig – was adopted instead: on the grounds that 'ascending Jews' should be regarded as persons returning to their own homeland, a distinction had to be made between an *oleh's* visa (for Jews), and an immigrant's visa (for non-Jews). This difference required the approval of two distinct acts: the Law of Return and the Citizenship Law<sup>38</sup>.

One definition was missing in the concerned legislation: who is a Jew?<sup>39</sup> At the beginning, no legal definition was provided, because it was believed that Jewishness was an issue of self-determination<sup>40</sup>. However, this definition has proved to be possibly the most debated issue in the State of Israel's history<sup>41</sup>.

#### b. THE RUFSEISEN AND SHALIT CASES

Oswald Rufeisen was a Polish Jew who, during the Second World War, helped rescue a number of Jews. In 1942, he converted to Catholicism and, in 1945, he joined the Carmelite Order as Brother Daniel. He chose this order, because it had a chapter in Palestine. In 1952 he went to Israel and asked for an *oleh's* visa. After his request was rejected on the grounds that a Jew may not profess another religion, he applied to the Supreme Court arguing that his conversion had not changed his feelings of belonging to the Jewish people, and that the concept of religion had to be kept separate from that of nationality. Further, he held that, according to *halachah*<sup>42</sup>,

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1089-1135; GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 36 and 53; ERNST, D., «The Meaning and Liberal Justifications», cit., especially pp. 577-601.

<sup>38</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 24-26.

<sup>39</sup> *Ibi*, p. 26; NESIS, L. S., «Who Is a Jew», cit., p. 56.

<sup>40</sup> HAIMAI, G., «Constitutionalism, Law and Religion», cit., p. 4.

<sup>41</sup> ALTSCHUL, M. J., «Israel's Law of Return», cit., p. 1352; RUBINSTEIN, A., «Law and Religion in Israel», cit., p. 413.

<sup>42</sup> Literally 'the way', it is "the totality of laws and ordinances that have evolved since biblical times to regulate religious observances and the daily life and conduct of the Jewish people" [<https://www.britannica.com/topic/Halakhah>, accessed 18 September 2019].





he was a Jew having been born to Jewish parents<sup>43</sup>. In fact, from the religious authorities' perspective, apostates are sinners, but they remain Jews<sup>44</sup>.

In a ruling of 1962, the judges, by a majority of four to one, endorsed a secular interpretation of the Law of Return<sup>45</sup> and concluded that a convert ceased to be a Jew. Indeed, also the minority judge Cohn grounded his dissenting opinion on a secular argument (the subjective test): according to him, the Law of Return applied to «*anyone who declared in good faith and sincerely that he was a Jew*»<sup>46</sup>. By contrast, the majority held that the secular criterion grounding the decision could not be subjective – that is, depending on the concerned person's self-determination –, but had to be objective – that is, referred to the conventional and usual meaning of 'Jew', as understood by the general public<sup>47</sup>. In the perspective of the objective test, being a Jew and being a Christian were mutually exclusive. Judaism did not need to be practiced, but it could not even be forsaken. Conversion to another religion implied the creation of a distance from the Jews' national past altogether<sup>48</sup>. Despite the rejection of the halachic principle 'once a Jew, always a Jew', the religious

<sup>43</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 64-65; RICHMOND, N. C., «Israel's Law of Return», cit., pp. 104-105; SHAVA, M., «Comments on the Law of Return», cit., p. 142.

<sup>44</sup> NESIS, L. S., «Who Is a Jew», cit., p. 65; SHAVA, M., «Comments on the Law of Return», cit., p. 142.

<sup>45</sup> RUBINSTEIN, A., «Law and Religion in Israel», cit., p. 413.

<sup>46</sup> SHAVA, M., «Comments on the Law of Return», cit., p. 143.

<sup>47</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., p. 65; NESIS, L. S., «Who Is a Jew», cit., pp. 65-66.

<sup>48</sup> RICHMOND, N. C., «Israel's Law of Return», cit., p. 106. The same objections have grounded the refusal to recognize Messianic Jews as *olem*. See DECKER, M., *The Law of Return with a Focus on Christians and Messianic Jews*, 2011 [<http://www.lcje.net/Papers%20of%20the%20conference%20High%20Leigh.html>, accessed 18 September 2019].



establishment did not protest against this decision<sup>49</sup>, as it would have done in the subsequent judgment concerning Shalit.

This second case did not concern directly the Law of Return, but it originated a heated debate, which ultimately led to an amendment of the law, in order to define who is a Jew and who is entitled to settle in Israel as an *oleh*<sup>50</sup>.

An Israeli Jewish citizen, Benjamin or Binyamin Shalit<sup>51</sup>, married a non-Jewish Scotswoman. Both declared to profess no religion. They had two children, a son in 1964 (he was circumcised but not in accordance with *halachah*), and a daughter in 1967. Under the law<sup>52</sup>, the children had to be registered in the population registry. This requirement included a compulsory declaration on their religion and nationality. The couple declared that the children were Jews by nationality, and had no religion<sup>53</sup>. However, as the Rufeisen case had already highlighted, Jewish religion and nationality were regarded as indissociable. Also, according to the 1960 guidelines issued by the Ministry of the Interior affairs, people would be registered as Jews (in both entries, ‘religion’ and ‘nationality’) if they were born to a Jewish mother<sup>54</sup> and did not profess another religion, or if they had converted to Judaism according to *halachah*<sup>55</sup>. Neither of these applied to Shalit’s children. Thus, the

<sup>49</sup> NESIS, L. S., «Who Is a Jew», cit., p. 81.

<sup>50</sup> See RICHMOND, N. C., «Israel's Law of Return», cit., pp. 106-107.

<sup>51</sup> Both spellings may be found in English literature.

<sup>52</sup> The 1949 Registration of Inhabitants Ordinance was in force when their son was born. The ordinance was repealed and substituted by the 1965 Population Registry Law, which applied to their daughter. The ordinance and the law had the same registry requirements.

<sup>53</sup> NESIS, L. S., «Who Is a Jew», cit., pp. 53-55.

<sup>54</sup> “*Sharing with Roman law the realistic view that mater semper certa est, Jewish religious law views descent from a Jewish mother as decisive in this connection*”. AZKIN, B., «Who Is a Jew - A Hard Case», in *Israel Law Review* 5 (1970), p. 261.

