



ISRAEL'S LAW OF RETURN: A QUALIFIED JUSTIFICATION

*A person of Bulgarian origin shall acquire Bulgarian citizenship through a facilitated procedure.*¹

Can Israel's "Law of Return" (LOR) be justified in the context of the norms of contemporary liberal thought? That is the question on which this article will focus.

I shall argue, via several cumulative arguments, that it can be justified—albeit in a qualified manner that tends to either *over-justify* the law (by including cases beyond the law's current formulation) or *under-justify* it (by excluding some of the categories included in the law).

The justifications I shall present are as follows: (1) If the LOR is illiberal, it is "a response" to illiberal persecution, and therefore justified on the basis of the nation-state's responsibility not to allow Diaspora members of the national group that exercise the right to self-determination in this state to be harmed; (2) the law is justified following several liberal-national arguments that justify preferential treatment of immigrants belonging to a national group that exercises the right to national self-determination in the "destination" country; and (3) following changes in conversion opportunities (including the first steps towards secular Jewish conversion), the LOR can be reinterpreted as cultural rather than ethnicity-based, and hence liberal and legitimate.²

The LOR has won the attention of prominent scholars, and the reader may be familiar with some previous work done in this field, or she/he may encounter this subject for the first time. I have tried to maintain a careful balance between introducing an adequate amount of previous work and trying to produce some novel perspectives. In any case, the subject is important enough to justify more than one piece of research.

The article will be organized in the following manner. "The Lor, An Introduction" section presents the LOR in its current version while briefly explaining some background details. "The Lor: Three

Critiques” section presents three potential critiques of the law: first, that it relies on non-chosen characteristics; second, that religious affiliation is not a legitimate consideration in immigration policies; and lastly, that the law, although not applicable to citizens, has non-egalitarian consequences for the citizens of Israel. “Three Justifications For The Lor” section is divided into three subsections, in which I present and discuss the three justifications for the law presented above. “Israel’s Lor And The Offered Justifications And Critiques” section discusses whether the justifications suggested in “Three Justifications For The Lor” section adequately respond to the critiques discussed in “The Lor: Three Critiques” section, and offers some final remarks.

Three preliminary remarks are in order. First, I do not offer specific corrections to the law. The goal is to analyze the law, and the re-working of specific alternatives will have to be done elsewhere. Second, the arguments and counterarguments presented in this article are an attempt to analyze the LOR from a broadly conceived liberal perspective. It was written in the hope that readers with liberal tendencies will find it useful in evaluating the LOR. I have aimed to present both the critiques in “The Lor: Three Critiques” section and the justifications in “Three Justifications For The Lor” section in an accurate and open-minded fashion. Let the reader decide. Lastly, at least one conclusion of this essay will be that if Israel’s *other* rarely used immigration and citizenship laws were to be employed more frequently, the LOR would become less controversial (see “Israel’s Lor And The Offered Justifications And Critiques” section), and Israel’s immigration policies appear more reasonable, especially in light of Israel’s economic development.

THE LOR, AN INTRODUCTION

The LOR is one of the main legal instruments designed to make Israel the state of the Jews. Before we can normatively evaluate it, a clear explanation is required. The LOR aims to enable the immigration of all Jews to Israel, regardless of health, age, material status, job qualifications, education, gender, or any other characteristic (Israel has immigration laws distinct from the LOR; see “Israel’s LOR and the offered justifications and critiques” below). Under the LOR, immigrants are eligible for an unusually quick naturalization process, which grants them full citizenship immediately.³ Originally passed in 1950,⁴ the law was changed in 1970, following the Supreme Court’s

“Shalit” decision.⁵ The law in its current form, which dates from 1970, contains the following two central paragraphs:⁶

- (1) The rights of a Jew under this law and the rights of an *oleh*⁷ (immigrant) under the Nationality Law, as well as the rights of an *oleh* under any other enactment, are also vested in the child and 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—excluding individuals who were Jewish and have voluntarily changed their religion.
- (2) For the purposes of this law, “Jew” means a person who was born of a Jewish mother or has converted to Judaism and who is not a member of another religion.

The LOR has symbolic and practical aspects insofar as it both symbolizes and realizes the status of Israel as the state of the Jews. The sixth paragraph of Israel’s Declaration of Independence (1948) reads as follows:

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 fully privileged members of the community of nations.

The law has practical aspects, as the number of immigrants that were allowed to immigrate to Israel under this law is substantial. Immigration under the LOR more than doubled the population of Israel between 1948 and the mid-1950s (roughly 600,000 from Europe, mainly Holocaust survivors, and 800,000 from Arab and Muslim states); in the 1990s, almost a million immigrants arrived from the former U.S.S.R., many of them non-Jews.⁸ For a country of 7.4 million people (2010), these are substantial numbers. That said, although immigration following the LOR continues, it is unlikely that another massive wave of immigrants will arrive in Israel, short of an unforeseen event. The most recent numbers of immigrants arriving to Israel under the LOR are 13,699 in 2008 and 14,567 in 2009.⁹

Reading the LOR, the question of how to define “Jew” arises. The definition under the LOR is not subjective; that is, a person’s *feeling* of being Jewish is not sufficient for him or her to be recognized as a Jew. However, it is difficult, to say the least, to define “Jew” and “conversion.” The disagreement about “who is a Jew” is one of the biggest controversies in Israel. In the context of this essay, two aspects of this broad question are important. *The first issue*, the reliance of the law on

the identity of one's parents, is a classic case of "*jus sanguinis*"¹⁰ that continues with *no* generational limits in the case of Jews, but limited to three generations in cases of non-Jews entitled under the law.¹¹ The *second* has to do with the meaning of "conversion." It was immediately recognized (following the establishment of the state of Israel) that orthodox Jewish conversions are legitimate from the perspective of the law. In an important development, the Israeli Supreme Court, in a series of decisions, recognized conservative and reform Jewish conversions as legitimate as well. The Supreme Court's recent decision that legitimized reform and conservative conversions performed both in and outside Israel appear to be signaling a gradual move toward a more national/cultural definition of Jewishness. It may follow that an individual recognized as a Jew by a given Jewish community ought to be recognized as a Jew under the LOR as well.¹²

We now have the main aspects of the LOR in front of us, and we can now move to the next section, in which the critiques of the LOR will be presented.

THE LOR: THREE CRITIQUES

What are the main critiques of the LOR? The critiques, by and large, are divided into two types. The first is of a more general family of arguments that discusses allocation of goods (political positions, jobs, access to higher education, and so on) in the context of liberal theories of justice. The second are specific objections tailored to the Israeli context. I shall discuss the two types of critiques separately in the following sections.

Two general objections to the LOR: allocation of goods following non-chosen characteristics, and the place of religion.

