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## **Ethnic-Priority Immigration in Israel and Germany: Resilience Versus Demise**

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Working Paper 45  
December 2001

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# **Ethnic-Priority Immigration in Israel and Germany: Resilience Versus Demise**

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*Abstract:* After World War II, Israel and Germany adopted curiously similar policies of ethnic-priority immigration, accepting as immigrants only putative co-ethnics. The first objective of this article is to provide analytical descriptions of an understudied type of immigration, which is entirely a political artefact and also offers a window into the constitution and contestation of the boundaries of the national community. The second objective is to account for the main variation between the two cases, the resilience of Jewish immigration in Israel, and the demise of ethnic-German immigration in Germany. The very fact of divergent outcomes casts doubt on a “primordialist” account of ethnic-priority immigration, which sees the latter as emanating—in a direct and unproblematic way—from an “ethnic” (as against “civic”) definition of nationhood. We point instead to the possibility of “liberal” and “restrictive” contention surrounding ethnic-priority immigration, and argue that for historical and geopolitical reasons the political space for such contention has been more constricted in Israel than in Germany.

## **Introduction**

Fatefully entangled as victim and perpetrator during 20th century’s darkest hour, Israel and Germany adopted curiously similar policies of ethnic-priority immigration after World War II. Both states welcomed newcomers as “immigrants,” that is, for permanent settlement and membership in the national community, only if they qualified ex ante as co-ethnics, that is, members of the state-defining majority nation. This sets an interesting counterpoint to the reverse development in the new settler nations, such as Australia or the United States, which shifted after World War II from ethnicity and race to culturally neutral criteria of immigrant admission, most notably individual skills and family unification. This is not to deny the fundamentally different perceptions of these immigrations in both cases, most notably the denial by Israel and Germany that their ethnic

immigrations were “immigration” at all, but rather the “return” of co-ethnics. However, this self-perception conflicts with the fact that in each instance we are dealing with the admission by a state of non-citizens (or “aliens”) for more than temporary stays on its territory, which in common sense, as well as in international migration law (Plender 1988), constitutes “immigration.”

This article has two objectives. The *first* is to give analytical descriptions of an understudied type of immigration policy, one that singles out putative co-ethnics for preferential treatment. While there has been considerable recent theorizing on the determinants of “normal” immigration policies, such as interest-group pressure (Freeman 1995), autonomous legal systems (Joppke 1998), subnational mobilization (Money 1999; Karapin 1999), and supranational norms and regimes (Jacobson, 1996; critical Guiraudon and Lahav, 2000), the specificities of ethnic-priority immigration policies have largely escaped scholarly attention. What causes and justifies the set-up of ethnic-priority policies; how do the respective states define and select co-ethnic immigrants; and what kind of pressures do these policies typically undergo? These are three central questions pertaining to ethnic-priority immigration, which we seek to shed light on by examining the German and Israeli cases. If in the following policies and their determinants figure centrally, this is also because we are dealing with a type of immigration that, perhaps more than any other type of immigration, is entirely a political creation. It is also an immigration that opens up a window into the processes through which the boundaries of the national community are produced, reproduced, and contested. The *second*, more specific purpose of this article is to account for the main variation between the Israeli and German cases: while Jewish-priority immigration in Israel continues unabated, the parallel “return” of ethnic Germans to Germany has, in principle, come to an end, in a law of 1993 that limits the status of ethnic Germans to persons born before 1993. The obvious

question to ask here is, Why does one ethnic-priority immigration persist, while the other has been halted?

Regarding the first objective, Israel and Germany's policies of ethnic-priority immigration are part of a larger family of immigration policies that screen newcomers according to ethnic, racial, or national-origins criteria. Such schemes differ along at least three dimensions; enumerating them allows us to situate the German and Israeli cases.<sup>1</sup> First, some ethnic-priority policies screen according to citizenship (in the formal sense of nationality or state membership), while others select on ethnicity proper. Selecting on citizenship is categorical and generic, based on the simple presence or absence of the requisite state nationality.<sup>2</sup> By contrast, selecting on ethnicity proper draws the state into the murky terrain of examining individual "identity" claims, which is an altogether more elaborate—and problematic—procedure than the former. Moreover, the latter creates an incentive on the part of would-be migrants for "creative ethnic reidentification" (Brubaker 1998:1053), even for fabricating the requisite ethnicity, for which one may assume the legal and moral threshold to be lower than for fabricating passports. In fact, the multiplication of "false" co-ethnics would pose a serious challenge to both the German and Israeli ethnic immigration policies in the 1990s.

Secondly, some ethnic-priority schemes preference certain ethnic or national-origin groups according to their putative proximity (but essential differentness) to the state-bearing nation, whereas others are based on the putative sameness of immigrant group and state-bearing nation. An example for "proximity" are the U.S. national origins quota of 1924 (see most recently King 2000), or the preference for Italians in early postwar French immigration policy (see Viet 1998), both of which were justified in terms of the "assimilability" of immigrants and preserving the "homogeneity" of the receiving society. An example of "sameness" are ethnic Germans and Jews, who are believed to be not similar to but identical with the state-bearing nation. Whereas proximity schemes are justified in

terms of homogeneity and assimilation, and thus in terms of state interests, sameness schemes are couched as the right of the ethnic migrant, to be held against the receiving state. In the German case, the right of return is a constitutional right, enshrined in Article 116 of the Basic Law; in Israel, it is formally a statutory right, but ideationally a natural right that precedes the existence of the state.

Finally, some ethnic-priority policies restrict eligibility according to the time and place in which ethnic claims are raised, while others do not. On this dimension the German and Israeli cases finally take opposite positions. The German Law of Return was designed as a temporary remedy for the consequences of war and expellation, covering only ethnic Germans caught in the Soviet Empire. By contrast, Israel's Law of Return is a permanent, state-constituting provision, applying to every Jew in the world. In its expansiveness and state-defining quality the Israeli ethnic-priority immigration is unique in the world.

This introduces the second objective of this article, to account for the resilience of Israel's ethnic priority immigration, and the demise-in-principle of Germany's. Reference to their different intended designs is, of course, at best the beginning of an answer, not the answer itself. The examples abound where notionally temporary and categorically limited rights and entitlements are expanded and perpetuated by the very clientele and vested interests created by these provisions, thus crossing out the originally limited purpose of the underlying policy (for the case of minority voting rights in the U.S., see Thernstrom 1987). The very fact of divergent outcomes in Israel and Germany casts doubt on a primordialist account of ethnic-priority immigration, which sees the latter as deriving--in a direct and unproblematic way--from an "ethnic", as against "civic", understanding of nationhood.<sup>3</sup> In an otherwise superbly subtle discussion of the normative dimensions of immigration policy, as a political community's quintessential act of collective self-determination and self-reproduction, Coleman and Harding (1995), for instance, argue (and defend) that Israel and

Germany (along with Japan) accept immigrants, if they accept them at all, according to ethnic criteria, because these states happen to adhere to an ethnic conception of political community. By contrast, the United States or Canada select newcomers according to individualistic criteria, such as skills and family ties, because they happen to adhere to a civic or strictly “political” conception of political community.<sup>4</sup>

The problem with such a primordialist account is not its insistence on the cultural conditioning of a state’s immigration policies—this conditioning exists (as we shall see). Rather, its problem is the assumption of a “straight line” between reified and fixed identities and policies, which leaves out the fundamental role of conflict and contingency, that is, politics and history, as intervening variables. Drawing a direct linkage between (ethnic or civic) conceptions of nationhood and immigration policy suffers from what Brubaker (1998b:274) has aptly called the “realism of the group”, that is, the misconception of political communities or nations as real entities with wills and intentions, or—to use Ruth Benedict’s (1934) terms—as “personalities writ large.” National identities may be invoked, Bourdieuan style, by individuals and groups who try to impose their preferred immigration policies in a liberal democracy, but “identities” do not as such generate the policies commensurable with them. How could we otherwise explain that the classic new settler nations, now torch-bearers of non-ethnic, and thus universalistic immigration policies, not too long ago subscribed to blatantly ethnic, even racial, criteria of immigrant selection? For the United States, the recent historiography of immigration and citizenship has shown that there are, at best, “multiple traditions” (R.Smith 1993) of nationhood<sup>5</sup> that can give rise to widely divergent immigration and citizenship laws and policies, racist as well as liberal ones.

More concretely, a primordialist account of ethnic-priority immigration has three shortcomings. First, it neglects the role of geopolitical and demographic interests of the state in the

design and implementation of ethnic migration policies (see section I). Second, primordialists, who see ethnic-priority policies as unproblematic emanations of shared (ethnic) definitions of the political community, have overlooked the possibility of disagreement and changing views on the very definition of ethnicity that underlies the priority policy (see section II). A third shortcoming of primordialism is its relying on a reified opposition between “ethnic” and “civic” nationhood. In this it follows a central streak in the nations and nationalism literature, from Hans Kohn (1944) to Liah Greenfeld (1992) and Rogers Brubaker (1992), which has classified Israel and Germany (along with Japan) as proverbially ethnic states, with a preconstituted “nation” conceiving of the state as its tool of representation and protection, as against “civic” states, where the nation is a creature of the state and thus is politically and territorially conceived.<sup>6</sup> As writers such as Anthony Smith (1986:149) have long argued, this dichotomy does not hold at the empirical level (see also the good recent critiques by Yack 1996 and Brubaker 1999, the latter cautiously retracting his own earlier position from 1992).