<sup>55</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 63-64. According to *halachah*, “*true and proper conversion in the case of the male is gained by the acceptance of the authority of the religious law, circumcision and immersion, and in the case of the female, acceptance of the authority of the religious law and immersion. Parental assertions alone in the case of a minor or the declaration of an adult himself that he wishes to be known as a Jew, are of no avail*” (NESIS, L. S., «Who Is a Jew», cit., pp. 54-55).



registration officer wrote ‘Father Jewish, mother non-Jewish’ as religion, and ‘no registration’ under the nationality entry<sup>56</sup>.

Shalit applied to the Supreme Court. He argued, like Rufeisen had also done, that nationality and religion were two separate things; one could be Jewish by nationality without being so by religion; being a Jew was a matter of self-identification with Israeli Jewish culture and history, and of desire to raise one’s children with those values<sup>57</sup>. The importance of this case is highlighted by the circumstance that this was the first time that the court sat in a full bench of nine judges (it normally sits in panels of three). The judgment, redacted in over 130 pages, was delivered almost two years after the hearing had started<sup>58</sup>. Actually, at the beginning, the court tried to avoid a decision on this complex issue, and asked the government to delete the nationality entry from the population registry<sup>59</sup>, but this was refused<sup>60</sup>.

The court had thus to examine the claim and, by a strict majority of five to four, it decided in favor of Shalit. The majority still refused to enter into the issue of who is a Jew, and examined the claim from the perspective of whether the registration official had acted properly. They concluded that he had to register the information provided by the individuals, based on their subjective self-determination – thus subscribing, in this case, to the opinion elaborated by Cohn in the Rufeisen case<sup>61</sup>. The Shalit judgment, issued on 23 January 1970, raised a heated debate on

<sup>56</sup> NESIS, L. S., «Who Is a Jew», cit., pp. 54-55. This author has specified that, in the case of the daughter, the registration officer mixed up ‘religion’ (under which he wrote ‘no registration’) and ‘nationality’ (under which he wrote ‘Father Jewish, mother non-Jewish’), but he was ready to amend the registration so that it would be the same as that of the son.

<sup>57</sup> Ibi, pp. 55-56.

<sup>58</sup> SHAVA, M., «Comments on the Law of Return», cit., p. 144.

<sup>59</sup> And from the identity card. Ben-Gurion stated that the need to declare one’s religion and nationality was justified by reasons of national security, in order to distinguish between Jews and Arabs. NESIS, L. S., «Who Is a Jew», cit., p. 61.

<sup>60</sup> Ibi, p. 56; AZKIN, B., «Who Is a Jew», cit., p. 263; SHAVA, M., «Comments on the Law of Return», cit., p. 144.

<sup>61</sup> ALTSCHUL, M. J., «Israel's Law of Return», cit., pp. 1354-1355; GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 65-66; SHAVA, M., «Comments on the Law of Return», cit., p. 145. Reasons



the (religious vs. secular) nature of the State of Israel. In particular, the Jewish Orthodox religious establishment protested vehemently, because the court had rejected the halachic definition of who is a Jew; the members of the religious party threatened Prime Minister Gold Meir to leave the coalition government. In the attempt to find a compromise, on 10 March the Knesset amended the Law of Return by a vote of 54 to 14 (and 9 abstentions)<sup>62</sup>.

### c. THE 1970 AMENDMENT AND CONTEMPORARY CRITICAL ISSUES

The reform consisted in the addition of two new clauses – 4A on the rights of members of family, and 4B on the definition of ‘Jew’ – and the amendment of one provision<sup>63</sup>.

According to Art. 4B, for the purposes of the Law of Return (as well as the Population Registry Law), a ‘Jew’ is “*a person who was born of a Jewish mother or has become converted to Judaism and who is not a member of another religion*”. It has been noted that this definition is narrower than the halachic one, because it excludes converts to another religion; at the same time, it is also wider, because it includes people who have converted to Judaism in any form – not only Orthodox, but also Reformed, Conservative, and so on<sup>64</sup>. In Israel, the supreme Jewish religious authority is the Orthodox-dominated Chief Rabbinate<sup>65</sup>, with the exclusions of other streams that prevail outside Israel. This is the case of the USA, home to the largest

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of space do not allow a detailed examination of the judges’ majority and minority positions. For more information, see NESIS, L. S., «Who Is a Jew», cit., pp. 65-79.

<sup>62</sup> BAKER, D. L., «Who is a Jew: The Dilemma of Israel», in *Journal of Church and State* 12 (1970), pp. 189-190; NESIS, L. S., «Who Is a Jew», cit., p. 85; SHAVA, M., «Comments on the Law of Return», cit., p. 146.

<sup>63</sup> The amended Art. 5 envisages that “*Regulations for the purposes of sections 4A and 4B require the approval of the Constitution, Legislation and Juridical Committee of the Knesset*”. This and the following quotations are from the official English translation at [<http://knesset.gov.il/laws/special/eng/return.htm>, accessed 18 September 2019].

<sup>64</sup> GINOSAR, S., «Who Is a Jew: A Better Law. The Law of Return (Amendment No. 2), 1970», in *Israel Law Review* 5 (1970), p. 265; NESIS, L. S., «Who Is a Jew», cit., pp. 80-82.

<sup>65</sup> RUBINSTEIN, A., «Law and Religion in Israel», cit., p. 414.



percentage of the Jewish diaspora<sup>66</sup>, where most Jews are Reformed (35%) or Conservative (18%), and only about 10% are Orthodox<sup>67</sup>. The Orthodox religious establishment insisted that the clause ‘converted to Judaism according to *halachah*’ should be included, but the secular circles were concerned about the effects this would have on the diaspora. As stressed, the establishment of the State of Israel was grounded on the guarantee of the right of every Jew to return and settle in the country. A restrictive clause on conversion would have alienated American Jews<sup>68</sup> – whose alliance and influence on American political support of Israel are vital<sup>69</sup>. It would have also discouraged future waves of immigration (at the time of the approval of the amendment, there were about 3 million Jews in the Soviet Union, whose immigration was anticipated)<sup>70</sup>.

According to Art. 4A, the rights recognized to Jews by the Law of Return are conferred also to “*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*”. This clause has much expanded the category of subjects entitled to *aliyah*: “*these rights and privileges have not even been made conditional on the Jewish spouse, parent or grandparent being still alive or actually setting in Israel. Moreover, since the law has been couched in the present tense (and not in the future), it is open to retroactive construction in favour of immigrants already settled in Israel*”<sup>71</sup>. It was noted that many non-Jews had suffered persecution and put their lives at risk in order to save

<sup>66</sup> As of 2010, 5.7 million Jews resided in the USA, and 5.6 in Israel. Together, they are about 80% of the world’s Jews. [<https://www.pewforum.org/2015/04/02/jews>, accessed 18 September 2019].