Non-chosen characteristics and immigration. Since J. Rawls' *A Theory of Justice* (1971), an oft-repeated argument is that governments should not allocate goods according to the arbitrary characteristics of individuals.¹³ As an individual usually does not choose certain characteristics of herself/himself, such as skin color or gender, these characteristics, argues Rawls, should not influence one's access to various desirable goods, including political positions, opportunities in the labor market and so on. Being non-chosen, they should not be relevant to the allocation of goods. The implication here is attractive: if a person changes his/her qualifications by, for example, working hard in school, it makes sense to allocate goods on the basis of this particular

qualification. However, if a person is born with certain characteristics over which s/he has no control, there is something disturbing about declaring him/her ineligible for certain goods. It leaves an impression of arbitrariness. Some liberal scholars, however, do allow the allocation of resources on the basis of certain non-chosen characteristics, as long as these characteristics are *relevant* to the good being allocated. A person born without fingers, for example, will never be a (W)NBA player, even though the lack of fingers is not her/his fault. The question is: what is relevant, and what is legitimately relevant?¹⁴

The philosophical debate continues, but here I am solely interested in its implications vis-à-vis the LOR. The next step is therefore to ask whether the assumptions about non-chosen characteristics apply to immigration. A famous observation (and critique) of liberal theories of justice is that they apply only in the context of a given country. The selection of new members of the society, and the borders of the country, do not follow from considerations of justice, and are hence outside the considerations of liberal criteria.¹⁵ A disagreement among theorists follows, in which some scholars argue that principles of distributive justice (the “do not allocate according to non-chosen characteristics” rule among them) only apply *within* states. In such a case, there is no sense to a discussion of a “liberal theory of immigration” at all.

However, some scholars argue that principles of allocation that ought to exist (and sometimes do exist) “within” liberal states ought to exist “between” states as well.^{16,17}

One such instance is the issue of immigration. *If* we accept that rules of liberal justice apply to immigration, then when considering immigration and access to citizenship, non-chosen characteristics ought not to play any part, or at least, ought to play as small a part as possible. What this means in practice is that characteristics such as race, ethnicity, and gender ought not to play any part in determining the immigration policies of liberal countries. Some versions of liberal theories of immigration reject the legitimacy of borders altogether, instead advocating open borders policies. However, a more moderate view accepts the reality that liberal countries protect the rights of existing citizens before those of non-citizens. *If* such a liberal state (i.e., one that places the interests of its citizens over the interests of non-citizens) decides to accept immigrants, the criteria used should not violate certain basic criteria. One basic requirement, for example, would be to exclude from consideration the three main non-chosen characteristics of race, ethnicity, and gender.

It should be noted that conditions existing in many non-western societies make even “skill”-related considerations (such as educational

background) highly dependent on the existence of certain institutions. The existence, or lack, of these institutions is something that is completely outside the influence and free will of most potential immigrants. The conclusion is that a liberal immigration theory that could truly meet the “non-chosen characteristics” standard would be rather radical, and might even extend to the opening of borders—an issue outside the purview of this essay.

How does the argument about non-chosen characteristics specifically apply to Israel’s LOR? The LOR states that “For the purposes of this Law, “Jew” means a person who was born of a Jewish mother.” Now, being born to a Jewish mother is an accident of birth. It is a non-chosen characteristic that symbolizes, from the perspective of (at least part of) the Jewish collective, belonging to the Jewish collective. The LOR gives rise to immediate entry to Israel, access to several kinds of material goods, and immediately, Israeli citizenship.¹⁸ In a world in which there are considerable material gaps, this is a good that is allocated following the non-chosen characteristic of belonging to a certain group through the maternal line. The liberal critic might suggest that the LOR ought to be changed in a way that will not deem this non-chosen criterion (Jewish mother) relevant to immigration policies.¹⁹ Note, however, that many countries accept some version of ethnicity-based immigration laws, along with many variations of *jus sanguinis* citizenship laws, as an important part of their immigration and citizenship policies.²⁰ Such countries adopt policies that follow non-chosen characteristics, but claim that these characteristics are relevant and legitimate nonetheless. I shall return to this point in “Three Justifications for the LOR” section.

Religion and allocation of goods. A different kind of objection to the LOR is based on the law’s connection to religion. Two aspects of the LOR are connected to religion. First, for non-Jews, becoming a Jew requires conversion; second, for Jews, conversion to a different religion makes one ineligible under the law’s requirements.²¹ The fact that the LOR accepts three kinds of Jewish conversions (Orthodox, Conservative, and Reform Jewish conversions)—although important insofar as it expands the definition of Jewishness—remains immaterial for those who argue that religion should not serve as the basis for the allocation of resources (see “Three Justifications for the LOR” below).

Religion is a “suspect” characteristic when allocating goods. Unless a specific justification arises, liberal political theorists usually claim that religious belief is a private matter and ought not to influence access to basic rights, eligibility for election to political positions, or equal opportunities in the labor market. Although there are some cases in which religion may be relevant to one’s eligibility for a specific

job (one needs to be Catholic to be the Pope), the presumption is that religion should not influence one's opportunity sets either in relation to the state or the private market.²²

The opinion that religion should not be considered a factor is especially true if one's religious belief does not place demands on the society at large, i.e., when the religious affiliation is a private matter that require resources from neither the government nor the employer. In cases in which religious belief does impose costs on the society at large, and is hence no longer a private matter, the religious belief may be relevant to decisions such as hiring a job applicant or determining immigration policies—and this point may be relevant for the LOR.²³ (I shall return to this point later under “Liberal–National justifications for the LOR”).

If such considerations apply *not only within* liberal states, but also “between” states, then differentiating among prospective immigrants on the basis of their religious affiliations is simply wrong, according to the liberal observer. The relevance of this argument to the LOR is obvious—the parts of the law that are based on religion should be changed following this critique and religion should become immaterial to the eligibility to immigrate to Israel. The critique can have two practical consequences. The first, and less radical, would be that Jews by nationality who have converted to another religion ought to be regarded as legitimate Jews under the LOR. The second and more radical change would be that the entire connection to the Jewish religion ought to be disregarded in the context of immigration to and/or access to citizenship in Israel.

Specific objection to the LOR: the internal inequality of the law

The LOR does not apply to Israeli citizens; rather it applies to potential immigrants. Some commentators (and Israeli judges) have thus argued that the law does not discriminate between Jews and non-Jewish citizens “in Israel.”²⁴ However, although true in principle, the LOR does in fact differentiate between Jewish and non-Jewish Israeli citizens in at least two ways. First, the law indicates symbolically that the country “belongs” to one group among the country's citizens. It may hence illicit emotional and identity-related feelings.²⁵ Second, as described in “The Lor, An Introduction” section above, the law has enabled the immigration of large numbers of those eligible under the law (although not exclusively Jews) to Israel. In so doing, it has increased the proportional size of a particular group in a given country—in this case, Jews and those related to Jews in Israel.

Is influencing the number of citizens in a democratic country important? Immigrants contribute to the economy of the country,²⁶ and

provide positive externalities for the society at large. However, given that there are two different national groups in Israel, Jews and Arabs, the balance between the numbers of members in the two populations may be important. The conclusion of some commentators is that in order to achieve full equality among Israeli citizens, the LOR will have to be canceled.²⁷

Having described what I consider the three most powerful critiques of the LOR, I turn now to the next Section, in which the justifications for the law will be presented.

THREE JUSTIFICATIONS FOR THE LOR

This section presents three justifications for the LOR: response to illiberal persecution; liberal-national justifications; and Jewishness as a choice. More than one justification may be necessary to justify the law, as will become evident following the analysis below. I shall discuss each justification separately.