The study of ethnic-priority immigration in two putatively hard cases of “ethnic” stateness allows us to demonstrate in detail how and why the ethnic-civic dichotomy, if reified as an empirical distinction between “ethnic” and “civic” states, does not hold. Certainly, there are ethnic components to the German and Israeli states’ self-conceptions, and their respective Laws of Return are primary expressions of them. These laws indicate that state and nation do not overlap, as is typically the case in civic states, but that the nation is prior to and wider than the state. However, these ethnic are strongly counteracted by civic components, which maximally derive from competing, more inclusive models of nationhood, and minimally are inherent in the logic of representative democracy, individual freedoms, and the universalistic rule of law in a liberal state. This minimal sense of civic stateness, which both Israel and Germany have to subscribe to qua (desiring to be a)

liberal state, is invoked in the Israeli notion that Israel should not only be the state of Jews, but a “state of all its citizens.” Note that in the Israeli case this points to a multi-national alternative conception of the state, which leaves the ethnic definition of its Jewish constituency intact and only seeks to include the Arab constituency on equal terms; there has been no attempt to forge an inclusive Israeli nation. By contrast, in Germany there has been a struggle over the very definition of German nationhood, ethnic or civic, with a strengthening of a civic definition over time. Minimal or maximal, civic-liberal precepts can be found in Israel and Germany alike, providing resources that can be—and have been—mobilized against an ethnic self-conception, and related policies, of the state (see section III).

However, there is not only one, but two possible sources of conflict surrounding ethnic-priority immigration. The “liberal” challenge articulates the tension between ethnic and civic stateness, and brings out that the state’s preferencing of one ethnic group (even if it coincides with the majority nation) entails discrimination for the non-preferenced group(s). The liberal challenge is thus carried by or on behalf of other immigrant or minority groups that are disadvantaged by (or appear disadvantaged vis a vis) policies supporting such immigration, such as Palestinians in Israel or asylum-seekers and the descendants of Turkish guestworkers in Germany. In addition, there is the possibility of a “restrictive” challenge. Instead of deriving from a tension between ethnic and civic stateness, it takes ethnic stateness for granted, and attacks an overly extensive implementation, or even a misguided direction of the priority policy, which allows the entry of “false” or “diluted” co-ethnics.

The notions of “liberal” and “restrictive” challenges point to the sources and mechanisms of contention surrounding ethnic-priority immigration. In a next step we argue that the political space for their articulation is differently developed in our two cases, tightly constricted in Israel, and less



constricted in Germany. Mapping out this political space defies any grand macro-historical or – sociological scheme, and requires a close attention to context and contingency, even to the mutual implication between the cases under investigation. Key in this respect is the fundamentally different geopolitical and historical connotations of both ethnic immigrations. In Israel, Jewish immigration is a central stake in the protracted national conflict between Jews and Arabs over the same territory. Jewish immigration is framed as a question of survival for a state involved in an intense conflict with its neighbours and anxious to control a perceived hostile national minority, which had been a majority before the establishment of the state in 1948. Given its historical roots in an ethno-national colonial project, Israel is determined to be, and this perhaps permanently, a “nationalizing state” (Brubaker 1996) that seeks to strengthen the Jewish majority against the Arab minority by admitting more (and in principle only) Jewish immigrants. As we will see, the demographic imperative has constricted the political space not only for the liberal, but even for the restrictionist challenge to ethnic-priority immigration—a doctrinary, narrow definition of Jewishness is simply luxurious in the Hobbesian zone of war, into which Israel seems precariously and ineradicably locked. If, in addition to this demographic imperative, Israel is an “ethnic” state in a much more unambiguous and stronger sense than Germany ever was, this is of course also due to its grounding in a powerful and enduring historical founding myth, which was provided by (Nazi) Germany’s very attempt to destroy world Jewry.

By contrast, the same Nazi quest for racial purity has rendered ethnic stateness in postwar (West) Germany rather oblique and qualified from the start. The ethnic orientation of this state, along with the ethnic immigration justified by it, was doubly limited—temporally, by being framed as an obligation to those Germans who suffered disproportionately from the consequences of the war, such as expellees and resettlers; and spatially cum ideologically, by stipulating a commitment only to those

Germans who were caught in the eastern territories that were now under communist rule. Once these conditions no longer applied, which was the case after national reunification and after the fall of communism in the early 1990s, the legitimacy for ethnic-German immigration disappeared. In this sense, the particular design of this politically created immigration *is* relevant for understanding its eventual demise. However, this tells us nothing about the concrete dynamics and mechanisms in and through which it became dismantled. One difference to Israel is that in Germany ethnic-priority immigration has never had to be at the service of a state whose territory is permanently contested by rivaling ethnonational groups. The geopolitical interest of the German state in ethnic-priority immigration was confined to the (only temporary) Cold War constellation. When the massive entry of notionally co-ethnic but sociologically Russian or East European immigrants in the 1990s created adjustment and integration problems similar to those of “normal” immigrants, an obvious opening was provided for the restrictive challenge, which at that point was no longer kept in check by the Cold War division of the European continent. Moreover, due to Germany’s privileged location in a Lockean zone of peace, the liberal challenge to ethnic-priority immigration also could fully prosper. In denationalizing and uniting Europe, the narrative of ethnic belonging and protection that underlies ethnic-priority immigration became increasingly anachronistic. A sense of civic nationhood, best captured in the notion of constitutional patriotism, emerged as a strong contender to the compromised ethnocultural tradition. The ethnic-return policy was ever more a policy to be pursued only tacitly, an impossible endeavour once the number of new claims suddenly multiplied in the late 1980s.

In sum, reference to the different geopolitical and historical connotations of ethnic-priority immigration in Israel and Germany goes a long way toward explaining the question of resilience versus demise. Our stress on the mechanisms that either shore up or undermine ethnic-priority

immigration is not to deny the important role of ethnic self-conceptions of the state in setting up ethnic-priority immigration; only they tell us little about the further careers of these immigrations. And even when acknowledging the role of ethnic stateness, we stress that it is their different historical accentuations (compromised in Germany, uncompromised in Israel) that matter. Note that in this respect the fateful encounter between Israel and Germany itself helps explain why one ethnic immigration could be permanent, while the other could not. We are dealing not just with two parallel histories, each shaped by its own factors and causes, but with cross-cutting histories that provided fundamentally different starting-points and contexts for ethnic-priority immigration in both states.

The following comparison has three parts. In the first, we trace the different origins and justifications of ethnic-priority immigration in Germany and Israel. Secondly, we contrast the (subjective and objective) selection criteria used by both states to define co-ethnic immigrants, and show that these definitions have not been stable but subject to contestation and change. Finally, we compare the social and political pressures on ethnic-priority immigration in the 1990s, which led to opposite outcomes: resilience in Israel, demise in Germany.

## **Grounds of Ethnic-Priority Immigration in Israel and Germany**

A frequent fallacy in cross-national comparisons is to blend out the different physical size of the compared objects and the different scope of their compared characteristics. Applied to our cases, the meaning and impact of numerically and typologically similar immigration is radically different in two countries of vastly different territory and population sizes, and these differences are bound to be even more extreme if one such immigration is entirely constitutive of state and society, whereas the other immigration remains rather peripheral to the latter. Accordingly, interpreting Jewish and ethnic German immigration exclusively in the light of ethnic state- and nationhood in

Israel and Germany obscures more than it reveals. In the German case, this linkage is at best an indirect one, and by far more relevant has been the (temporary) imperative of mastering the consequences of World War II, in the context of the Cold War confrontation with the Communist East. In Israel, there is a more direct and openly promulgated link between Jewish immigration and ethnic state- and nationhood; however, the full significance of Jewish immigration derives from a conflictive geopolitical environment in which demography is seen as destiny.

### *Demography as Destiny in Israel*

The principle of unrestricted Jewish immigration was legally enshrined in the Law of Return of 1950, whose first article declares that “Every Jew has the right to come to this country as an *oleh*”.<sup>7</sup> The Law of Return—one of the few Israeli laws in which there is an explicit reference to Jewishness as the basis for a special privilege—is perhaps the major legal expression of the definition of Israel as a Jewish state (see Klein 1997; Shachar 2000). By framing Jewish immigration as “return”, the law provides statutory enunciation of the link between the state and the Jewish Diaspora. Tellingly, the right of return was framed not as an entitlement granted by the state, but as a “natural” right of every Jew in the world that precedes and constitutes the state. Accordingly, the state only recognizes and endorses, but does not create, this right. As Prime Minister Ben-Gurion put it, the Law of Return is not an “immigration” law in which the state establishes which kind of immigrants it is willing to accept; rather, it is “the law of the persistence of Jewish history”, on the basis of which the State of Israel has been established.<sup>8</sup> The law was passed by the Knesset unanimously, not even the non-Zionist Israeli Communist party dissenting (Hacohen 1998), and the notion of an absolute and “natural” right of every Jew to settle in Israel was taken for granted by all members of parliament.

Part of the legitimation of Israel as a Jewish state is that it should provide a shelter for Jews threatened by persecution. This motif was mentioned in the presentation of the Law of Return in the Knesset.<sup>9</sup> Yet, it is important to stress that the principle of unrestricted Jewish immigration did not only apply to those Jews suffering from discrimination or persecution; instead, the right of return was conceived of as belonging also to Jews willing to settle in Israel because of their “love to the ancient tradition, to Hebrew culture and to Israel’s glorious independence.”<sup>10</sup> Hence, in a sharp contrast to Germany, the right to freely immigrate to Israel was ideologically framed as based on membership in the ethno-national community per se, and not merely as a remedy to persecution or discrimination. Accordingly, in the law itself there is no reference at all to persecution as a condition to be entitled to the right to immigrate to Israel.