<sup>67</sup> [<https://www.pewresearch.org/fact-tank/2016/03/15/unlike-u-s-few-jews-in-israel-identify-as-reform-or-conservative>, accessed 18 September 2019].

<sup>68</sup> GINOSSAR, S., «Who Is a Jew», cit., p. 265; RICHMOND, N. C., «Israel's Law of Return», cit., p. 110.

<sup>69</sup> ALTSCHUL, M. J., «Israel's Law of Return», cit., pp. 1363-1364; RICHMOND, N. C., «Israel's Law of Return», cit., pp. 113-114. See also BRACKMAN, N., «Who is a Jew: The American Jewish Community in Conflict with Israel», in *Journal of Church and State* 41 (1999), pp. 795-822.

<sup>70</sup> NESIS, L. S., «Who Is a Jew», cit., pp. 60 and 72.

<sup>71</sup> GINOSSAR, S., «Who Is a Jew», cit., p. 266.



their Jewish husbands; now they had come to Israel to live and make their children live as free Jews. They had not converted because this was a demanding procedure or for reasons of conscience, but in any case they had the intention to contribute to and make their family be part of the Jewish nation<sup>72</sup>. Nonetheless, religious circles criticized this provision, because it would have allowed entry and settlement in Israel – as *olim* – of people who were not Jews, without requiring their conversion<sup>73</sup>. The Prime Minister Gold Meir herself noted the alarming rate of 20% of intermarriage among American Jews<sup>74</sup>. In fact, Art. 4A has favored especially the immigration of people from the former Soviet Union: they were not halachically Jews, but were related to Jews through marriage or blood ties from their father's side<sup>75</sup>.

The 1970 amendment prevented future registrations in the registry law, like those requested by Shalit<sup>76</sup>. Nevertheless, this problem was solved in 2002, when the Population Registry Law was amended and reference to nationality was removed, because of an increasing percentage of people, mainly immigrants from the former Soviet Union, who identified themselves as Jews, but did not meet the legal criteria to be classified as such<sup>77</sup>. Incidentally, as early as 1995 the Central Bureau of Statistics had changed its classification categories: originally, Israel's population was classified into 'Jews' and 'non-Jews'; then a third category, 'other', was introduced for those who were neither Jews nor Arabs<sup>78</sup>.

A number of other issues have remained open and still spark controversy. Just because the 1970 amendment has been a compromise, none of the interested parties has been fully satisfied<sup>79</sup>. For the religious authorities, conversion continues

<sup>72</sup> NESIS, L. S., «Who Is a Jew», cit., p. 59.

<sup>73</sup> BAKER, D. L., «Who is a Jew», cit., p. 190.

<sup>74</sup> See NESIS, L. S., «Who Is a Jew», cit., p. 81.

<sup>75</sup> HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, cit., p. 4.

<sup>76</sup> BAKER, D. L., «Who is a Jew», cit., p. 190; NESIS, L. S., «Who Is a Jew», cit., p. 84.

<sup>77</sup> DAVIS, U., *Apartheid Israel: Possibilities for the Struggle Within*, London 2003, p. 221, endnote 29.

<sup>78</sup> HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, cit., p. 4.

<sup>79</sup> BAKER, D. L., «Who is a Jew», cit., p. 190; GINOSSAR, S., «Who Is a Jew», cit., p. 266.



to be a thorny issue: in the course of time the religious parties have tried to amend the Law of Return, in order to require Orthodox conversions for those settling in Israel as *olim*<sup>80</sup>. *“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”*<sup>81</sup>.

In any case, it should be stressed that the non-halachic definition of who is a Jew is only relevant for the purposes of the Law of Return. The jurisdiction of rabbinical courts within Israel has not been affected<sup>82</sup>. This means that, when non-Orthodox Jews settle in Israel, they may be regarded as non-Jews by Orthodox religious authorities, and, thus, denied the right to marriage – unless they convert according to *halachah*<sup>83</sup>. According to some figures, *“by a religious definition there are roughly 14 million Jews around the world, but over 23 million people eligible for citizenship under the Law of Return. This potentially leaves a large segment of the population in limbo – eligible for immigration and citizenship but ineligible to legally marry”*<sup>84</sup>.

If religious authorities have been concerned about the settlement of non-Orthodox Jews in Israel, some circles have been worried by the entry, under Art. 4A of the Law of Return, of large numbers of people who have no aspiration to contribute to the Jewish nation, or whose distinct identity, coupled with the lack of specifically Jewish cultural elements, makes integration very difficult. The standards of living in contemporary Israel can also make immigration desirable merely for

<sup>80</sup> ALTSCHUL, M. J., «Israel's Law of Return», cit., pp. 1348 and 1357-1359; RICHMOND, N. C., «Israel's Law of Return», cit., p. 113.

<sup>81</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., p. 68.

<sup>82</sup> GINOSAR, S., «Who Is a Jew», cit., p. 265; NESIS, L. S., «Who Is a Jew», cit., p. 83.

<sup>83</sup> BAKER, D. L., «Who is a Jew», cit., p. 191; RICHMOND, N. C., «Israel's Law of Return», cit., p. 114; RUBINSTEIN, A., «Law and Religion in Israel», cit., p. 413.

<sup>84</sup> MCGONIGLE, I. V., HERMAN, L. W., «Genetic citizenship», cit., p. 473.



economic reasons<sup>85</sup>. The composition of *aliyah* has changed especially with the arrival of Jews from Ethiopia and the former Soviet Union<sup>86</sup>. «*Since 1990, more than 1.2 million Russian-speaking Jews have made aliyah (come up) to Israel. In a nation of seven million Jews, that's close to 20 percent of the population*»<sup>87</sup>. Different solutions have been suggested, from the use of DNA tests to prove Jewish ancestry<sup>88</sup>, to the separation of the status of *oleh* from that of citizen. Up to now, individuals settling in Israel under the Law of Return have been bestowed citizenship immediately and, thus, conferred the right to take part in the political life, although they may not be familiar with the country's language and form of government. Gavison has suggested that legislation should be passed in order to grant citizenship only after a period of residence in the country and proof of integration in its economic and social life (as it happens with non-*olem* applicants for citizenship)<sup>89</sup>. This solution would not require an amendment of the Law of Return, nor a limitation on the right to *aliyah*.