Response to an illiberal persecution

This justification acknowledges that the LOR may (although not necessarily) be guilty of the faults described in “The Lor: Three Critiques” section above—insofar as it relies on non-chosen characteristics, has a strong connection to religion, and differentiates between the citizens of Israel who belong to, or have a connection to, one group (Jews) from those who belong to other groups (Druze, Arabs, etc.). The LOR, however, may nonetheless be justified. Why? Because the law does not stand alone; it is not the result of some capricious decision by Israel. Rather, the LOR is an answer to numerous events, spanning many years, in which Jews were persecuted in other countries with nowhere to go, rejected from some countries, and subjected to the most cruel and inhuman treatment. The LOR is thus a “response” designed to ensure that certain events—such as the St Louis’ futile attempt to find safe harbor after *Kristallnacht*, or the antisemitic Canadian government’s infamous line “None is too many” in reference to the number of Jewish refugees it was willing to accept immediately following World War II—would not repeat themselves.²⁸ Although the LOR cannot prevent antisemitic persecution, it can at least guarantee that persecuted Jews will find an open door in Israel.

In this context, we need to examine two separate issues. First, does the persecution of Jews justify the LOR? Second, given that the persecution of the Jews during World War II occurred over 65 years

ago, does that persecution continue to justify an immigration policy that persists in 2010? I shall discuss both below.

First, does the desire to address the problem of the persecution of Jews justify an unequal immigration policy? Obviously the persecution of Jews is executed by external entities, whereas the LOR has been passed by the Israeli parliament. The real question, then, is whether the Israeli government is more justified in abolishing the LOR (and by this "omission" harming persecuted Jews) or in preserving the law (and thus "actively" maintaining legislation that may be guilty of the problems discussed in "The Lor: Three Critiques" section above). This depends on the level of harm caused by the two relevant scenarios. It seems to me that the harm caused by keeping the LOR is much smaller than the harm that might result by abolishing it.

A second issue stems from the question of whether the persecution of Jews is a thing of the past. Asa Kasher has tried to argue that the LOR is a form of affirmative action; the implication is that, like other affirmative action cases, the LOR is a temporary measure, not a permanent one.²⁹ Kasher argued that this affirmative action policy ought to exist until the point at which two conditions are met: the self-determination of Jews exists in the form of an independent country, and there exists a viable majority of Jews in this independent country. If these two conditions are met, argues Kasher, the affirmative action policy will have fulfilled its goal and ought to be canceled. At this point, a Jew wishing to immigrate to Israel could request to do so, but her/his request should be considered on the basis of factors beyond the fact of his/her Jewishness: economic factors, the urgency of the situation, and so on,³⁰ i.e., "normal" immigration considerations.

I differ from Professor Kasher in two respects. First, Kasher's two "end conditions" (self-determination and a Jewish majority) apply to Jews living in Israel. However, persecution of Jews, at least in ways relevant to the LOR, is done to Jews living outside of Israel. There seems to be a gap between Kasher's "end conditions" and the goal of the affirmative action.³¹ Jews living in Israel do not need the LOR in order to avoid persecution; it is the Jews living *outside* Israel who may need it. Second, it seems to me that the end point of the policy should be the end of the circumstances specifically targeting Jews, i.e., antisemitism. As long as antisemitism and hatred of Jews continue, I see no reason to view the LOR as an affirmative action type policy.³²

Antisemitism, in other words, is not a thing of the past, but continues into the present day. If the state of Israel were to abolish the law, the omission would harm, at least potentially, and in some cases in a very actual way, the interests of Jews not living in Israel today.

This is obviously a controversial point, and one that is difficult to settle. There are empirical issues to consider (e.g., the number of antisemitic incidents, the number of antisemitic movements, and the various manifestations of antisemitism), as well as subjective and emotional considerations (e.g., how safe do Jews in location X feel?). I am not sure if a precise answer to this point exists. I admit that I prefer to err on the side of overcautiousness. That is, if we are not certain as to whether antisemitism, in all its different manifestations, still exists, I would argue that this justifies the existence of the LOR.³³

It seems to me that, from a liberal perspective, the LOR is justified as a response to illiberal persecution. Now, to anticipate two potential objections: Israel's unique response to antisemitism and the more encompassing phrasing of the law.

A first objection might be that even if antisemitism still exists as a phenomenon, it is similar to other illiberal phenomena. Israel is thus not the only country responsible for responding to it. Why specifically Israel? The reason is that there is a difference between what should be done by other states and what can realistically be expected from them. Michael Walzer's argument is significant in this regard. He asserts that when members of a national group are in need, and a state exists that expresses the group's common culture, it is legitimate to expect that state to accept them. Walzer says: "What else are such states for?"³⁴ The point is that in today's global climate it is justified to expect Israel to accept the obligation of accepting Jews when the need arises. This certainly does not mean that other states should not do so.

A second potential objection might be that the LOR is not tailored to persecuted Jews, but rather to all Jews. In other words, even if we accept the logic presented in this sub-section, it can only justify "some" cases in which Jews immigrate to Israel under the LOR. This would include the arrival of Holocaust survivors to Israel during the late 1940s, and that of many cases of Jews from Arab countries, but not, let us say, contemporary Jewish immigrants coming to Israel from California. I grant this point, and refer back to my assertion that the LOR as is might be justified through an accumulation of arguments, one of which is the response to illiberal persecution. I therefore move on to the next justification, that of liberal/national arguments.

Liberal-National justifications for the LOR

This section presents a liberal-national justification for the LOR. Liberal-national theories try, with varying degrees of success and through various arguments, to justify nationalism as a whole, and a variety of national policies in particular, "from within" liberal

perspectives. Liberal-nationalism attempts to justify legislation concerning the public sphere, such as days of rest, language rights, national holidays, and so on.³⁵ There are two broad versions of liberal-national arguments. The first argues that each individual is a member of a given group, and that membership, although an individual good, is important enough to justify certain policies in the aggregate. There are several arguments of this kind, each of which provides a different description of the specific good attained by the individual through an ongoing connection to her/his community.³⁶ I shall refer to this family of arguments as “normative liberal-nationalism.”

A second version of liberal-national theories argues that liberal states “need” nationalism, or implicitly rely on nationalism, in order to achieve other goals. National homogeneity (not in race, but for example, as in a widely shared language), in this argument, is a useful instrument if the state is to fulfill certain important roles, including the maintenance of a modern bureaucracy, modern economy, welfare state, and so on.³⁷ I shall refer to this version as “instrumental liberal-nationalism.”

Our interest in liberal-nationalism is specific—namely, to examine whether liberal-national justifications from either group of arguments can justify preferential treatment of potential immigrants who are members of, or culturally related to, the national group that exercises national self-determination in the destination country—thus in turn justifying the LOR. Two preliminary remarks are necessary. First, I will not be arguing for or against liberal-national theories as a whole; rather I will be addressing the justificatory power of such theories with regard to the relevant issue of immigration. If the reader rejects liberal-national arguments altogether, she/he will find no use for this sub-section. Second, liberal-national theories rely on “non-chosen” characteristics as relevant and legitimate factors in the matter of immigration policies. Just as an NBA team would regard the non-chosen characteristic of having been born without fingers as a relevant and legitimate factor, such theories view the (often) non-chosen fact of belonging to a national group as a relevant and legitimate factor when considering potential candidates for immigration.³⁸

Normative liberal-national arguments and the issue of immigration. Let us assume that liberal-national arguments are correct. Individuals have a special kind of connection to their communities/culture. What can we derive from this liberal-national approach toward immigration policies? In order to keep a clear focus, and to differentiate this argument from the previous sub-section, let us assume that there is no urgency, that is, that we are not discussing a persecuted member of a Diaspora community of the national group that exercises national

self-determination in the destination country, but a regular member, living elsewhere, who merely strongly prefers to live her/his life in a country that fulfills and expresses the self-determination of her/his community. Should this individual be granted preferred/automatic entry?