However, the constitutive role of Jewish immigration is grounded not only in the ethno-national self-definition of the Israeli polity, but also in the specific conditions of material state-building. Jewish immigration has played an instrumental role in the internal conflict between the Zionist settlers and the Arab population of Palestine (who became Israeli citizens after 1948), and in the external confrontation with the Arab countries since 1948. The Zionist colonial project was from the start founded on immigration flows, and the existence of a pre-state Zionist community in Palestine was entirely the result of successive waves of Jewish immigration. After the establishment of the state, Jewish immigration continued to play a fundamental role in the demographic make-up of Israeli society. Between 1948 and 1995 the net migration balance constituted nearly 50 percent of the Jewish population growth (DellaPergola 1998:66). Figure 1 illustrates the weight of immigration in the composition of the Israeli Jewish population. According to the first census carried out in November 1948, 65 percent of the Jewish population was foreign-born. As a consequence of massive immigration this proportion significantly increased over the early fifties. Since then and until

the nineties the percentage of foreign-born among the Jewish population decreased, but still remained at very high levels. The large wave of immigration from the former Soviet Union during the nineties caused a temporary halt in the downward trend.

[FIGURE 1 HERE]

From the start, Jewish immigration played a key role in the management of the national conflict with the Palestinians. Since the beginning of Zionist settlement in Palestine and over the entire pre-state period, the demographic ratio between the Zionist settlers and the Arab Palestinian population was one of the central dimensions of the conflict between the two national movements, along with the conflicts over the control of territory and of the labor market (Kimmerling 1983; Shafir 1989). Both sides recognized that demography would be a central factor in the determination of the political future of Palestine and its two national communities. Accordingly, Palestinian attempts to halt, or at least to limit Jewish immigration, and Zionist efforts to enlarge it as much as possible, were key components in their respective political strategies.

The dependence on immigration for the consolidation of the Zionist project vis-a-vis the Arab population continued, and even intensified, after the establishment of the state, especially during its first decade of existence. Following the 1948-49 War, the national composition of the population residing on Israeli territory changed dramatically. First, due to flight and expulsion, only about 170,000 of an estimated 700,000-900,000 Palestinians who had lived in the territory before the founding of Israel remained (Peretz 1958:95). In addition, as a consequence of the enormous wave of immigration following the establishment of the state, the Jewish population doubled within three years. Despite this sweeping demographic transformation, the Israeli state continued defining

the ratio between the Jewish and Arab populations as a matter of national security and survival, and Jewish immigration remained the main tool to maintain what is called in official discourse the “demographic balance”. This is an euphemism that refers to the basic interest of the Israeli state in keeping the demographic superiority of the Jewish population over the Palestinian minority, and which gained further impetus from significantly higher fertility rates among the Palestinian population (Goldscheider 1996:207).<sup>11</sup> This demographic superiority is seen by the state and most political forces as a precondition for holding down the Palestinian minority in a subordinate status, especially given the fact that as citizens they enjoy full formal political rights (i.e. voting rights).

The instrumental link between Jewish immigration and state-making, which goes well beyond symbolic notions of ethno-national belonging, is illustrated by the state-initiated and operated massive immigration of Jews from Moslem countries during the fifties and early sixties. Despite the ambivalent and often overtly negative attitudes of European Zionist state-builders towards these “Oriental” Jews and disregarding some voices that demanded a more selective immigration policy, state agencies actively encouraged their massive immigration to Israel. These immigrants were considered mainly as an instrument to pursue elementary state-building tasks, especially to increase the Jewish population ratio, to plant Jews in the peripheral areas of the country with a high concentration of Palestinians, and to strengthen Israeli state and society in economic and military terms. As stated in 1949 by the Minister of Finance, Eliezer Kaplan: “We need workers and fighters” (quoted in Segev 1986:117).

The demographic motif in the management of the national conflict became more acute after the 1967 war, when the occupation of Arab territories significantly enlarged the Palestinian population under Israeli control, providing new fuel to the “demographic threat” to the Jewish character of the Israeli state (see Lustick 1999). By then the reservoir of potential Jewish immigrants

from the Moslem countries was practically exhausted, and the Jewish communities in the Soviet block were banned from emigration by their respective governments, except for a brief period during the early seventies. Under these aggravated conditions, the framing of Jewish immigration as imperative for assuring Israel's survival remained salient and broadly consensual among Zionist political forces. As we will elaborate later, when the collapse of the Soviet Union in the early 1990s opened up a huge new reservoir of Jewish immigrants for Israel, the iron link between Jewish immigration, demography and the protracted national conflict helped shore up the principle of ethnic-priority immigration against its liberal and restrictive challengers.

While the Law of Return stands for the ethnic self-definition of Israel as a Jewish state, its place in Israeli politics is affected also by the operation of civic principles in the legitimation and functioning of the Israeli state. For example, the Nationality Law incorporates significant civic elements, as it sanctions the acquisition of citizenship by birth on territory and by residence (Gouldman 1970: Chapter 5). Civic principles in the operation of state agencies and in the political arena in general, have become more prominent over the last two decades, although they are still subordinated to ethno-national notions (Shafir and Peled 1998). For instance, the addition to the "Basic Law: the Knesset" of 1985 not only disqualifies from running in elections political parties that negate the Jewish character of the state, but also those negating its democratic character or promoting racism (Kretzmer 1987:41; Peled 1992:438). On the basis of this amendment, Rabbi Kahane's racist party, which called for the expulsion of all Palestinians (including citizens) from Israel and the occupied territories, was disqualified from running in the 1988 elections. The operation of both ethnic and civic principles, and the tensions between them, are manifest especially in the relations between the state and its Arab-Palestinian citizens. As Peled (1992) notes, although excluded from the ethnically defined national community, Palestinian citizens enjoy formal civil and



political rights, which allow them to participate, albeit in a restricted form, in the political process. Moreover, the relative strengthening of state-level civic principles has enlarged the opportunity structure of Palestinian citizens to challenge the ethno-national character of the Israeli state and to exert some influence upon state policies (see Rosenhek and Shalev 2000). These civic notions would be mobilized during the 1990s by the Palestinian leadership and others to advance their liberal challenge to the principle of ethnic-priority immigration.

### *Mastering the Consequences of War in Germany*

Calling ethnic-priority immigration in Germany a peripheral and temporary, rather than state- and society-constituting device, is not to belittle the magnitude of the German expellee problematique. Expellees from the lost eastern territories and beyond constituted some 20 percent of the West German population in 1950. Their swift and generous integration was the single biggest challenge to the fledgling West German democracy, because expellees represented a considerable source of revanchism and right-wing radicalism.<sup>12</sup> Public-order perhaps more than “identity” considerations conditioned the setup of the legal framework for Germany’s ethnic-priority immigration in the 1950s.

Accordingly, the link between ethnic-priority immigration and the ethnocultural tradition of German nationhood is less straightforward and direct than conventional wisdom would have it (e.g., Brubaker 1992). Consider, for example, that the Weimar Republic had denied any responsibilities toward some 13.000 forcibly collectivized German-origin peasants during the Stalin era, who had asked for their repatriation to Germany. The German ambassador in Moscow at the time sardonically declared that “these peasants cannot be helped, their German nationality is doubtful, and their desire to enter Germany is pure illusion” (in Otto 1990:17).<sup>13</sup> This suggests the centrality of

the consequences of World War II for (re)activating the ethnocultural tradition, which was not automatically available for indiscriminate co-ethnics.

It is still important to point out, in line with the argument of ethnocultural tradition, that postwar Germany, like Israel, has always denied that its ethnic-priority immigration is “immigration” at all, but the “return” of co-ethnics to their homeland. This points, in both cases, to an ethnocultural relationship between people and “their” states: not states building citizenries in their image, and thus the former preceding the latter, but pre-constituted people forming states for their self-representation and protection. Is then Germany the “state of Germans”, as Israel is a “Jewish state”? A crucial difference between both is that as a very result of the confrontation between Germans and Jews under Nazism the German ethnocultural idiom of nationhood has in principle been delegitimized, whereas the idea of Israel as a Jewish state has been powerfully reaffirmed, as a safe haven from persecution. In addition, the ethnic homogeneity of the residence population in Germany prevented the rise of an Israeli-style demographic imperative in its policy toward ethnic Germans—there was no unrestive minority to hold down by peopling the country with loyal “Germans”.<sup>14</sup> In contrast to Israel, whose ethnic texture is internally visible in the rift between Jews and Arabs, the ethnic dimension of the (West) German state became internally invisible, as it was transferred into the future (as the mandate of national reunification) and extraterritorialized (as the—in the cold war period mostly virtual—commitment to admit co-ethnics).<sup>15</sup>

Daniel Levy (1999:22) has succinctly argued that the ethnic German expellees allowed the “rehabilitation” of Germany’s otherwise delegitimated ethnocultural self-understanding after World War II: through reference to the “victimhood” of expellees ethnocultural nationhood could be “dissociated from Nazism” (p.49). Was (West) Germany, at least in this indirect way, a state of Germans, as Israel is a state of Jews? Turning to West Germany’s founding document, the Basic