A far more radical reform has been called for by the so-called post-Zionists, who support the abrogation of the Law of Return altogether. «*Some intellectuals view the law as a concrete demonstration of Israel's intolerance for its minority population while others feel that Israel must define itself as a «democratic and multicultural» state in which the Law of Return has no place*»<sup>90</sup>. This change would

<sup>85</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 67, 70 and 83. See also ALTSCHUL, M. J., «Israel's Law of Return», cit., pp. 1360-1362; RICHMOND, N. C., «Israel's Law of Return», cit., pp. 116, 124 and 132-133; VAN POTTELBERGE, J., «The Right of Return in a Changing World Order», in *Tel Aviv University Studies in Law* 13 (1997), pp. 313-314.

<sup>86</sup> SEMYONOV, M., GORODZEISKY, A., «Israel: An Immigrant Society», in *International Perspectives: Integration and Inclusion*, ed. FRIDERES, J., BILES, J., Montreal 2012, pp. 1-17; ALTSCHUL, M. J., «Israel's Law of Return», cit., pp. 1357-1360; GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 73-75; HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, cit., pp. 4 e 16; RICHMOND, N. C., «Israel's Law of Return», cit., pp. 115-121.

<sup>87</sup> [<http://www.gpg.org/news/russian-jews-and-their-impact-on-israel.html>, accessed 18 September 2019]. See also LUSTICK, I. S., «Israel as a Non-Arab State: The Political Implications of Mass Immigration of Non-Jews», in *Middle East Journal* 53 (1999), pp. 417-433.

<sup>88</sup> MCGONIGLE, I. V., HERMAN, L. W., «Genetic citizenship», cit.

<sup>89</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., pp. 86-116.

<sup>90</sup> ALTSCHUL, M. J., «Israel's Law of Return», cit., pp. 1358-1359. See also VAN POTTELBERGE, J., «The Right of Return», cit., p. 312.





alter profoundly not only a basic character of Israel as a Jewish State, but would also affect the traditional understanding of Jewishness: Israel would be understood no longer as having a unique history, but as being part of the world universal history. Others, more pragmatically, are worried by overpopulation<sup>91</sup>. However, the repeal of the Law of Return does not seem to be a realistic solution. It does not only have a paramount symbolic and ideological significance, but it also has a crucial practical importance. The Law of Return has allowed a striking increase of the Jewish population, which in turn has contributed to maintain a demographic majority in the State of Israel. Jews, who were 650,000 in 1948, rose to 6.6 million in 2018; in the same period, there was an increase of the Arab population from 160,000 to 1.8 million. It has been calculated that 3.2 million *olim* settled in Israel between 1948 and 2016: thus, approximately 40% of the increase of Israel's population was due to *aliyah*<sup>92</sup>.

### 3. THE PALESTINIANS' CLAIM TO THE RIGHT TO RETURN

The Law of Return and the related issues on who is a Jew and who is entitled to *aliyah* do not only raise a heated debate within Israel and within Judaism, but they also acquire a dramatic dimension when conjoined to the parallel, and opposite, right to return claimed by the Palestinians.

Reasons of space do not allow a detailed analysis of the issues of the definitions of Palestine and Palestinians, and of the notions of nation, people and identity – which have all a paramount importance in the Palestinian Question<sup>93</sup>. Also,

<sup>91</sup> ALTSCHUL, M. J., «Israel's Law of Return», cit., p. 367.

<sup>92</sup> HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, cit., pp. 1-2 and 7.

<sup>93</sup> On these issues, see inter alia KHALIL, A., *Palestinian Nationality and Citizenship. Current Challenges and Future Perspectives. CARIM Research Reports 2007/07*, 2007 [<https://cadmus.eui.eu/bitstream/handle/1814/8162/CARIM%20RR-2007-07.pdf?sequence=1&isAllowed=y>, accessed 18 September 2019]. Likewise, any considerations on the issue of citizenship must be omitted. For more information, see HARPAZ, Y., HERZOG, B., *Report on Citizenship Law: Israel*, cit.; BARAK-EREZ, D., «Citizenship and Immigration Law in the Vise of Security, Nationality, and Human Rights», in *International Journal of Constitutional Law* 6 (2008),



this paper will not trace its historical development. As known, intractable conflicts like this one do not find any consensus on their causes. Each party traditionally regards the other as entirely responsible: the Israelis insist that the Palestinians either left the country voluntarily or were forced to do so by the Arab States; the Palestinians claim that they were subject to forceful expulsion by the Israelis<sup>94</sup>. In this perspective, “*the allocation of moral and legal responsibility for the refugee problem it created remains one of the most intractable obstacles to Palestinian return*”<sup>95</sup>. Some have nonetheless argued that the causes of the Palestinian Question have a relevance only to determine whether the flight constituted an enforced population transfer or a mass expulsion, which are forbidden by international law<sup>96</sup>. Others have maintained that “*if the right of return is formulated in terms of international human rights law, as opposed to refugee law, then concerns of causation become less determinative*”<sup>97</sup>. Accordingly, whether Palestinians left

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pp. 184-192; NIKFAR, B. M., «Families Divided: An Analysis of Israel’s Citizenship and Entry into Israel Law», in *Northwestern Journal of International Human Rights* 3 (2005), pp. 1-20.

<sup>94</sup> BRACKA, J. M., «Past the Point of No Return? The Palestinian Right of Return in International Human», in *Melbourne Journal of International Law* 6 (2005), pp. 276-277.

<sup>95</sup> *Ibi*, p. 273. An example of the position supporting “*a restricted right of return for Palestinians as an expression of the collective Jewish responsibility for the Palestinian refugee’ plight*” is offered by GANS, C., «The Palestinian Right of Return and the Justice of Zionism», in *Theoretical Inquiries in Law* 5 (2004), p. 304. Likewise, Peled and Rouhana argue that “*recognition by Israel of the right of return*”, which is required to ensure reconciliation between the parties, entails “*its assumption of responsibility for the uprooting of the majority of Palestinian society in 1948*” (PELED, Y., ROUHANA, N. N., «Transitional Justice and the Right of Return of the Palestinian Refugees», in *Theoretical Inquiries in Law* 5 (2004), p. 318).

<sup>96</sup> AGTERHUIS, S., «Right to Return and Its Practical Application», in *Revue hellénique de droit international* 58 (2005), pp. 190-191.