Chaim Gans argues that this individual ought to receive preferential treatment, but not automatic entry.³⁹ Gans, if I understand his argument correctly, argues that a state may prefer, in its immigration policies, a member of the national group on the basis of three factors: *first*, the interest of the potential immigrant in living in the context of her/his cultural and national group; *second*, the interest of the national group living in the “mother state” in maintaining a sufficient number of “members” to guarantee the continued existence of the group, and therefore, their interest in preferring immigrants belonging to the national group;⁴⁰ and *third*, the duty of a nation-state to accept persecuted members of the national group that exercises self-determination in this nation-state.

Gans’ argument seems reasonable to me, and many states are indeed maintaining connections with their Diaspora communities through a variety of policies, including immigration policies.⁴¹ Note, however, that Gans argues for preferential treatment, but not for automatic entry.

Gans’ arguments, along with the immigration laws of countries such as Bulgaria (as quoted in the beginning of this article, and many others), point to the conclusion that a nation-state is justified in preferring a potential immigrant who is a member of the national community that exercises self-determination in the nation state over an immigrant with no connection to this community. This applies not only in cases in which the receiving society requires new members, but also when the immigrant has an interest in living in her/his cultural and national context.

How does this conclusion apply to the LOR? It means that giving preference to Jews who wish to immigrate to Israel over non-Jews is justified, and thus the LOR is justified—with three caveats. First, because Jews are not the only national community in Israel, we can ask whether the liberal-national logic does not demand an expansion of Israel’s immigration laws to all the relevant communities in Israel (see “The LOR and the Arab-Palestinian minority in Israel” below).⁴² Second, accepting the liberal-national argument will raise again the question of “who is a Jew,” and more broadly, how to define sufficient connection to the national community (see “Jewishness as a choice” below). Lastly, the LOR grants Jews automatic entry, not merely preferential treatment.

The conclusion is that the normative liberal-national logic can provide a certain degree of justification for the LOR, but there is not a total overlap between this justification and the law. It may be, however, that an aggregation of the suggested arguments may result in a complete justification of the LOR.

This leads me to the liberal-national instrumental argument, to which I now turn.

Instrumental liberal-national arguments and immigration. Instrumental liberal-national arguments are instrumental arguments that support the creation of a homogenous (not based on race or ethnicity, but on language, common education, etc.) body of citizens in order to facilitate a functioning bureaucracy, labor market, educational system, and so on. It is obviously easier to run a state bureaucracy if a large majority of the citizens speak the same language, rest on the same day of rest, and share a broad cultural background. Following such theories, a country should try to integrate minority groups and immigrants into the dominant culture, either actively or indirectly, i.e., by allocating relatively few resources to institutions that enable the maintenance of the culture of minority groups and then to wait patiently for them to assimilate.⁴³ In some cases, protection of cultural minorities may coexist with the instrumental liberal-national model, but only as long as shared characteristics, such as shared language exist, and the minority level is “additional” to the shared characteristics.⁴⁴

Given this perspective, what would be the instrumental liberal-national approach toward immigration? It seems that this approach would emphasize the contribution of potential immigrants to those goals *for* which nationalism is an instrument, such as a successful economy. Prospective immigrants who are most likely to contribute to the country's economy—who will not burden it and are less likely to require a long acculturation process—should be preferred over other immigrants. One category of these “easy-to-integrate” prospective immigrants is likely to be members of Diaspora communities. This seems an obvious choice, insofar as they are members of the same national community; share a similar cultural background as well as knowledge of the national history, language, and so on; and, if intending to come to the “mother country,” may have family members or other contacts to assist them in the absorption process.

Given this perspective, the LOR is justified in preferring Jews over other prospective immigrants. Jews will share the national culture, possibly the Jewish religion, are more likely to speak Hebrew, and are more likely to have family and friends in Israel. This means that the LOR is a reasonable choice from the perspective of what may be

called “instrumental liberal-national” approach. As might be expected, however, this justification is not tailored to the existing law in at least two ways. *First*, economic advantages may or may not be associated with Diaspora members of the relevant national community. *Second*, some Diaspora members will be an economic burden to the “mother country”; indeed, under the LOR, many Jewish immigrants require substantial resources from Israel (giving the LOR strong egalitarian consequences from an internal Jewish perspective).

To conclude, the LOR can gain some justification from an instrumental liberal-national view, but this justification does not justify “the entire” scope of the law, nor does it justify “only” the LOR.

The LOR and the Arab-Palestinian minority in Israel. If liberal-national theories justify preferential treatment in immigration, are such arguments applicable only to the majority group? In our context, the question is whether the minority national group in Israel, the Arab Palestinians, has a right to a Palestinian LOR into Israel proper (within the June 4, 1967 borders).

Perhaps a good starting point for our discussion of this controversial issue is to examine the arguments of C. Gans and R. Gavison. Gans argues against the Israeli LOR at its current form; however, he rejects a “parallel” LOR for Palestinians into Israel proper and prefers an equivalent LOR for the Palestinians to a future Palestinian state. His main argument is that in the 60+ years since 1948, Jews have acquired a right to self-determination in Israel proper, and receiving a large number of Palestinians into Israel will undermine that self-determination. In other words, if there is a right to national self-determination, it follows that a LOR for the Arab minority in Israel to Israel proper should be rejected.^{45,46}

Gavison rejects a LOR for Palestinians into Israel proper for prudential reasons. Gavison argues that in the context of an armed struggle between two national groups, it is unreasonable to expect Israel to accept Palestinian refugees/members of the Palestinian Diaspora into Israel proper, and that the actual outcome of a large-scale Palestinian migration into Israel proper will probably be highly problematic.⁴⁷

Although Gavison and Gans disagree in many other contexts, they seem to agree that a Palestinian LOR into Israel proper should be rejected. A Palestinian LOR should be directed at a future Palestinian state. I concur, but I will add the following points. First, similar prudential arguments have been made in other contexts, and are not limited to the Israeli case.⁴⁸ Second, the liberal literature has sufficient resources on prudential issues and social order-related considerations to reasonably justify the conclusion reached by both

Gavison and Gans.⁴⁹ Third, a rejection of a Palestinian LOR to proper Israel, has to include, on the basis of equality, a Palestinian LOR to the future Palestinian state. While the establishment of a Palestinian state depends also on the actions of other actors aside from Israel, Israel has to support it to the fullest degree, in order to justify its own LOR. Lastly, all this does not mean that immigration of Palestinians to Israel should not be allowed (I shall return to this issue at the end of this article).

Jewishness as a choice

This sub-section discusses the option of Jewish secular conversion to Judaism. As discussed in “The Lor, An Introduction” section above, conversion, a religious concept, is an important part of the LOR. There are two main cases in which conversion is relevant to the LOR: first, the case of a non-Jew who converts to Judaism and thus becomes eligible under the law and second, the case of a Jew who converts to another religion, thereby losing his/her eligibility under the law.