Law, one can observe a tension between ethnic and liberal elements. The ethnic elements are tellingly tied to the temporariness and incompleteness of the West German state. Accordingly, the preamble of the Basic Law states that it was to apply only for a “transition period” (*Uebergangszeit*), until the “unity and liberty of Germany was completed”. Moreover, the “German people”, in crafting this constitution, had “acted also for those Germans, who were denied participation”—the German division obviously reactivated the traditional non-congruence between state and nation. On the liberal side, the Basic Law’s preamble commits the new state to a “united Europe” and “to serve peace in the world”, and the constitution’s first seven articles protect universal human rights independently of citizenship—all commitments that, in contrast to the ethnic ones, were conceived of as not only temporarily valid.<sup>16</sup>

A cornerstone of postwar Germany’s ethnic orientation, and the constitutional foundation of its ethnic-priority immigration, is Article 116(1), which defines who is a German. It contains a liberal element in simply stating that “German” is who “owns German citizenship”, leaving the determination of citizenship to the political process. Accordingly, the German Basic Law never prescribed an ethnic citizenship law, like the one that was in force until 1999. However, Article 116(1) contains an ethnic element in adding that “German” is also who “as refugee or expellee of German origins (*Volkszugehoerigkeit*) or as his spouse or descendant has found reception in the territory of the German Reich according to its borders of 31 December 1937.” This meant that (West) Germany was not only the state of its citizens, but also of certain non-citizens, if they qualified as co-ethnics. However, as in the unity mandate in the preamble, this ethnic commitment was to be temporary only—this is expressed in the facts that Article 116 was put under a statutory proviso, and that it appears only in the last section of the Basic Law, which dealt with “Transitory and Concluding Regulations”.<sup>17</sup>

Article 116 points to the fundamental difference between Jewish and ethnic German immigration: while the former was an invitation to every Jew in the world, the latter applied only to those ethnic Germans who were “refugee or expellee.” From Article 116 alone one might conclude that the pool of potential claimants was both wider and more narrowly conceived than the actual ethnic immigration engendered by it: “wider”, because there was no geographical specification attached, so that, say, ethnic German refugees from Pinochet’s Chile would qualify as well; “narrower”, because in common understanding “refugee or expellee” is someone who is actually forced to leave one’s homeland by a persecuting power. The Federal Expellee and Refugee Law (FERL) of 1953, which spells out the statutory framework for Germany’s ethnic-priority immigration, reversed this constellation. Its Article 1(2)(3) stipulates: “An expellee is also who as German citizen or as German Volkszugehoeriger...*after the end of the general expulsion measures* has left or leaves the former eastern territories, Danzig, (the Baltic States), the Soviet Union, Poland, Czechoslovakia, Hungary, Romania, Bulgaria, Jugoslawia, Albania, or China (emphasis supplied).” This peculiar expellee, who was not actually expelled, but who had to originate from a Communist country, was labelled “resettler” (*Aussiedler*). Interestingly, this geographic restriction of expellee/resettler status, which denied the latter to German minorities in Denmark, France, or Italy, occurred “with respect to the western Allied powers”, that is, was mandated by the winners of war (Muenz and Ohliger, 1998:13). In addition, it is curious that among the listed territories for resettlers are China and Albania—not known for harboring any German minority groups. This reveals, as the administrative Expulsion Pressure Guidelines of 1986 put it, the “regime- and ideology-reference” of the notion of resettler.<sup>18</sup> In other words, only ethnic Germans under communism qualified for resettler status. By the same token, one could forfeit one’s claim by “special tie(s) to the political regime of the state of origin.”<sup>19</sup> Communists could not become

resettlers. Theirs was obviously not only an ethnic, but a political status also, betraying the pivotal role of the Cold War for shaping German ethnic-priority immigration.

Resettlers, most of whose ancestors had left the “German” lands before there even was anything akin to a German national consciousness, let alone a German nation-state (see Apel 1990), have formed the bulk of ethnic German immigration after World War II. Accordingly, what had started as a temporary measure to integrate the millions of ethnic Germans who were actually forced to leave their homeland by the advancing Red Army and retaliatory expulsion, was turned around by the Federal Expellee Law and its—rather generous—subsequent administrative implementation into an open-door policy for anyone from Eastern Europe and the Soviet Union who could claim, however remotely, German origins (Brubaker 1998:1050). It is therefore not far-fetched to assume that, much like the Israeli Law of Return, German policy quite literally produced co-ethnics where there were none before, lured by the prospect of moving into a country with vastly better living conditions.

## **Selecting Jews and Ethnic Germans**

Max Weber (1976:237) famously defined ethnicity (*ethnische Vergemeinschaftung*) as constituted by a “subjective belief in a communality of descent”. This concise definition sets ethnic groups apart from clans or kinship groups, in which common descent is not only believed, but objective fact; and from races, which are not self- but other-defined, and this with a stigmatizing intent (ibid., 239). However, for the purposes of a state’s ethnic immigration policies, which require the identification of legitimate ethnic claimants, a Weberian subjective definition of ethnicity would not do—it would cast the net too wide and invite the fabrication of ethnicity, particularly when, as in Israel and Germany, ethnic status entails significant benefits and privileges vis a vis other migrants,

and even vis a vis the domestic population. Accordingly, objective, other-defined tests of ethnicity came to complement, or even to replace, subjective recognition criteria.

The development of this has been rather different in Israel and Germany. At the behest of religious groups, Israel shifted from an initially purely subjective bona fide approach in determining Jewishness to an objective definition, as prescribed by religious Law (*Halacha*). However, it pulled the restrictive sting out of this narrow definition of Jewishness by allowing also the extended, non-Jewish family members of Jews to enter under the Law of Return, thus corresponding to the demographic imperative of containing the Arab minority. Germany, by contrast, from the start combined subjective and objective tests of ethnic Germanness. The overarching idea, however, was Germanness as essentially a matter of subjective “confession to German peoplehood” (*Bekennnis zum deutschen Volkstum*) with objective markers only as “affirmation” (*Bestaetigung*) of subjective Germanness. This recognition practice sits oddly with the stereotypical view, shared in much of the academic literature (e.g., Hampton 1995), of Germanness as constituted by objective blood ties. However, the subjective confession test had from the start a rather objective tilt, epitomized by the strange legal construction that a confession could be inherited across generations. Moreover, ironically to redress discrimination against Jewish claimants for ethnic German status, the weight shifted over time from subjective to objective criteria, whereby the latter were taken as “indicative” for the existence of subjective Germanness.

### *Subjective versus Objective Tests in Israel*

The question of how a Jew should be defined is strongly connected to the long-lasting controversy over a religious versus secular definition of the Jewish nation (see Kimmerling 1999). When the Law of Return was passed in the Knesset, the question of who is a Jew, and thus entitled

to “return” to Israel, was left unanswered. In order to avoid a political crisis with the religious parties, which demanded the adoption of the religious definition of Jewishness, no operative criteria of eligibility were specified in the law (Hacohen 1998). This non-decision strategy—widely used in Israeli politics, especially regarding the delicate relationship between state and religion—only postponed the conflict. The “Who is a Jew” question emerged as a central point of contention between supporters of a secular definition of Jewishness and supporters of a definition according to Jewish religious law.

Until 1970, the eligibility to the right of return was decided according to varying criteria, depending on coalition agreements and the political orientation of the responsible minister. The criteria oscillated between a “subjective” secular test based on the self-definition of the applicant, and an “objective” religious test that defines a Jew as a person born to a Jewish woman or converted to Judaism. The refusal of the legislator to define who is a Jew provoked several interventions by the Supreme Court of Justice. Particularly important is the Rufeisen (Brother Daniel) Case of 1958. It concerned a Jew who had applied for an immigrant visa under the Law of Return, despite his conversion to Catholicism during World War II and his service as a Catholic priest. Rufeisen claimed that, while being of Catholic faith, he still belonged to the Jewish nation. The Court rejected the petition on the ground that the term “Jew” in the Law of Return had to be interpreted according to its “common sense and popular” meaning, according to which the notions of Jew and Christian were mutually exclusive. It is important to stress that the Court decision, although recognizing that Jewish ethnicity is not neutral vis a vis religious identification, was based on an “ordinary”, secular definition of Jewishness, and not on Jewish religious law (see Richmond 1993:104-6).

In 1958, the lingering controversy over the “Who is a Jew” question caused a coalition crisis, when the National Religious Party quit the government because of an administrative directive to base nationality registrations in the population register on the individual’s bona fide declaration.<sup>20</sup> To put an end to the coalition crisis, Prime Minister Ben-Gurion directed the “Who is a Jew” question to a group of 50 Jewish religious leaders and intellectuals in Israel and abroad, the so-called “Sages of Israel” (Samet 1985). The very fact that the Israeli government requested the opinion of Jews in the Diaspora on a question with clear repercussions for Israeli law and immigration policy illustrates the complex relationships between the Israeli state and the Jewish people, wherever they may reside in the world, which defies the modern notion of a territorially bounded state accountable only to its own citizens. The majority of the participants in the “mini-referendum” endorsed a definition of Jewishness according to an objective test based on religious law, rejecting the subjective test of self-definition.