<sup>97</sup> BRACKA, J. M., «Past the Point of No Return?», *cit.*, p. 281.



under coercion or voluntarily can be relevant to find a political solution, but not to determine the legal foundations of their right to return.<sup>98</sup>

#### a. PALESTINIAN REFUGEES AND DISPLACED PERSONS

The United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) defines Palestine refugees as “*persons whose normal place of residence was Palestine during the period 1 June 1946 to 15 May 1948, and who lost both home and means of livelihood as a result of the 1948 conflict*”<sup>99</sup>. In the course of time, UNRWA has changed the eligibility criteria: in 1965, it included third-generation descendants and, in 1982, all descendants, including legally adopted children, through the male line<sup>100</sup>. As a result, the Palestinian refugees, who were over 700,000 in 1948, have now become about 5 million<sup>101</sup>. As such, they constitute the oldest and most numerous refugee population in the world<sup>102</sup>.

Another category of Palestinians includes people who were displaced as a consequence of the 1967 Six-Day War and the occupation of the West Bank and the Gaza Strip by Israeli forces. In their immediate aftermath, more than 300,000 – including about 120,000 registered Palestinian refugees – were reportedly displaced<sup>103</sup>.

UNRWA’s definition of ‘refugee’ is much wider than the one envisaged by the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees, which basically exclude those who have acquired a new nationality, and enjoy the protection of the country of their new nationality.

<sup>98</sup> *Ibidem*; SAIDEMAN, L., «Do Palestinian Refugees Have a Right of Return to Israel - An Examination of the Scope of and Limitations on the Right of Return», in *Virginia Journal of International Law* 44 (2004), p. 832.

<sup>99</sup> [<https://www.unrwa.org>, accessed 18 September 2019].

<sup>100</sup> [<https://foreignpolicy.com/2018/08/17/unrwa-has-changed-the-definition-of-refugee>, accessed 18 September 2019].

<sup>101</sup> [<https://www.unrwa.org>, accessed 18 September 2019].

<sup>102</sup> AGTERHUIS, S., «Right to Return», cit., p. 189.

<sup>103</sup> BARTHOLOMEUSZ, L., «The mandate of UNRWA at sixty», in *Refugee Survey Quarterly* 28 (2009), p. 459.



Lindsay has critically noted that “*UNRWA is the only refugee organization in the world that considers citizens of a state to be refugees, and there are many of these oxymoronic «citizen-refugees» on UNRWA rolls*”<sup>104</sup>. In fact, there are different opinions on the applicability of the 1951 Convention and its cessation clause to the Palestinian refugees. However, even when it is agreed that the acquisition of a new citizenship terminates Palestinians’ refugee status, it does not seem correct to conclude – as Saideman does<sup>105</sup> – that this affects their claim to the right to return. The 1951 Convention is concerned with protection; the right to return is about freedom of movement. Naturalization in a different country may indeed be seen as a weakening of the link with the country where one wants to return; however, it does not necessarily indicate the intention to waive one’s right. One thing is the availability of different options among which an individual can choose; quite different is a situation where a person, displaced from a country (Palestine) that no longer exists as a legal entity, has no other alternative to the acquisition of a new citizenship, and is prevented (for circumstances beyond his/her control) from strengthening the link with the country (Israel) where he/she wants to return<sup>106</sup>.

#### b. THE RIGHT TO RETURN IN INTERNATIONAL LAW: COMPETING INTERPRETATIONS

A detailed examination of all the documents related to the right of return, in particular as regards Palestinian refugees and displaced people, goes beyond the

<sup>104</sup> LINDSAY, J. G., «Reforming UNRWA», in *Middle East Quarterly* 19 (2012), p. 88.

<sup>105</sup> SAIDEMAN, L., «Do Palestinian Refugees», cit., pp. 833 and 859-877.

<sup>106</sup> See MASRI, M., «The Implications of the Acquisition of a New Nationality for the Right of Return of Palestinian Refugees», in *Asian Journal of International Law* 5 (2015), 356-386.



purposes (and space) of this paper<sup>107</sup>. My remarks will be thus limited to the most relevant ones.

Art. 13(2) of the 1948 Universal Declaration of Human Rights (UDHR) provides that “*Everyone has the right to leave any country, including his own, and to return to his country*”<sup>108</sup>. The right to return has always been conceived as a component of the freedom of movement<sup>109</sup>, but it also has a close connection with the concept of nationality, understood as the “*natural desire for base or homeland*”<sup>110</sup>. UN General Assembly Resolution 194 (III) of 11 December 1948 has considered the situation in Palestine. According to Art. 11, the refugees who wish to return to their homes “*should be permitted to do so at the earliest practicable date*”<sup>111</sup>. This principle has been reiterated in numerous, subsequent resolutions (according to Agterhuis, it has been reaffirmed over 110 times<sup>112</sup>), including UN General Assembly Resolution 3236 (XXIX) of 22 November 1974, which reaffirms “*the inalienable right of the Palestinians to return to their homes and property from which they have been displaced and uprooted, and calls for their return*”<sup>113</sup>, and UN General Assembly Resolution 52/59 of 10 December 1997, which reaffirms “*the right of all persons displaced as a result of the June 1967 and subsequent hostilities*

<sup>107</sup> For more information, see AGTERHUIS, S., «Right to Return», cit., *passim*; MASRI, M., «The Implications of the Acquisition», cit., pp. 361-362.

<sup>108</sup> [<https://www.un.org/en/universal-declaration-human-rights>, accessed 18 September 2019].

<sup>109</sup> AGTERHUIS, S., «Right to Return», cit., pp. 168 and 171; BRACKA, J. M., «Past the Point of No Return?», cit., p. 289; MASRI, M., «The Implications of the Acquisition», cit., p. 360.

<sup>110</sup> AGTERHUIS, S., «Right to Return», cit., p. 169.

<sup>111</sup> Art. 11 “*resolves that the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of 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; [...]*”

[<https://unispal.un.org/DPA/DPR/unispal.nsf/0/C758572B78D1CD0085256BCF0077E51A>, accessed 18 September 2019].

<sup>112</sup> AGTERHUIS, S., «Right to Return», cit., p. 200.

<sup>113</sup> Para. 2 [[https://undocs.org/A/RES/3236%20\(XXIX\)](https://undocs.org/A/RES/3236%20(XXIX)), accessed 18 September 2019].



to return to their homes or former places of residence in the territories occupied by Israel since 1967”<sup>114</sup>.