At this point the option of secular conversion becomes important. Secular conversions, although in their early stages in Israel, may change the LOR in two ways. First, for non-Jews who wish to become nationally or culturally Jewish, the religious aspect of Judaism will cease to be relevant. In other words, the way to become Jewish will change and will no longer involve faith-based issues, but rather language, history, knowledge, along with a connection to a Jewish community willing to sponsor the secular conversion process. In this context, some have argued that the term “conversion” is inappropriate and that terms like “adoption” by the Jewish people or “joining” the Jewish people should be preferred.⁵⁰

Second, for those who are Jews by birth or on the basis of their nationality/culture, converting to another religion (Christianity, Islam, or any other), should not mean that they are no longer considered Jewish under the LOR. This is inversely related to the previous point: if secular Jewish identity should (through conversions) be legitimate under the LOR, it ought to be regarded as legitimate in the “reverse” case of a Jew by nationality who has opted for a non-Jewish religious affiliation.

The discussion of the importance of Jewish secular conversions, and its importance vis-à-vis the LOR may seem like a particular case of the liberal-national justification of the LOR, and I concur. Note, however, that although most liberal-national theories view culture as an *a priori* assumption about individuals, at least some versions view culture

as a choice—not a trivial one but rather an important choice to be respected by liberal governments. From this perspective, choosing to join one national community ought to be meaningful in the context of immigration policies.⁵¹

I would argue, therefore, that the slowly developing practice of secular Jewish conversion broadens the LOR in a significant way, by including a category that does not rely on either non-chosen characteristics or religious beliefs, i.e., two of the three critiques that were presented under “The LOR: Three Critiques” section above.

Three caveats are relevant here. The first is that secular Jewish conversions are still in their first stages in Israel. Although the Israeli Parliament has been discussing them for many years,⁵² the first secular conversion class, offered by *Tmura*, a secular Jewish Israeli NGO, began as recently as January 2009. The social results of this process thus have yet to be seen. Furthermore, while religious conversions (orthodox, conservative, and reform) have been put to test and approved by Israeli courts (i.e., individuals undergoing such conversions have been recognized as Jews in the population registry), secular Jewish conversions are yet to be tested in a real case before an Israeli court. Although a detailed discussion is not possible here, I would cautiously argue that the acceptance of secular conversions will likely be consistent with a 2002 Israeli Supreme Court decision that recognized reform and conservative conversions as legitimate.⁵³

A second caveat is that the case of a Jew by nationality who has converted to another religion, but argues that she/he maintains her/his Jewish national identity, is far from trivial. Such a scenario contradicts a long tradition of Judaism as a dual term, meaning both nationality and religious belief.⁵⁴ Although a national meaning of Judaism is accepted by many scholars (and secular Judaism is a respected aspect of contemporary Jewish life), a complete disconnect between Judaism as nationality and Judaism as religion—one that would enable Jews by nationality to hold a variety of non-Jewish religious beliefs—is a challenge to well-established views. Furthermore, at least two real-life cases of Jews by nationality but Christians by faith asking to be recognized as Jews under the LOR have been denied by Israeli courts.⁵⁵ Note, however, that roughly 25 percent of the immigrants from the former Soviet Union who arrived in Israel during the late 1980s and early 1990s were not Jewish—some were openly Christian—and yet their arrival to Israel was not legally challenged.⁵⁶ Although their eligibility under the LOR followed *jus sanguinis* and not a secular understanding of Jewishness, I think that it does point to a broader understanding, both legal and social, of the meaning of Jewishness.

In any case, it is obvious that secular Judaism as a relevant identity under the LOR is a slowly emerging possibility or phenomenon. Simply put, we need to wait and see how it develops both socially and legally.

A third and last caveat is that even if secular Jewish conversions and identity are accepted as legitimate under the LOR, this only addresses two of the three critiques discussed in “The Lor: Three Critiques” section above—namely, the “non-chosen” and “religious” characteristics. Jewishness is still, however, a specific cultural identity, and although broader than the current definition of Jewishness under the LOR, it is still Jewish, and therefore still excludes non-Jews, with the concomitant problematic consequences for the non-Jewish citizens of Israel, as discussed under “Specific objection to the LOR: the internal inequality of the law” above. Two points are important here. First, the LOR may not be the adequate answer to this objection, but rather Israel’s other immigration laws (see “Israel’s LOR and the offered justifications and critiques” section). Second, although secular Jewish identity is “thicker” than, say, mere economic qualifications, I would hesitate to argue that “thick” identity characteristics should be banned altogether from immigration-related considerations. As Carens argues in the context of French-speaking migrants to Quebec⁵⁷ (and other identity issues in the case of Japan⁵⁸), if the characteristics discussed are not race or ethnicity, but characteristics that can be learned by any non-member, than abolishing them might harm the freedom of association, and/or the right to self-determination of the relevant small national community, in this particular case Jews. In a world of nation-states, complete state neutrality is a myth, and a complete lack of state neutrality does not mean a violation of the rights of the citizens of states that do not belong to the dominant culture. Such strict egalitarianism would not accept diverse particularities as Sweden’s flag (a cross), Quebec’s immigration laws (with preference given to French-speaking immigrants), Bulgaria’s access to citizenship laws, and even the formal status granted to Christmas in the U.S. I doubt if such a strict egalitarianism is even possible; in any case, it is not easy to “jump” from the traditional democratic defense of political rights to this very strict egalitarianism.

ISRAEL’S LOR AND THE OFFERED JUSTIFICATIONS AND CRITIQUES

This section includes a discussion of whether the justifications discussed in the previous section adequately address the critiques offered in “The Lor: Three Critiques” section, along with some final remarks

with regard to the LOR and Israel's other immigration- and citizenship-related laws and policies.

Justifications v. Critiques

In “The LOR: Three Critiques” section, I have presented three objections to the LOR: its reliance on non-chosen characteristics, its connection to religion, and the meaning of the law vis-à-vis Israeli citizens (not only potential immigrants). In “Three Justifications For The Lor” section, I presented three justifications for the law: a response to illiberal persecution, liberal-national justifications, and Jewishness as a choice.

Without endeavoring to engage in a precise evaluation of the aforementioned critiques, it seems to me that the responses to objections 1 and 2 (non-chosen characteristics and religious affiliation) are reasonably strong. Both objections can be countered by all three justifications: response to illiberal persecution, liberal-national justifications, and Jewishness as a choice. The justificatory power of “response to persecution” and “liberal-national justifications” should be enough to justify the LOR, even in its obviously less than perfect current formulation.

Note, however, that the justifications for the LOR analyzed in this essay may bring about demands for changes in the law. For example, liberal-national justifications might propose that those more closely affiliated with the national culture (those, for example, with a knowledge of Hebrew), should be given priority, while the justification based on the need to protect potentially persecuted Jews implies that the LOR should, let us say, provide priority to Jews under risk.