This definition of Jewishness in conformity to religious law was adopted by the new government established in 1959. Its Minister of Interior, appositely a member of the Religious National Party, issued administrative guidelines that defined a Jew as a person born to a Jewish woman or converted to Judaism according to the *Halacha*. However, in 1969 the controversy erupted again, when in the Shalit case the Supreme Court of Justice overruled the 1959 directive. Benjamin Shalit, an Israeli Jew married to a non-Jewish woman, had petitioned the Supreme Court to order the Ministry of Interior to register their children as Jews in the population registry. Ruling in his favor, the Court adopted a secular and subjective definition of membership in the Jewish people (see Richmond 1993:106-8). Although the Shalit decision did not involve the Law of Return directly, it had important ramifications for the further development of the latter. It precipitated a new coalition crisis, when the National Religious Party insisted on bestowing the religious definition of



Jewishness with statutory status through its inclusion in the Law of Return (Samet 1985). This demand was met in an amendment to the Law of Return passed by the Knesset in 1970.

The 1970 amendment introduced two important changes in the law that would have significant effects on the ethnic character of immigration and on the political controversies surrounding the Law of Return during the 1990s. An obvious compromise between religious and secular factions in government and parliament, one of the changes restricted the definition of membership in the Jewish people for the purposes of immigration, while the other expanded the right of immigration also to family members of Jews that were not deemed Jewish according to religious law. A Jew was defined, largely according to religious law, as "...a person who was born of a Jewish mother or has become converted to Judaism and who is not member of another religion." But this restrictive test was accompanied by an expansive rule extending the rights of a Jew under this and other laws (e.g., Nationality Law) 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..."<sup>21</sup> Epitomizing their expansive thrust, these rights were extended to family members of a Jew whether he or she was still alive or not, and whether he or she had immigrated to Israel or not. The main argument to justify the extension of immigration rights to *Halachic* non-Jews was to avoid the separation of mixed families with both Jewish and non-Jewish members.

It is safe to assume that in 1970 government and legislators did not fathom that twenty years later Israel would become an attractive country for non-Jewish immigrants, and that the Law of Return, the main manifestation of the Jewishness of the state, would paradoxically become a front-gate of entry and automatic citizenship for significant numbers of non-Jews. In any case, the extension of immigration rights to non-Jews did not cause significant political debate and controversy at the time (Rubinstein 1976:165), despite the usual opposition by the religious parties in the

Knesset. The parliamentary debate concentrated rather on the broad political significance of including a restrictive *Halachic* test of Jewishness in a state's secular law.<sup>22</sup>

### *Subjective and Objective Tests in Germany*

According to the Federal Expellee Law of 1953, there are two criteria for being acknowledged as an ethnic German immigrant: one had to be an expellee (*Vertriebener*) from the enumerated eastern territories, which included the “resettlers” who were not in fact expelled but deemed to suffer from repression; and one had to be either German citizen or of German origin (*Volkszugehoerigkeit*). The link between both is that one had to have suffered “expulsion pressure” (*Vertreibungsdruck*) for one's Germanness. While without expulsion pressure one could not be a resettler, administrative practice, sanctioned by decisions of the Federal Administrative Court (FAC), came to define the former in the widest possible sense. This was formalized in the Expulsion Pressure Guidelines of 1986, which state that “the oppression (*Bedrueckung*) of Germans in the resettlement territories continues to exist, (and) is generally presumed to be the essential cause for leaving...and not to be individually examined.”<sup>23</sup> According to an influential FAC decision of 1977, *Bedrueckung* was already constituted by the “solitarization” (*Vereinsamung*) of those who were left behind in the expulsion territories after the latter became largely depopulated by Germans.<sup>24</sup> This made the “expulsion pressure” criterion all but meaningless, because “solitarization” could also be seen as a result of ethnic-priority immigration itself.

Expulsion pressure thus being effectively neutralized as a selection criterion (no one from the enumerated eastern territories and states could fail in this regard), all the weight came to last on determining the “Germanness” of the applicant. This was easy for those who were Germans according to the 1913 Nationality Law, that is, the inhabitants of the former German eastern

territories or their descendants (even if they were ethnically slavic, and subsequently Polonized via so-called “verification procedures” between 1945 and 1951) (see Alexy 1989:2851). It was more difficult for non-citizens, whose Germanness had to be established through the ethnic route of *Volkszugehoerigkeit*. Article 6 of the Expellee Law lists two conditions for being ethnically German: the subjective component of a “confession” to German peoplehood and the existence of objective markers to “affirm” this confession, such as descent, language, education, and culture. As the critics of ethnic-priority immigration never failed to mention (e.g., Otto 1990:25), this definition of ethnic Germanness was copied almost verbatim from a 1939 Nazi ordinance, by means of which parts of the populations in the conquered eastern territories were to be “Germanized”.<sup>25</sup>

There was nothing in the German case like the extreme oscillation between subjective and objective recognition criteria in the Israeli case; instead, the German logic of subjective and objective tests is additive rather than substitutive. The 1980 Guidelines to Implement Article 6 of the Expellee Law (henceforth “Ethnicity Guidelines”) state that subjective and objective components were “two separate and independent legal presuppositions”, both of which had to be fulfilled in order to be recognized as ethnic German (quoted in Liesner 1988:78). The Guidelines further explicate, in excruciating detail, what counts as “confession” and what are “affirmation marks.” However, this doesn’t make each of these criteria any less muddled. “Confession” is not bona fide self-identification as in the Israeli case, but dependent on their verifiable perception by third parties before the end of the war (after 8 May 1945, the beginning of the official mass expulsions, confessions were deemed to be too exacting on the applicant). In fact, the function of “confession” in the recognition procedure was to make sure that the respective applicant had been persecuted for his or her other-perceived Germanness; accordingly, “confession” took on a rather objective dimension. A confession could be given either as “explicit declaration” (e.g., in the census, passport

applications, school enrollment, or the military draft), or in terms of “conclusive behavior”.

Regarding the second route, Article 2.3.2 of the 1980 Ethnicity Guidelines states that “the public use of German language and the tie to German culture point to a confession to German peoplehood (*Volkstum*).”<sup>26</sup> Strictly speaking, this rendered the distinction between subjective and objective recognition criteria obsolete, because objective criteria were used to determine subjective ethnic Germanness.

A second curiosity of “confession” is that it could be inherited, even into the third generation. This was within the logic of genealogical German nationhood (and sanctioned by Article 7 of the Expellee Law), but patently against the common-sense meaning of what a “confession” is. Accordingly, the expellee authorities and courts in the 1980s had to evaluate the subjective Germanness of an applicant by evaluating the subjective Germanness of his or her parents or grandparents in or before 1945. An administrative judge criticized such practice as “beyond the limits of justiciability”, in effect reducing this part of the examination to the “non-verifiable assertions of the respective applicant for expellee status” (Alexy 1989:2858). In this sense, the subjective “confession” test was in the end reduced to bona fide self-identification, as in the Israeli case.

Particularly delicate was the handling of Jewish applications for ethnic German status. After all, the Nazi model for the Expellee Law’s ethnic German clause (Article 6) had stated that “persons of species-alien (*artfremden*) blood, especially Jews, can never be German *Volkszugehoerige*, even if they have so far considered themselves as such” (quoted in Otto 1990:25). Accordingly, the 1980 Ethnicity Guidelines contain a section on how to determine the “confession of Jewish applicants.” It states that membership of a religious community is “neutral vis a vis peoplehood” (*volkstumsneutral*), which means that Jews also could have been confessing Germans.<sup>27</sup> For obvious reasons, their confession “deadline” was moved back from 8 May 1945 to 30 January

1933, the day when Hitler was elected Reichskanzler. Asking Jews also for a “confession” was, of course, commanded by the Expellee Law. However, it created special difficulties, not only because a Jewish confession was even further back in time, and thus more difficult to prove. In the multinational territories of south-eastern Europe, where many Jewish applicants for ethnic German status were coming from, Jews were themselves considered a national minority, and—as in Romania—one that was an official census category. According to the 1980 Ethnicity Guidelines, a Jewish as against a German census entry forfeited one’s German confession claim. Because of the existence of Jewish minorities in Romania, the expellee offices and administrative courts seemed to have put more exacting confession standards on Jews than on non-Jews. In one case, a court even considered the enrollment in a Jewish theological school as an indicator against confession.<sup>28</sup> Furthermore, many of the ethnic German associations in these territories, participation in which counted as confession, were anti-semitic and Nazi-oriented, and it would be a strange thing to ask Jews to have been part of that. All this indicated that for Jews it was not only more difficult, but also *made* more difficult by the expellee authorities and administrative courts, to prove that they were confessing Germans.

In 1981, the Federal Constitutional Court ruled on a number of Jewish applications for expellee status, which had been rejected by administrative courts because they all had failed the “confession” test.<sup>29</sup> This rule, which reinstated the Jewish claims, wiped out the previous strict separation between subjective and objective recognition criteria. Referring to the intentions behind the making of the Expellee Law, the Court established that ethnic Germanness was at its heart a matter of subjective confession. The objective “affirmation marks” had only a “complementary” function in establishing this confession. But this meant that the existence of objective marks could be seen as “evidence” (*Indizwirkung*) for a subjective confession, if the latter could not be determined

otherwise. This evidential nexus applied especially to applicants from the multinational states of south-eastern Europe, and to Jews, for whom because of the bigger time gap “the threshold for proving the confession to (German) peoplehood must not be set too high.”<sup>30</sup> This landmark rule changed the balance between subjective and objective components in the determination of ethnic Germanness in deeply ironic ways: in the name of establishing ethnic Germanness as essentially a matter of subjective confession, it upgraded the role of the objective “affirmation markers” as “indicative” of this confession, while downplaying the role of an independent subjective confession test.