Unlike the abovementioned documents, which are non-binding<sup>115</sup>, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR) are binding on all the states that have signed and ratified them, including Israel<sup>116</sup>. Art. 5(d)(ii) ICERD recognizes “*the right to leave any country, including one’s own, and to return to one’s country*”<sup>117</sup>. According to Art. 12(4) ICCPR, “*No one shall be arbitrarily deprived of the right to enter his own country*”<sup>118</sup>. The latter refers to the right ‘to enter’ – and not ‘to return’ – in order to include also the persons who were born outside the country and who have never lived or been in it<sup>119</sup>. The main issue is the meaning of the expression ‘one’s country’: is it the State of which a person is a citizen, or the country which one considers ‘home’, regardless of citizenship? The UN Human Right Committee’s General Comment 27 of 1 November 1999 has specified that its scope

*“is broader than the concept «country of his nationality» [...] ; it embraces, at the very least, an individual who, because of his or her special ties to or claims*

<sup>114</sup> Para. 1 [<https://www.un.org/unispal/document/auto-insert-182675>, accessed 18 September 2019]. For a scholarly discussion on the right of displaced persons to return, see QUIGLEY, J., «Family Reunion and the Right to Return to Occupied Territory», in *Georgetown Immigration Law Journal* 6 (1992), pp. 223-240 and 250-251; ZEDALIS, R. J., «Right to Return: A Closer Look», in *Georgetown Immigration Law Journal* 6 (1992), pp. 499-517.

<sup>115</sup> As to the issue of whether the right to return is binding under customary international law, see AGTERHUIS, S., «Right to Return», cit., pp. 167 and 170-171; BOLING, G. J., *The 1948 Palestinian Refugees and the Individual Right of Return. An International Law Analysis*, Bethlehem 2007, pp. 15-24; BRACKA, J. M., «Past the Point of No Return?», cit., pp. 293 and 308-310; LAWAND, K., «The Right to Return of Palestinians in International Law», in *International Journal of Refugee Law* 8 (1996), pp. 544-546; MASRI, M., «The Implications of the Acquisition», cit., p. 361; SAIDEMAN, L., «Do Palestinian Refugees», cit., pp. 833-836 and 843-847.

<sup>116</sup> [<https://treaties.un.org>, accessed 18 September 2019].

<sup>117</sup> [<https://www.ohchr.org/en/professionalinterest/pages/cerd.aspx>, accessed 18 September 2019].

<sup>118</sup> [<https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>, accessed 18 September 2019].

<sup>119</sup> See AGTERHUIS, S., «Right to Return», cit., pp. 165 and 174-175; BRACKA, J. M., «Past the Point of No Return?», cit., p. 300; LAWAND, K., «The Right to Return», cit., p. 547.



*in relation to a given country, cannot be considered to be a mere alien. This would be the case, for example, [...] of individuals whose country of nationality has been incorporated in or transferred to another national entity, whose nationality is being denied them*<sup>120</sup>.

As early as 1955, in the judgement concerning the case *Nottebohm (Liechtenstein v. Guatemala)*, the International Court of Justice had also concluded that the determination of one person's country required the existence of a genuine and effective link between that person and that country, based inter alia on attachment, interests and sentiments – thus, not merely citizenship<sup>121</sup>.

Scholars have also debated about the meaning of 'arbitrarily'<sup>122</sup>. In the abovementioned General Comment 27, UN Human Right Committee has clarified that the

*“reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative, and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”*<sup>123</sup>.

It goes without saying that Israel and the supporters of the Palestinian cause have interpreted the sources of the right to return in opposite ways. Israel has always denied the existence of the right of Palestinians to return<sup>124</sup>. Some of the most

<sup>120</sup> Para. 20 [<https://digitallibrary.un.org/record/366604>, accessed 18 September 2019]. At this regard, Lawand has examined *“the effect of changes of sovereignty in the territories of what was Palestine on the de jure nationality of Palestinian refugees and displaced persons, and thus on their possible claim to return on the basis of nationality”*, and she has concluded that *“if nationality follows State succession, then nationals of what was formerly Palestine could claim the right to return to Israel and/or Palestine, in view of their de jure nationality”* (LAWAND, K., «The Right to Return», cit., pp. 532-533. See also pp. 558-568).

<sup>121</sup> See MASRI, M., «The Implications of the Acquisition», cit., pp. 370-371.

<sup>122</sup> AGTERHUIS, S., «Right to Return», cit., pp. 172-173; BRACKA, J. M., «Past the Point of No Return?», cit., pp. 305-306; LAWAND, K., «The Right to Return», cit., pp. 547-548; SAIDEMAN, L., «Do Palestinian Refugees», cit., pp. 854-857.

<sup>123</sup> Para. 21 [<https://digitallibrary.un.org/record/366604>, accessed 18 September 2019].

<sup>124</sup> See inter alia ZILBERSHATS, Y., GOREN-AMITAI, N., *Return of Palestinian Refugees to the*



recurring arguments are<sup>125</sup>: Resolution 194 (III) does not mention the word ‘right’; the expression ‘should be permitted’ implies a recommendation, and not a legal obligation; the clause ‘at the earliest practicable date’ excludes that repatriation to Israel must be immediate or unconditional. Resolution 194 (III) was rejected by the Arab countries, because it meant the acceptance of the existence of the State of Israel; subsequent resolutions have stressed that equally acceptable alternative remedies are compensation<sup>126</sup> and resettlement (in other countries): as a consequence, unqualified return to Israel may not be regarded as the only legal solution. The clause ‘to one’s country’ must be interpreted as the country of citizenship – and Palestinian refugees and displaced people are not Israeli citizens.

It nevertheless seems that the abovementioned legal arguments are merely instrumental to the protection of vital ideological, political and strategic interests. Saideman has endorsed the opinion of the existence of the right of Palestinians to return under international law, but has concluded that this is limited by “*Israel's right to refuse those dangerous to its security*”<sup>127</sup>. The return of several million

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*State of Israel*, Jerusalem 2011; LAPIDOTH, R., «The Right of Return in International Law, with Special Reference to the Palestinian Refugees», in *The Progression of International Law. Four Decades of the Israel Yearbook on Human Rights – An Anniversary Volume*, ed. DINSTEIN, Y., DOMB, F., Leiden 2011, pp. 25-44; MARC, Z., SHNYDER, S., «Palestinian Right of Return or Strategic Weapon: A Historical, Legal and Moral-Political Analysis», in *Nexus* 8 (2003), pp. 77-136.