However, even if we accept a somewhat modified version of the LOR (let us say, attempting to better “tailor” the law to the justifications offered), it might better answer Objections 1 and 2, but it would still not answer Objection 3, which has to do with the meaning of the law for the entire scope of Israeli citizens. Even if secular Jewish conversions become legitimate from the perspective of Israeli law, thus rendering the definition of Jewishness more inclusive, this remains an inner Jewish identity that does not overlap with the entire citizenry of Israel. However, as some scholars have pointed out, many other countries do show preference for the members of the national group that exercise national self-determination in those states in some cultural aspects (including immigration policies),⁵⁹ and the LOR may be considered another example of such a preference, justified not only on the basis of this comparative logic but also on the basis of the justifications discussed above vis-à-vis response to persecution and liberal-national arguments.

The LOR and Israel's other immigration and access to citizenship laws and policies

Arguing that nationality-based immigration laws are legitimate does not mean that we should be satisfied with Israel's immigration policies. The LOR is a specific piece of legislation created to address specific needs, and as such should not be the entire scope of Israel's immigration policies. Israel has labor migrants, the economy of a developed country, and a large percentage of non-Jewish citizens among its population; yet its immigration policies "are" the LOR, in the sense that immigrants to Israel are usually unable to become Israeli citizens, save through the LOR, or in some unique situations (such as the case of children of labor migrants). This does not make sense. The fact that the LOR is, de facto, Israel's immigration policy is what has brought about some of the pressure to change it. I would argue against this. The solution to other aspects of immigration to Israel ought to stem not from changing the LOR in a way that would change its form completely, but by using Israel's "other" immigration laws, as such laws do exist. Although expanding the LOR to include secular Jewish conversions is of course desirable from a Jewish liberal, pluralistic approach, stretching it too far is the wrong answer for this important issue. If the LOR does not provide a solution for all of Israel's immigration concerns, then other laws should be the response—not twisting and pushing the LOR beyond recognition.

Israel has other laws of immigration, and ways to access citizenship beyond the LOR. Generally, naturalization in Israel requires a minimum of time spent legally in Israel (3–5 years), eligibility for the status of permanent resident, some knowledge of Hebrew, the waiving of any other citizenship, and a pledge of alliance.⁶⁰ Such conditions are not very demanding; however, they are rarely used due to substantial ministerial discretion that almost always blocks the granting of Israeli citizenship, making the LOR the main instrument of the country's immigration policies. However, this is not a legal issue, but rather a political decision. Were Israel to grant citizenship through its nationality law to non-LOR immigrants, it would arguably decrease the constant attempts to widen the framework of the LOR. The current situation, in which the LOR is Israel's immigration policy, creates growing pressure on the LOR to accommodate more and more cases—an undesirable situation. Rather than changing the LOR, the solution should be to maintain a situation in which the LOR is a permanent companion to Israel's more normal (read economics-based) immigration policies and citizenship laws (including further, required developments in this field aside for the current naturalization process discussed above).

CONCLUSION

In this article, I have analyzed several objections to and justifications for Israel's LOR. As the law is particular to one cultural group, and liberal theories of justice are universal in nature, it may seem that I am trying to achieve the impossible. However, it seems to me that the LOR is similar to many other immigration and citizenship laws that are identity related. If Israel's other immigration and citizenship methods were used, the pressure to expand the LOR would be much reduced. It is not clear to me why the Israeli LOR should be treated in a different manner than the Bulgarian law cited at the beginning of this essay (and many other similar cases). More frequent usage of Israel's other migration and citizenship laws would change the unfortunate situation in which the LOR is Israel's immigration policy. Once this happens, the LOR will become a symbol of belonging, and an insurance policy of sorts, for the members of the Jewish nation. Given the history of the Jewish people, such policy is more than plausible and probably justified.

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NOTES

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1. Article 25(2) of the constitution of Bulgaria, 1991, and see, Daniel Smilov and Elena Jileva, "The Politics of Bulgarian Citizenship," in *Citizenship Policies in the New Europe*, (eds) Rainer Baubock et al. (Amsterdam, 2010), pp. 211-239, especially 220, 224-25; besides people with criminal record, ethnic Bulgarians enjoy de facto automatic access to Bulgarian citizenship.

2. See Joseph Carens, "Immigration, Political Community, and the Transformation of Identity: Quebec's Immigration Politics in Critical

Perspective,” in *Is Quebec Nationalism Just?*, (ed.), Joseph Carens (Montreal, 1995), pp. 20-81

3 There is a further complication that has to do with the status of immigrants under the LOR and their status as Jews in the Israeli population registry (a department within the Israeli ministry of the interior, which documents data such as date of birth, material status of Israeli citizens, and other basic information, similar to other such agencies in many countries, but also nationality and religion). Note also that the LOR itself does not grant citizenship, but permission to immigrate to Israel, citizenship is granted through Israel's nationality law. However, as immigrants under the LOR are granted citizenship, I will discuss immigration and access to citizenship throughout this essay.

4. The background to the legislation of the LOR is connected to the struggle for free Jewish immigration to Palestine before 1948 and the dire situation of displaced persons in Europe following World War II; this important background, however, is outside of this essay's focus which is contemporary in nature; see Ruth Gavison, *60 Years to the Law of Return: History, Ideology, Justification* (2009, available online at: <http://www.metzilah.org.il/webfiles/fck/File/ShvutENG.pdf>, Chapter 1).

5. Benjamin Shalit, an Israeli Jewish naval officer, married a Scottish woman abroad and returned with her to Israel where they had two children. As Shalit is an Israeli citizen the children were automatically Israeli citizens. However, in the early 1960s the Shalits, considering themselves atheists but part of the Jewish nation, attempted to register their children as Jews under the “nationality” designation, while keeping the “religion” category blank. The Ministry of Interior refused, and instead wanted to keep both “nationality” and “religion” blank. As Jewishness follows a maternal line in the Jewish tradition, the disagreement was fierce. Shalit petitioned to the Supreme Court which ruled in his favor in 1970 by 5:4. *Shalit v. Minister of the Interior*, 68/58. In a different but related development, the nationality identification was erased from personal IDs in Israel, but is still recorded in the national population registry.

6. Sections 2 and 5 of the law allow the minister of the interior discretion in the application of the law. Such discretion was important, for example, in the case of Christian descendants of Jews that immigrated to Israel from the former USSR in the early 1990s. A detailed discussion of this issue is beyond this article's subject matter.

7. The wording “oleh” is in the source in Hebrew, and so I kept it here. “Oleh” means “going up” and therefore attributes a positive normative meaning to the act of Jewish migration to Israel. This positive normative attribution is of course controversial, but that is beyond my interest here.

8. As the LOR grants eligibility to potential immigrants up to the third generation, and as Jewishness follows a maternal line, the LOR may apply to many non-Jews. This was the case in this immigration wave from the former U.S.S.R, in which roughly 25% of the immigrants (some say 30%) were not Jews. Unlike the immigration waves of the late

1940s and early 1950s, today there is an economic incentive to immigrate to Israel. See Yfaat Weiss, “The Golem and its Creator: or How the Jewish Nation State Became Multi Ethnic” in *Challenging Ethnic Citizenship*, (eds) Yfaat Weiss and Daniel Levy (Berghahn Books, 2002), pp. 82–106, and Ayelet Shachar, “Citizenship and Membership in the Israeli Polity,” in *From Migrants to Citizens*, (eds) Alexander T. Aleinikoff and Douglas Klumeyer (Washington D.C., 2000), pp. 386–433.