### **Liberal and Restrictive Challenges in the 1990s**

In the 1990s, both Jewish and ethnic German immigration came to face serious social and political challenges. The external causes for this are similar, the removal of exit restrictions in the declining communist states of Eastern Europe and the Soviet Union. This greatly increased the number of ethnic claimants, many of whose veracity appeared rather dubious. In response, there has been a dual “liberal” and “restrictive” challenge to ethnic-priority immigration in Israel and Germany alike. The existence of a liberal challenge sets ethnic-priority immigration apart from “normal” (labour, family, or refugee) immigration, opposition to which has been restriction-minded only. The liberal challenge to ethnic-priority immigration articulates the points of view of other migrant or minority groups disadvantaged by, or in respect to, the priority policy. By contrast, the restrictive challenge articulates the point of view of (certain groups among) the majority population, which sees itself threatened by the cultural and economic consequences of immigration. In the specific case of ethnic-priority immigration, the restrictive challenge is either premised on (as in Germany) or directly tackles (as in Israel) a questionable veracity of claims for co-ethnicity. This questioning entails the

cognitive and evaluative transformation of “returning” co-ethnics into ordinary “immigrants”. While the duality of liberal and restrictive challenges has been the same, the nature of the restrictive challenge has been rather different in both cases considered here: religious in Israel, populist in Germany. However, the major difference has not been the kind of restrictive challenge posed, but the opposite outcomes: the resilience of Jewish immigration in Israel, and the closing down in principle of ethnic German immigration in Germany.

### *Resilience in Israel*

While still supported by a large majority of the Jewish population in Israel (64 percent according to a recent survey),<sup>31</sup> the Law of Return came under significant pressures during the 1990s. This pressure emanated from two opposite ideological sources. The first objects to the notion of Israel as a Jewish state, proposing instead a non-ethnic definition of the polity. The second challenges the (de facto) expansive secular definition of the Jewishness of the state, offering instead a more restrictive, ethno-religious conception of membership.

The Liberal Challenge. The thrust of the liberal challenge is to bring out the fundamental contradiction in the self-definition of Israel as both a Jewish and a democratic state (see Rouhana 1998; Yiftachel 1992), targeting the Law of Return as a major expression of the ethnic character of the state. In Israel, the liberal challenge builds on a minimal sense of civic stateness, with a religious-culturally neutral, plurinational *state* as the goal. In contrast to Germany, there are no significant political actors pursuing the constitution of a more inclusive, ethnically neutral Israeli *nation*. Tellingly, the Israeli liberal challenge is mainly, though not exclusively, articulated by the political and

cultural elites of the Palestinian population in Israel. For example, the celebrated Palestinian writer in Hebrew language, Anton Shammas, denounced the Law of Return as a “racist law” (1988:49). According to Shammas, the Law of Return may have been justified in the immediate wake of the Holocaust and if applied to *persecuted* Jews, but the indiscriminate granting of immigration rights to every Jew in the world was surely indefensible today (Shammas 1988, 2000). In addition, Palestinian members of the Knesset have recently picked up the notion of “a state of all its citizens,” questioning and challenging the ethnic character of the Israeli state and its exclusion of the Palestinian minority. In this context, the Arab political parties openly raised the demand to abolish the Law of Return. Their basic claim is that as long as the definition of Israel as a Jewish state stands, with the Law of Return as its key symbolic and institutional component, this state cannot be regarded as a genuine democracy. For example, Knesset member Azmi Bishara, chairperson of the (Arab) National Democratic Alliance party, characterized the Law of Return as a discriminatory law that should be revoked,<sup>32</sup> seeing this as a necessary step towards the de-Zionization of Israel and its transformation into a liberal-democratic state which is founded on non-ethnic, civic principles of membership (in Shavit 1998).

In order to highlight the discriminatory character of the law, Palestinian leaders often contrast the right of return granted to Jews with the dismal situation of the Palestinian refugees. In sharp contrast to the unrestricted immigration of Jews, the Palestinian population displaced and expelled during the 1948-49 War was never allowed to return to their homeland by the Israeli state (see Adalah 1998). This comparison is drawn by Knesset member Talab El-Sana from the United Arab List: “If the Jewish people have the right, according to the Law of Return, to come to the State of Israel, and this on the basis of a historical claim from 2,000 years ago, why is this right denied to



those Palestinians who were forced to leave their towns and villages, not 2,000 years ago, not 1,000 years ago and not 100 years ago, but only 51 years ago?”<sup>33</sup>

The liberal critique of the Law of Return has recently been adopted by “post-Zionist” Jews. Post-Zionism, while originally an intellectual and academic preoccupation, has gained considerable public attention, particularly through its popularization in the media. It claims that the Israeli state should cease to be defined according to ethnic principles, and be transformed into a “normal” liberal democracy based on the notion of ethnically neutral citizenship (see Ram 1999). Post-Zionism does not necessarily reject Zionism in toto. Rather, it reduces the latter to a historical stage in the dynamics of Israeli state and society that now should be surpassed. Like other Zionist notions, the principle of unrestricted and exclusive Jewish immigration also is viewed by many post-Zionists as an anachronism that impedes the transformation of Israel into a democratic state of all its citizens. Hence they urge the abolishment of the law (Silberstein 1999:8, 123). Post-Zionist ideas are slowly sinking into the liberal wing of Zionist parties. For instance, Knesset member Zahava Gal-On from Meretz, a “left-wing” Zionist party,<sup>34</sup> stated: “It is possible to sincerely recognize that in the Law of Return there are also racist elements, because it is based on origin and membership in a group... It is a law that discriminates between those that want to immigrate to Israel and also between Jewish and non-Jewish citizens.”<sup>35</sup> Interestingly, she proposed a German-style restriction of the right of return as applying only to Jews suffering persecution, and to establish a “normal law of immigration such as those existent in Western countries” for non-persecuted Jews.

There is no doubt that the liberal critique of the Law of Return is at the moment very weak politically, and the likelihood that it will affect a basic change in Israel’s ethnic migration regime in the foreseeable future is extremely low. Yet, the very appearance of this challenge and its growing

legitimacy reveal the emergence of cracks in the ideological foundations of the ethnic character of the Israeli state.

The Restrictive Challenge. The restrictionist attack on the Law of Return also emerged during the 1990s, as a response to the ethnic composition of the large immigration wave from the Soviet Union and its successor states.<sup>36</sup> Due to the 1970 amendment in the Law of Return that made non-Jews with family ties to Jews eligible for immigration and automatic citizenship, nearly 20 percent of the immigrants arriving between 1990 and 1994 were *Halachic* non-Jews (Tolts 1997:150). The proportion of non-Jews even increased considerably in following years (DellaPergola 1998:86). The Minister of Diaspora Affairs, Michael Melchior, reported that among the 1997 immigrants 45 percent were non-Jews; among 1998 immigrants the share of non-Jews further increased to 53 percent.<sup>37</sup> Based on figures published by Israel's Central Bureau of Statistics in 2000, roughly 300,000 of all immigrants arriving in the country during the last decade were registered as non-Jews.<sup>38</sup> An unknown, but probably large number of them are non-Jews not only according to the *halachic* definition, but also according to their religious and ethnic self-identification.

The growing numbers of non-Jewish immigrants were viewed by several segments of Israeli society, especially (but not only) the ultra-orthodox religious circles, as a severe threat to the Jewish character of Israel. This concern was first raised in 1990, just one year after the beginning of the new immigration wave. The then Ministers of Interior, Arye Deri, and of Immigration and Absorption, Yitzhak Peretz, both from the ultra-orthodox Shas Party, proposed to change the law to reduce the number of non-Jewish immigrants.<sup>39</sup> Other ministers and Knesset members from the ultra-orthodox parties explicitly depicted the non-Jewish immigrants as a threat to Israel's existence.<sup>40</sup> Even some members of Zionist secular parties expressed concern about the future of the

Jewish definition of Israel.<sup>41</sup> The print media also became involved in the mounting campaign for a more restrictive immigration policy. For example, an opinion article in the Jerusalem Post stated: “Has the Law of Return, Zionism’s ultimate instrument for the ingathering of the exiles, inadvertently become a mechanism for the creeping de-Judaization of Israel? The answer is yes, and therefore it is time, alas, to amend the law. [...] Ironic, isn’t it? A Zionist cornerstone, out of control, is contributing to the diminishment of Israel’s Jewish character.”<sup>42</sup>

Up to now, however, all attempts to limit the immigration of non-Jews have failed. In order to understand why, one must consider the weight of the arguments mustered in defence of the law, which—in the order presented here—make reference to the Holocaust, demographic fears, and the risk of a cataclysmic (restrictive-cum-liberal) challenge to the Law of Return as such. The first line was to frame the eligibility criteria in the Law of Return as a response to anti-Semitic ideology in general, and to Nazism in particular. In order to legitimize the granting of immigration rights and automatic citizenship to the non-Jewish grandchildren of Jews, many of the supporters of the Law of Return in its present form link it to the definition of Jewishness practiced by the Nazi regime during the holocaust. For instance, an editorial opposing any change in the law claims: “Providing a safe haven was our *raison d’être*. But now we are considering changing the message. And the dangers inherent in doing so are vast. Legislators beware... (N)othing could be more immoral than for the Jewish state to deny a home to the same category of Jew that Hitler wanted to exterminate.”<sup>43</sup> Similarly, the Minister of Immigration and Absorption, Yael Tamir (known in academic circles for her work on “liberal nationalism”), declared in the Knesset: “There are reasons for the definition of Jewishness and the definition of who is entitled to immigrate under the Law of Return. They derive from Jewish history. They are not disconnected from the Jewish past, from the persecutions of Jews.