<sup>125</sup> AGTERHUIS, S., «Right to Return», cit., pp. 199-201; BRACKA, J. M., «Past the Point of No Return?», cit., pp. 285 and 291-299; KALMAN, M., «The Palestinian Right of Return in International Law - The Israeli Perspective», in *Nexus* 8 (2003), pp. 54-57; WEINER, J. R., «The Palestinian Refugees’ “Right to Return” and the Peace Process», in *Boston College International & Comparative Law Review* 20 (1997), pp. 37-43.

<sup>126</sup> Tadmor among others has argued that this should be the primary remedy. “*A large scale repatriation to Israel will most likely not occur, either because Palestinians will opt not to return or because Israel will not allow them to do so*” (TADMOR, Y., «The Palestinian Refugees of 1948: The Right to Compensation and Return», in *Temple International and Comparative Law Journal* 8 (1994), p. 433).

<sup>127</sup> SAIDEMAN, L., «Do Palestinian Refugees», cit., pp. 832 and 856-857. This and other limitations have been discussed by QUIGLEY, J., «Displaced Palestinians and a Right of Return», in *Harvard International Law Journal* 39 (1998), pp. 199-219.





Palestinians to Israel is seen as a “*demographic suicide*”<sup>128</sup>, endangering Israel’s Jewish character and, thus, posing a security threat to the very existence of the State. From the point of view of the majority of Israelis, the State of Israel would be destroyed not only in the case of its actual liquidation by hostile Arabs, but also by its transformation into a multicultural entity<sup>129</sup>. According to Bracka, even admitting the existence of a norm of international law recognizing the Palestinians’ right to return, this issue “*poses a unique dilemma which defies normative standards in both duration and demographic dimension [...]: no matter how justified in principle, how feasible is the return of the 1948 refugees to Israel after more than five decades?*”<sup>130</sup>.

Gavison has recognized “*the importance of the emotional and national force of hopes for return as a part of the formative identity of the Palestinian collective*”, but she has added that “*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*”. When the Palestinian State is established, it “*may, if it so chooses, recognize the right of return of Palestinian refugees and their descendants to within its borders*”<sup>131</sup>. These remarks make two interesting points. The first one is the reference to the Law of Return, which legally grounds the Jews’ right to return, as opposed to the alleged right of Palestinians who, inter alia, are not regarded as having any connections with Israel. At this regard, Masri has argued that even the Law of Return “*does not require any strong links to the country but merely belonging to the Jewish faith*”<sup>132</sup> – which

<sup>128</sup> BRACKA, J. M., «Past the Point of No Return?», cit., p. 285. This Author, too, has discussed the issues of the limitations to Art. 13(2) UDHR and the derogation from Art. 12(4) ICCPR (pp. 303-308).

<sup>129</sup> See *ibi*, p. 285; KALMAN, M., «The Palestinian Right of Return in International Law», cit., p. 58. Israeli supporters of the right of Palestinians to return to Israel are more unique than rare. This is the case of the journalist and politician Uri Avnery, the first Israeli to establish a contact with the PLO’s leadership and to meet Arafat. He has vividly described the majority’s fears towards the “*Palestinians’ sinister design*” as a “*hair-raising monster [...]. The end of our state! The end of the vision of generations! A second Holocaust!*” (AVNERI, U., «The Right to Return», in *Nexus* 8 (2003), p. 35).

<sup>130</sup> BRACKA, J. M., «Past the Point of No Return?», cit., pp. 309-310.

<sup>131</sup> GAVISON, R., *The Law of Return at Sixty Years*, cit., p. 54.

<sup>132</sup> MASRI, M., «The Implications of the Acquisition», cit., p. 372.



is one of the critical issues characterizing the debate in the State of Israel and in Judaism, as already discussed. Nevertheless, from the Zionist perspective, the Palestinians' claim to the right to return is "*antithetical to the special, even God-given, historical and religious relationship Jews have with the land*"<sup>133</sup>. The second point is the insistence – on the part of the supporters of the Israeli position – on the partition between two States, each of which should receive its own 'nationals'. Joel Singer, former legal adviser to Israel and negotiator of the Oslo Agreement, has argued that "*after Israel and the PLO agreed to partition Palestine into two states – one Jewish and one Palestinian – the Palestinians cannot continue to argue that the Jewish state is the Palestinians' «own country» and that they therefore are entitled to return to it*"<sup>134</sup>. However, given the non-existence of an authentically sovereign Palestinian State and the lack of indication that this will be established in the near future, this does not seem to be a viable solution in the short or medium term.

Israel's position has "*arguably remained in fossilised form since 1948*"<sup>135</sup>, based on demography- and security-related concerns about the threat posed by a mass repatriation of Palestine refugees and displaced people<sup>136</sup>. But is it correct to take for granted that all of them want to return? Khalidi has noted that there exists "*no authoritative Palestinian definition of what constitutes the right of return*"<sup>137</sup>, and that this has meant many different things in the course of time. At the beginning, the idea prevailed that return implied the dissolution of Israel and its substitution by an Arab State. Later, the existence of the State of Israel has been accepted, as long as with alternative solutions like compensation and the improvement of the

<sup>133</sup> WEINER, J. R., «The Palestinian Refugees», cit., p. 2.

<sup>134</sup> SINGER, J., «No Palestinian 'Return' to Israel», in *ABA Journal* 87 (2001), p. 15.

<sup>135</sup> ZUREIK, E., «Palestinian Perceptions of the Israeli Position on the Refugee Issue», in *Israel and the Palestinian Refugees*, ed. BENVENISTI, E., GANS, C., HANAFAI, S., Berlin 2007, p. 131.

<sup>136</sup> WEINER, J. R., «The Palestinian Refugees», cit., pp. 27-31.

<sup>137</sup> KHALIDI, R. I., «Observations on the Right to Return», in *Journal of Palestine Studies* 21 (1992), p. 29.