9. Data available at the central bureau of statistics, Israel, www.cbs.gov.il

10. “*Jus sanguinis*” means the “right of blood,” which means that citizenship is granted following the identity of one’s parents, regardless of one’s place of birth. The opposite method of access to citizenship is “*jus soli*,” the “right of land,” in which citizenship is granted following one’s place of birth, regardless of the identity of one’s parents.

11. Citizenship in Israel is generally granted through *jus sanguinis*, (of at least one parent who is an Israeli citizen) regardless of the place of birth. If located outside of Israel, *jus sanguinis* expires after one generation. A recent development is the granting of citizenship through *jus soli* to several hundred children of labor migrants. However, this is a recent development exercised through governmental decision (rather than legislation), and it is too recent as to point to a substantial change in Israel’s citizenship law. Israel allows naturalization as well (see section 4). On those recent developments, see Adriana Kemp, “Managing Migration, Reprioritizing National Citizenship: Undocumented Migrant Workers’ Children and Policy Reforms in Israel,” *Theoretical Inquiries in Law*, Vol. 8, No. 2 (2007), Article 12.

12. Israel’s Supreme court decision, 5070/95, *Naamath v. the Minister of Interior Affairs*; see also Amnon Rubinstein and Barak Medina, *Israel’s Constitutional Law*, Vol. 1. (Tel Aviv, 2005), pp. 397, 400–402 (Hebrew); also 2597/99, *Toshbaim v. Minister of Interior Affairs*. Note that in *Naamath*, the court was careful to discuss the population registry and not the LOR, but I agree with Rubinstein and Medina (and other Supreme Court decisions, especially supreme court decision 1031/ 93 *Psro v. The Minister of the Interior*), that the same logic applies to both cases, i.e., that recognition of the national/cultural logic in the population registry applies to the LOR as well.

13. John Rawls, *A Theory of Justice* (Oxford, 1999, 1971), p. 86.

14. A full discussion is not possible here; see Samuel Freeman, *Rawls* (New York, 2007), pp. 86–96, and Bernard Boxill, *Blacks and Social Justice* (Rowman & Littlefield, 1992), 12–18.

15 Michael Walzer, *Spheres of Justice* (New York, 1983), Chapter 2. The International Convention on the Elimination of all Forms of Racial Discrimination (1969) ‘excludes’ nationality, citizenship, and naturalization (article 1, section 3).

16. Joseph Carens, “Aliens and Citizens: The Case for Open Borders,” *The Review of Politics*, Vol. 49, No. 2 (1987), pp. 251–273.

17. And some scholars argue that liberal criteria may apply to immigration policies, but still give priority to the citizens of the state, in a quasi

moderate view roughly in between Walzer and Carens; see David Miller, *National Responsibility and Global Justice* (2008), Chapter 8.

18. The fact that Israeli citizenship and Jewishness may be thought of as an advantage, is note worthy, as the danger in such identification should be less dire than the advantages—an interesting perspective on the success of Zionism.

19. For a detailed analysis of liberal theories of justice and the LOR, see Naama Carmi, *The Law of Return, Immigration Rights and their Limits* (Tel Aviv, 2003, Hebrew).

20. Two useful sources for a variety of immigration policies and naturalization processes are: Patrick Weil, "Access to Citizenship, A Comparison of 25 Nationality Laws," in *Citizenship Today, Global Perspectives and Practices*, (eds) Alexander T. Aleinkoff *et al.* (New York, 2001), pp. 17–35, and Christian Joppke, "Comparative Citizenship: A Restrictive Turn in Europe?," *Law & Ethics of Human Rights*, Vol. 2, No. 1 (2008).

21. Although not in all cases, under the discretion of the minister of the interior, Christians who are connected to Jews through marriage or are the descendants of Jews, were allowed to immigrate to Israel under the LOR in large numbers during the 1990s.

22. Note that religiosity is a relevant factor in freedom of association cases—but as long as such religious associations do not allocate important political and economic goods, they are outside of my discussion.

23. In cases in which the religious belief does involve costs that would be borne by the society at large, there is disagreement in the liberal literature, between those who argue that the cost should be borne only by the believer and those who argue that sometimes it is justified to expect the society to bear part of the cost; for the former, see Peter Jones, "Bearing the Consequence of Belief," *Journal of Political Philosophy*, Vol. 2, No. 1 (1994), pp. 24–43; for the latter, see Nahshon Perez, "Cultural Requests and Cost Internalization, A Left Liberal Proposal," *Social Theory and Practice*, Vol. 35, No. 2 (2009), pp. 201–228.

24. See Rubinstein and Medina, *Israel's Constitutional Law*, pp. 396–413.

25. Note that any distinction between potential immigrants will reflect on the existing citizens too.

26. Furthermore, the Jewish Diaspora is extremely important to the well-being of Israel, and the LOR is one way to insure the continued existence of Diaspora–Israel connections, nor is Israel the only state that maintains such connections; see Michael Fullilove, *World Wide Webs, Diasporas and the International system*, Lowy Institute paper 22.

27 See Raef Zriek, "Notes on the Value of Theory: Readings in the Law of Return, A Polemic," *Law and Ethics of Human Rights*, Vol. 2, No. 1.

28. See Irving Abella and Harold Troper, *None is Too Many* (Toronto, 1986).

29. See Thomas, Nagel, "Equal Treatment and Compensatory Discrimination," in *Equality and Preferential Treatment*, (eds) Marshall Cohen *et al.* (Princeton, 1977), pp. 3–19. See also the U.S. Supreme

Court decision concerning affirmative action, *Grutter v. Bollinger* 539 U.S. 306 (2003), that limited affirmative action policies to 25 years, counting from the day of the decision.

30. Asa Kasher, "Justice and Affirmative Action: Naturalization and the Law of Return," *Israel Yearbook of Human Rights*, Vol. 15 (1985), pp. 101–112.

31. It may be argued that maintaining Jewish majority requires the LOR, and therefore Kasher's end conditions create a *permanent* connection between Israel and Diaspora Jews. However, this would change Kasher's argument to an argument that attempts to justify the *continued* existence of a Jewish majority. This is far from the subject matter of Kasher's essay, and I assume that this is not his intention.

32. Affirmative action policies are defined as policies that take place after the actual/legal discrimination policy has ended. Therefore, under my interpretation above, the LOR should not be classified as affirmative action type policy. If antisemitism will end, the affirmative action logic will start, and with it the question of the end point of this policy.

33. The literature on antisemitism is immense. Two important examples are: Robert Wistrich, *Anti-Semitism: The Longest Hatred* (New York, 1991), and Robert Wistrich, *A Lethal Obsession: Anti-Semitism from Antiquity to the Global Jihad* (New York, 2010). Some of the motivation of the recent immigration from France was antisemitism, so was the recent immigration from Yemen, and there are other cases.

34. Michael Walzer, *Spheres of Justice*, (New York, 1983), 42.

35. Acceptance of liberal-national arguments will, many times, leave some citizens in a less than equal status than other citizens, not belonging to the dominant national/cultural group. This is probably unavoidable as language, public holidays, and days of rest have to be chosen, but the level of exclusion can be of various degrees. See Charles Taylor, "The Dynamics of Democratic Exclusion," *Journal of Democracy*, Vol. 9, No. 4 (1998), pp. 143–156, and Nahshon Perez and Ruth Gavison, "Days of Rest in Multicultural Societies: Public, Private, Separate?," *Law and Religion in Theoretical and Historical Context*, (eds) Peter Cane *et al.* (Cambridge, 2008), pp. 186–213.