The state of Israel was established as a shelter ... for the Jewish people as they were defined, to our regret, by their persecutors in the Diaspora, and not as they were defined by the *Halacha*.”<sup>44</sup>

A second argument raised by the defenders of the Law of Return in its presently expansive version relates to the demographic functions of immigration within the context of the Israeli-Palestinian conflict. As Lustick (1999) pointed out, to maintain the demographic advantage over the Palestinian minority—whether in the whole “Land of Israel” (including the occupied territories) or only within the State of Israel’s recognized borders—has been the main reason for the unwillingness of most political forces to amend the law in a restrictionist direction. In this vein, Knesset member Moshe Arens, a former Minister of Defence and of Foreign Affairs from the Likud Party, explains his opposition to limiting the number of non-Jewish immigrants from the former Soviet Union: “I’m afraid that if we accept the proposal of Knesset member Halpert [to restrict the eligibility of non-Jews], ... we might put at risk the Jewishness of the state, because today we have 20 percent of Arabs in the country. The natural increase of the Arab population is higher than the natural increase of the Jewish population... (If we don’t succeed in increasing the percentage of Jews in the population, in not too many years we will face a huge (demographic) problem.”<sup>45</sup> Expressing a mainly secular notion of membership in the Jewish people, the defenders of *Halachic* non-Jewish immigration for demographic purposes hold that the newcomers would eventually be integrated, formally through conversion to Judaism, and substantially through their participation in central Jewish-Israeli institutions, such as the educational system and the army.<sup>46</sup>

The third line of reasoning by the opponents of restricting the law is interestingly connected with the liberal challenge to the Law of Return. The late Prime Minister Barak declared, not only that the Law of Return should not be changed, but also that he would not permit any discussion of it in the cabinet.<sup>47</sup> This stance is driven by the fear that an amendment in the law limiting the eligibility of

non-Jews, or even a discussion of such an option, might open the “pandora’s box” of a thorough public debate on the principle of ethnic-priority immigration as such, enlarging the political opportunities also for the *liberal* challengers to the Law of Return. This is intimated by the Minister of Immigration and Absorption, Yael Tamir: “(W)e would throw ourselves into a very painful and unnecessary debate, in which the claim will be raised—that I do not want to see raised—that the Law of Return should be abolished completely.”<sup>48</sup>

To sum up, the challenge to the Zionist principle of Jewish-priority immigration, whether from a liberal or from a religious-restrictionist perspective, has failed so far. Yet, the public debate on the Law of Return is in motion. The emergence of this debate, triggered by the ethnic composition of the immigration wave from the former Soviet Union, shows more generally the gradual erosion of Zionist hegemony in Israel and the growing political power and increasingly confrontational politics conducted by the Palestinian minority. Should the national conflict with the Palestinians and the Arab countries come to an end (admittedly an uncertain outcome for the time being), the controversy over the ethnic character of the Israeli state and the tensions between ethnic and civic components in its definition of membership are likely to exacerbate. Then, with the weakening of the “demographic imperative”, the political space for the questioning of Jewish-priority immigration, from both liberal and restrictive perspectives, would widen significantly.

### *Demise in Germany*

Between 1950 and 1987, about 1,4 million resettlers were admitted to the Federal Republic, an annual trickle of just 37.000. Low numbers kept German ethnic-priority immigration outside the public limelight. This abruptly changed in 1988, when due to the liberalization of Eastern Europe and the Soviet Union the number of admitted resettlers skyrocketed, to about 220.000 in

that year alone. Between 1988 and 1997, a total of 2.2 million resettlers were admitted—which is almost double as much as in the preceding four decades (Muenz and Ohliger 1998).

As in the Israeli case, escalating numbers of ethnic migrants created pressures on the underlying policy. In a second parallel to the Israeli case, these pressures originated from both liberal and restrictive positions. As in Israel, the liberal challenge spoke on behalf of those migrants and minorities who were disadvantaged vis a vis ethnic migrants, in this case asylum-seekers and the guestworker immigrants. However, the restrictive challenge was different in kind. There could not be an ideological challenge and concomitant plea to return to the original spirit of Germany's "Law of Return," because the rationale of this policy—mastery of the consequences of the war—was simply no longer valid. There was no original spirit to recapture. Witness that, in contrast to Israel, an equally doubtful veracity of claims for co-ethnicity was generally presumed,<sup>49</sup> and did not trigger calls to admit only "true" ethnic Germans. Instead of an ideological challenge, Germany's restrictive challenge was a populist challenge, in which the economic and social privileges attached to expellee status lost their public support. The populist challenge moved the center-right government toward a gradual retreat from ethnic-priority immigration.

The Liberal Challenge. Just about the time when the center-right government elevated the reception of ethnic German resettlers to an "act of national solidarity" (Chancellor Kohl, quoted in Levy 1999:132), the same government responded to a swelling number of asylum-seekers by trying to renege on the constitutional asylum right, as guaranteed by Article 16 of the Basic Law. This inequity was doubly scandalous, because both asylum-seekers and the resettlers (who were officially assumed to suffer from "expulsion pressure") were notionally "refugees." However, how could resettlers from post-communist Poland, Hungary, or Romania still be subject to "expulsion

pressure,” when according to the new “safe country of origin” rule in asylum policy the same states were officially labelled “free of persecution” (*verfolgungsfrei*), so that asylum requests by people originating from these states were generally denied? The contradictory treatment of both types of “refugees” was first attacked by a leading SPD politician, Oscar Lafontaine. Calling the center-right government’s preference for ethnic German over non-German refugees “*Deuschtuemelei*” (an intranslatable term denoting ethnic nationalism), Lafontaine declared: “I have certain problems to admit German-origin people in the fourth and fifth generation, while coloured people whose lives are at risk are rejected.”<sup>50</sup> Chancellor Kohl, known externally for his commitment to unifying Europe but on the domestic scene a long-standing proponent of an resuscitated ethnic sense of national community, derided this statement as “disgusting,” and he reviled the Germans would be a “morally deprived people” if they did not stand by their “compatriots.”<sup>51</sup>

As in Israel, this was a struggle between liberal and ethnic interpretations of the German state, the liberals rallying around the defense of the constitutional asylum right (Article 16), the ethnics pointing to the commitments enshrined in the Basic Law’s ethnic German expellee clause (Article 116). A first difference, however, was that the commitment to asylum-seekers was an abstract human rights commitment, directed at people outside Germany’s territorial and national boundaries, whereas the Israeli liberals’ reference to disadvantaged Palestinians meant a group that was not only within the state’s borders but considered its territory their ancient homeland, much like Jews did. In this regard, the structural equivalent to Palestinians in Israel are the descendants of non-European guestworkers (especially Turks). They were kept out of the citizenry by archaic citizenship laws that favoured the resettlers, even though the latter were without any concrete ties to German society. This was a much more powerful comparison, because it pointed to a discriminated group in, rather than outside, society. Calling those Polish, Russian, and Romanian newcomers “Germans who

want to live among Germans” (Liesner 1988:3), while calling those who were born and raised in Germany “foreigners,” showed *in extremis* the obsolescence of the ethnocultural idiom. Liberal challengers of ethnic-priority immigration, in fact, were drawing references both to disadvantaged asylum-seekers and guestworker immigrants. If the asylum-seeker reference was more prominent, this was simply because this was the largest migrant group in the early 1990s, singled out by the resettler-friendly center-right government for restrictive measures.

The notion of *Deuschtuemelei* and the inclination of the German liberal challenge to associate the conservative government’s ethnic-return policy with the Naziist “*Heim-ins-Reich-Politik*”, which had a basis in some questionable administrative practices,<sup>52</sup> indicates a second difference to the Israeli case—the obvious delegitimation and decline of an ethnocultural understanding of nationhood. Positively phrased, the German liberal challenge to ethnic-priority immigration could rely not only on a minimal sense of civic stateness, based on the procedural logic of representative democracy and legal universalism, but also on a thicker sense of civic nationhood, according to which it has become anachronistic to define Germanness on the basis of ethnic genealogy (for details see Levy 1999). This made the German liberal challenge potentially much stronger than its Israeli counterpart, which remained limited to a few (Arab and “post-Zionist”) fringe voices, outside the political and societal mainstream.

At the discursive level, the German liberal challenge came in two variants. One was to consider resettlers as just one of several immigrant groups, and to call for a comprehensive and self-declared “immigration policy” to take care of all of them. As a Green MP put it, “resettlers are immigrants and refugees, independently of their ethnic origins.”<sup>53</sup> Another variant was to take sides, particularly with asylum-seekers against resettlers, as in the Lafontaine response. Behind these responses were different images of resettlers: as what they were, a sociological minority, like



asylum-seekers eager to escape poverty and state-breakdown; or as what they were made to be in official discourse, co-ethnics, and thus unloved relics of ethnic nationhood.