Palestinians' conditions of life where they already reside (that is, outside Israel)<sup>138</sup>. In the Palestinians' view, the core of the issue remains justice, and reconciliation requires the admission of the wrongs they have suffered<sup>139</sup>. Elia Zureik, a member of the Palestinian delegation of the Refugee Working Group established in the framework of the Oslo peace process, has called for the *“need to go beyond the legalese surrounding United Nations General Assembly Resolution 194”* and has praised Lustick's suggestion that the Israelis and the Palestinians should reach an agreement on 'shared truth', that is a formulation of *“Israel's moral responsibility towards Palestinian refugees in a way that would satisfy notions of justice – without Israel assuming the sole culpability for what happened in 1948”*<sup>140</sup>. Experiments have been reported, where conflicts involving sacred values (like justice for Palestinians or the right to the State of Israel for Jews) can be solved peacefully through symbolic tradeoffs. They have showed that violent opposition decreased when each party made a symbolic compromise over its own sacred values: *“antagonism to compromise over sacred values would be mitigated by equitable losses over sacred values by both sides”*<sup>141</sup>.

#### 4. CONCLUSIVE REMARKS: THE RIGHT TO RETURN AS AN ISSUE OF MUTUALLY EXCLUSIVE RELIGIO-ETHNIC IDENTITIES?

In 2018, the Joint List – formed in 2015 by four parties voted by the Arab electorate – proposed a basic law defining Israel as *«a state for all its citizens, whose regime is a democratic regime»*. It aimed to affirm the principle of equal citizenship, to recognize the existence and rights of two national groups (Jewish and Arab) living

<sup>138</sup> *Ibi*, pp. 32-40. See also BRACKA, J. M., «Past the Point of No Return?», cit., pp. 282-283; KLEIN, M., «Between Right and Realization: The PLO Dialectics of 'The Right of Return'», in *Journal of Refugee Studies* 11 (1998), pp. 1-19; ZUREIK, E., «Palestinian Perceptions», cit., p. 133.

<sup>139</sup> KHALIDI, R. I., «Observations on the Right to Return», cit., pp. 31-32; ZUREIK, E., «Palestinian Perceptions», cit., pp. 131-132.

<sup>140</sup> ZUREIK, E., «Palestinian Perceptions», cit., p. 138.

<sup>141</sup> GINGES, J., ATRAN, S., MEDIN, D., SHIKAKI K., «Sacred bounds on rational resolution of violent political conflict», in *Proceedings of the National Academy of Sciences* 194 (2007), p. 7357.



within the country and, last but not least, to repeal the Law of Return<sup>142</sup>. On 4 June, the Knesset Presidium (composed of the Speaker and the Deputy Speakers) decided by a majority vote of 7 to 2 (with one abstention) to disqualify the bill before its discussion in the plenum, because it denied the existence of the State of Israel as the Jewish people's state. One of the members who voted in favor, Revital Swid (Zionist Union), reportedly said: «*Placing this bill on the Knesset's table may set a precedent for placing other inherently racist bills on the Knesset table. Since this bill negates Israel's existence as the Jewish nation's state and negates the Right of Return, we cannot allow it to be placed on the Knesset's table*»<sup>143</sup>. Incidentally, accusations of racism have been reciprocal: UN General Assembly Resolution 3379 (XXX) of 10 November 1975 (repealed in 1991<sup>144</sup>) determined “*that zionism is a form of racism and racial discrimination*”<sup>145</sup>.

On 19 June, the Knesset approved a controversial law, by a vote of 62 of 55 (with two abstentions), which defines Israel as «*the Nation-State of the Jewish People*»<sup>146</sup>. The bill was first introduced in 2011 and it has been amended multiple times<sup>147</sup>. Its supporters have argued that what has become Israel's 14th Basic Law is mainly symbolic and restates, with few exceptions<sup>148</sup>, what had already been declared by the 1948 Declaration for the Establishment of the State of Israel<sup>149</sup>.

<sup>142</sup> See the unofficial English translation at [[https://www.adalah.org/uploads/uploads/Proposed\\_Basic\\_Law\\_A\\_State\\_for\\_all\\_its\\_citizens\\_2309\\_2018.pdf](https://www.adalah.org/uploads/uploads/Proposed_Basic_Law_A_State_for_all_its_citizens_2309_2018.pdf), accessed 18 September 2019].

<sup>143</sup> [[https://m.knesset.gov.il/EN/News/PressReleases/pages/Pr13904\\_pg.aspx](https://m.knesset.gov.il/EN/News/PressReleases/pages/Pr13904_pg.aspx), accessed 18 September 2019].

<sup>144</sup> BRACKA, J. M., «Past the Point of No Return?», cit., p. 297.

<sup>145</sup> [<https://unispal.un.org/UNISPAL.NSF/0/761C1063530766A7052566A2005B74D1>, accessed 18 September 2019].

<sup>146</sup> [<https://www.timesofisrael.com/final-text-of-jewish-nation-state-bill-set-to-become-law>, accessed 18 September]. This page also provides an English translation.

<sup>147</sup> [<https://www.bbc.com/news/world-middle-east-44881554>, accessed 18 September 2019].

<sup>148</sup> This is the case of Art. 4, which downgrades Arabic from one of Israel's official languages to a language “*with a special status in the state*”.

<sup>149</sup> For example, Art. 1: “*The land of Israel is the historical homeland of the Jewish people, in which the State of Israel was established. The State of Israel is the national home of the Jewish people, in which it fulfills its natural, cultural, religious and historical right to self-determination. [...]*”; Art. 5: “*The state will be open for Jewish immigration and the ingathering of exiles*”.



However, Suzie Navot has correctly noted that *“even though the Basic Law states what seems to be a picture of reality, it is, still, very problematic. Not because of what is included within it, but mainly for what is missing from it: the idea of a democratic state and the principle of equality”*<sup>150</sup>.

Altschul has argued that Israel needs to maintain the Law of Return until the achievement of a durable peace settlement<sup>151</sup>, but the yet vehement anti-Semitism spread all over the world may justify its maintenance, regardless of whether or not the Palestinian Question is solved. In this writer’s opinion, an effective, and long-lasting conciliation between Israelis and Palestinians does not necessary imply a relinquishment of Israel’s original mission to serve as a safe haven for all threatened Jews. However, it may not disregard a different accommodation with the other fundamental character of the State: the democratic one. This requires a redefinition of Israel’s religio-ethnic identity, which in any case depends and will continue to depend not only on the proposed solution(s) to the Palestinian Question, but also on the debate between the religious and secular circles on who is a Jew.

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<sup>150</sup> [<https://verfassungsblog.de/a-new-chapter-in-israels-constitution-israel-as-the-nation-state-of-the-jewish-people>, accessed 18 September 2019].

<sup>151</sup> ALTSCHUL, M. J., «Israel's Law of Return», cit., p. 1346.