36. Avishai Margalit and Moshe Halbertal, "Liberalism and the Right to Culture," *Social Research*, Vol. 63, No. 1 (1994), pp. 489–510; Will Kymlicka, *Multicultural Citizenship* (Oxford, 1995), Chapter 5; Nahshon Perez, "Cultural Requests and Cost Internalization," Gans, Chaim, *The Limits of Nationalism* (Cambridge, 2003), and "Nationalism and Immigration," *Ethical Theory and Moral Practice*, Vol. 1, No. 2 (1998), pp. 159–180.

37. See Ernest Gellner, *Nations and Nationalism* (Ithaca, 1983); David Miller, "The Ethical Significance of Nationality," *Ethics*, (7.1988), Vol. 98, No. 4 (1998), pp. 647–662; Margaret Moore, "Normative Justifications for Nationalism: Justice, Democracy and National Identity," *Nations and Nationalism*, Vol. 7, No. 1 (2001), pp. 1–20.

38. Note that such arguments may justify nationality-based immigration preferences on permanent bases, differently than the approach that views such policies as illegitimate, or only temporarily legitimate.

39. Chaim Gans, "Nationalism and Immigration," *Ethical Theory and Moral Practice*, Vol. 1, No. 2 (1998), pp. 159–180; *A Just Zionism* (Oxford, 2008), pp. 129–133.

40. Joseph Carens also argues in favor of this logic, even if the threat is not empirical, but applies to the identity and self-understanding of the national group (he discusses Japan as an example); however, such a society may be required to assist potential immigrants in need through other means. Joseph Carens, "Migration and Morality: A Liberal Egalitarian Perspective," in *Free Movement*, (eds) Brian Barry and Robert Goodin (New York, 1992), pp. 25–48.

41. Alexander Jakobson, "Jewish Peoplehood and the Jewish State—How Unique?" *Israel Studies*, Vol. 13, No. 2 (2008), pp. 1–27, for a detailed discussion on the Romania–Hungary case study, see Constantin Iordachi, "Dual Citizenship and Policies toward Kin-Minorities in East-Central Europe: A Comparison between Hungary, Romania, and the Republic of Moldova," in *The Hungarian Status Law Syndrome: A Nation Building and/or Minority Protection*, (eds), Zoltán Kántor *et al.* (Slavic Research Center, Hokkaido University, 2004), pp. 239–269.

42. Gans himself argues for a sub-statist view of nationalism; see his *The Limits of Nationalism* (2003), and *A Just Zionism*, but has a complex view with regard to the LOR see also the section on Normative liberal national arguments and the issue of immigration.

43. See Gellner, *Nations and Nationalism*; Cowen Tyler, *Creative Destruction* (Princeton, 2002).

44. David Miller, *Citizenship and National Identity* (Cambridge, 2000), pp. 125–142.

45. Naama Carmi argues in a similar fashion: "Immigration Policy: Between Demographic Considerations and Preservation of Culture," *Law & Ethics of Human Rights*, Vol. 2, No. 1 (2008).

46. Chaim Gans, *A Just Zionism* (Oxford, 2008), pp. 84–93, 130–133; for a general argument with regard to the importance of the passage of time (the superseding thesis) in the context of corrective justice, see Jeremy Waldron, "Superseding Historic Injustice," *Ethics*, Vol. 103 (1992), pp. 4–28 and Jeremy Waldron, "Settlement, Return and the Supersession Thesis," *Theoretical Inquiries in Law*, Vol. 5 (2004), pp. 237–268; see also the recent decision of the ECHR regarding Cyprus (*Demopoulos v. Turkey*, 46113/99), deciding against property claims of Greek Cypriots *vis-à-vis* the Turkish part of Cyprus, following (among other issues), the rights of the current inhabitants (especially para. 116 of the decision).

47. See the Ruth Gavison and Yaacov Medan covenant, available at <http://www.gavison-medan.org.il/english/arrangements/>. See also *60 Years to the Law of Return: History, Ideology, Justification* (Jerusalem, 2009, available online at: <http://www.metzilah.org.il/webfiles/fck/File/ShvutENG.pdf>), section 3.

48. India's constitution does not grant Indian citizenship to people who have immigrated from India to Pakistan starting March 1947, in the

context of the struggle, and mass population exchange, that lead to the birth of these two states. The refusal to accept people that migrated from India to Pakistan stems (most likely) from political and religious anxieties, which are similar to what many Israelis feel with regard to the Palestinian refugees and Diaspora. See Part Two, Article 7 of the Indian constitution.

49. I am thinking mainly of the literature that discusses the importance of social order, in the context of immigration, as discussed by several contemporary scholars, with evident connections to Hobbes and Hume; see Peter Schuck, *Diversity in America* (2003), Chapter 4, the classic discussion of social order is that of Thomas Hobbes, *Leviathan*, ed. Crawford Brough Macpherson, (Penguin Classics, 1651, 1968), Chapter 13.

50. In an informal way, this process is occurring in Israel, following the growing numbers of non-Jews in Israel, that are integrating to the Jewish-Israeli way of life; see Cohen Asher and Bernard Susser, "Jews and Others: Non-Jewish Jews in Israel," *Israel Affairs*, Vol. 15, No. 1 (2009), pp. 52-65.

51. On culture as a choice and liberal arguments, see Amartya Sen, *Identity and Violence* (2006), Nahshon Perez, "Cultural Requests and Cost Internalization."

52. See Shahar Ilan, "Courts to perform secular conversions which bypass rabbinate," *Haaretz*, 11, 16, 08.

53. Israel's Supreme court decision, 5070/95, *Naamath v. The Minister of Interior Affairs*.

54. See Ella Belfer, *Double Identity, on the Tension between Worldliness and Spirituality in the Jewish World*, (Bar Ilan, 2003, Hebrew).

55. *Rufeisen v. Minister of the Interior*, (1962) 16 PD 2428, and *G. and S. Beresford v. Minister of the Interior*, (1992), 265/87.

56. Theodore Friedgut, "Immigrants from the Former Soviet Union (FSU): Their Influence and Identity," in *Israel Identity in Transition*, (ed.) Anita Shapira (London, 2004), pp. 185-214.

57. Joseph Carens, "Immigration, Political Community, and the Transformation of Identity: Quebec's Immigration Politics in Critical Perspective."

58. Joseph Carens, "Migration and Morality: A Liberal Egalitarian Perspective."

59. Jeff Spinner Halev, "Unoriginal Sin: Zionism and Democratic Exclusion in Comparative Perspective," *Israel Studies Forum*, Vol. 18, No. 1 (2002), pp. 26-56; Alexander Yakobson, "Jewish Peoplehood and the Jewish State - How Unique?." Such states include Bulgaria, Romania, Armenia, and many others.

60. *Israel Nationality Law* (1952), see, Carmi, *The Law of Return*, p. 26, and see the recent changes in access to citizenship in Israel following the growing numbers of labor migrants in Israel: Adriana Kemp, "Managing Migration, Reprioritizing National Citizenship."