The Restrictive Challenge. In the context of a center-right party coalition in power during most of the 1990s, the restrictive challenge had to be more immediately effective than the liberal challenge to ethnic-German immigration. Its focus became the economic and social benefits bestowed on ethnic newcomers by the state. The Expellee Law of 1953, the legal basis of ethnic-priority immigration, was in the first a social integration law, which provided a long list of positive discrimination measures. Elderly resettlers, for instance, received fictionally wage- and employment-based pensions that equalled, sometimes even exceeded those of comparable native Germans, even though they had never worked in Germany and thus had not contributed to the social security fund.<sup>54</sup> “Who has lost his home and property because of his Germanness may well expect that the great insurance community of West Germany will compensate him for this,” said the responsible minister during the crafting of the Expellee Law.<sup>55</sup> This reasoning may have been appropriate in early 1953, when the number of resettlers was down to a trickle of 4.000 per year. It was anachronistic when more than 20 times as many arrived in 1988, with a rather lesser sense of obligation on the part of West Germany’s “great insurance community.” In addition, there was preferential access to public housing, immediate unemployment benefits (based on qualifications and the type of work performed before resettlement), compensation for lost property according to the Equalization of Burdens Act (*Lastenausgleichsgesetz*), subsidized loans for furnishing apartments or opening businesses, preferential hiring (employers who hired resettlers were reimbursed fifty percent of employment costs), even lower car insurance rates (see the entire catalogue in Otto 1990:193-208).

Against the backdrop of increasing mass unemployment and slimming welfare benefits for natives, the horn of plenty showered over the resettlers had to stir massive resentment and social envy. By 1990, over 80 percent of the public was in favour of restricting ethnic immigration, which was deemed by most to be economically rather than ethnically motivated (Levy 1999:143). Pushed by the recent successes of the far-right *Republikaner* party, which was the first to scandalize the privileges for ethnic resettlers, even the Bavarian sister party of the ruling CDU, the CSU, started campaigning against overly generous pension schemes for resettlers (Puskeppeleit 1996:112).

In response to the dramatic collapse of public support for ethnic German immigration, the center-right government quickly retreated from its initial approach to make the newcomers' swift integration a 1950s-style "national task." Just one year after passing an ambitious Special Programme for Integrating Resettlers in 1988, the focus shifted toward keeping resettlers in their places of origins, by means of development aids and securing *in situ* minority and self-government rights (Puskeppeleit 1996:104). For those still bent on immigrating, a series of laws has been passed since 1989 to make this both less lucrative and more difficult. The Integration Adjustment Act of January 1990, among other things, replaced wage-based unemployment benefits with a standardized and more modest "integration money", limited to one year. The interior minister saw this as a response to populist pressure: "(P)ossible irritations among the native population about the...favouritism of *Aussiedler*...are counteracted" (quoted in Levy 1999:167). Six months later, the Resettler Reception Law, in a copy of the British "entry clearance" system, shifted the application procedure to the countries of origin. This amounted to an unofficial quota system (and approximation of ethnic-return to "normal" immigration), almost halving the number of admitted resettlers, from 400.000 in 1990 to 220.000 in 1991.

The restrictive trend culminated in the Law on Settling the Consequences of the War (*Kriegsfolgenbereinigungsgesetz*) of 1993, which phased out all special laws dealing with war consequences, thus signalling the official end of the postwar period. This law was a compromise between the ruling CDU and the oppositional SPD. The SPD wanted to put an end to ethnic German immigration as such by means of a “fixed day” (*Stichtag*), after which no further applications were to be accepted, arguing that after the liberalization of Eastern Europe there was no longer any “expulsion pressure.” On the other side, the CDU rejected such a “fixed day” rule, but interestingly with the defensive argument that the resulting “exit panic” would further increase rather than decrease ethnic immigration (Alexy 1993)—the wish to decrease ethnic German immigration had evidently become consensual by then. There was particular bite to the SPD demand, because the parliamentary opposition’s consent was needed for the center-right government’s plan to curtail the constitutional asylum right. In the so-called Asylum Compromise of December 1992, the SPD gave in to restrict asylum, but only at the price of restricting ethnic German immigration.<sup>56</sup>

Accordingly, the *Kriegsfolgenbereinigungsgesetz*, which (among other things) realizes the *Aussiedler* component of the Asylum Compromise, bears the mark not only of the restrictionist, but also of the liberal challenge to ethnic-priority immigration.

The crucial novelty of the new law is to deny the status of resettler to all persons born after 1 January 1993. This means that ethnic German immigration has in principle come to an end. For those still eligible to apply, the procedure has been fundamentally reshuffled. First, there is now a formal quota restriction of 200.000 admissions per year (reduced to 120.000 in the late 1990s). Secondly, except for applicants from the former Soviet Union, the existence of expulsion pressure is no longer presumed, but to be proved by the applicant. Thirdly, the criteria for *Volkszugehoerigkeit* have been tightened for applicants born after 31 December 1923. In the

revised Article 6 of the Expellee Law, the proof of descent has been upgraded to a third separate recognition criterion, next to the subjective confession and objective affirmation-mark tests.

Moreover, the confession has to be present in the applicant him- or herself; it can no longer be inherited from parents or grandparents. Finally, “language” is now the key objective affirmation mark, prior to “education” and “culture.” This last change, innocent as it seems, marks a fundamental departure from previous recognition practice, in which the very absence of German language skills was taken as sign of oppression and forced assimilation, and thus held in favor of the ethnic claimant.

The centrality of language for being recognized as ethnic German has been affirmed in a 1996 landmark rule of the Federal Administrative Court.<sup>57</sup> The court argued that there is a “close internal connection” between language, on the one hand, and education and culture, on the other hand; someone whose mother tongue was Russian “normally belongs to Russian culture,” and thus could not qualify as ethnic German. This important rule, which came to legitimize the introduction of very tight language tests in the admission procedure, also implies a redefinition of ethnic Germanness. Someone, like the Russian plaintiff in this case, who descended from an ethnic German mother (who in fact already lived as resettler in Germany) and whose “confession” to German peoplehood was not in question, still did not qualify as ethnic German because he was “incapable of conducting a simple conversation in German language.”<sup>58</sup>

The new centrality of language competence is less the result of a new vision of ethnic Germanness than of the mundane need to better “integrate” ethnic migrants. This stress on “integration” as such is difficult to reconcile with the official logic of “returning” co-ethnics. Regarding its recognition function, harsh new guidelines stipulate that the language test, obligatory since 1996, cannot be repeated, because its purpose is the “determination of a status.” In 1996/7,

over one third of Russian applicants failed the individual language test and thus once and for all forfeited their chances to be admitted as resettler. At the same time, the German government generously finances German language classes in Russia, which are currently attended by over 100.000 potential resettlers. This shows the “integration” concern behind the mandatory language test—the German government simply wants to make sure that resettlers are not subject to “integration” problems in Germany. Making language competence the key to admission amounts to conceding the obsolescence of “ethnic return” migration. The new language policy is contradictory also in a second respect: if its official purpose is “determination of a status”, why does the government help to create this status by means of subsidized language classes? As Muenz and Ohliger (1998) indicate, the language classes could have the “unintended effect” of increasing rather than decreasing the number of potential claimants. However, this unintended increase is bound to be short-term only, because there cannot be ethnic Germans born after 1992.

## **Conclusion**

The first objective of this article was to provide analytical descriptions of an immigration policy that selects newcomers according to putative co-ethnicity. One common feature of such policies is to force the state into the difficult business of checking individual identity claims—interestingly, not unlike asylum policy, in which individual biographic claims are the subject of an excruciating recognition procedure. We showed that these classificatory practices by states are not determined by a fixed sense of “identity”, but instead are moldable, subject to conflict, and injected with a heavy dose of political exigency. In Israel, the question “Who is a Jew” has been anything but clear, and the eligibility criteria of the Law of Return have been the stake of permanent conflict between secular

and religious understandings of Jewishness. In Germany, the most recent emphasis on language in determining ethnic Germanness is entirely the result of political exigency. It responds to the oddity of sociological non-Germans entering as official co-ethnics, which had brought up the public against the policy and has found concrete manifestation in obvious problems in socially integrating the latest wave of *Spaetaussiedler*, particularly from ex-Soviet Eurasia (e.g., Dietz and Hilkes 1994). If the government still insists that its language test is (a non-repeatable) determination of a status, and thus reflective of (its view of) ethnic Germanness, it also admits that this status is more the result of its own policy than of primordial ethnic Germanness.

This indicates a second feature of immigration policies based on co-ethnicity: the production of ethnicity by the very policies that are meant to presuppose and to passively register this ethnicity. This paradox is also known from affirmative action policies in the United States, in which preferential race quota in college admission or public employment provide an incentive on the part of individuals for identifying along “minority” lines (see Ford 1994). The receiving state’s production of ethnicity is amplified by some objective demographic features of the sending regions. The pool of applicants for ethnic German or Jewish status in Eastern Europe and the former Soviet Union is anything but sharply bounded; instead, it is characterized by high degrees of intermarriage and cultural and linguistic assimilation with their local environments (see Muenz and Ohliger 1998). It is therefore not far-fetched to assume that not “real” but the “official” ethnicity of the state is driving this strangely “non-Euclidian” immigration, in which “outmigrations may increase rather than decrease the reservoir of potential ethnomigrants” (Brubaker 1998:1053). There is a thin line between fabricating the requisite ethnicity and exhausting the wide opportunities provided by the state—the German government-financed language courses in Russia quite literally help produce the co-ethnics that are then subjected to a (paradoxically language-centered) status test. Unfortunately, there is a lack of

reliable data on this creation of ethnicity by the status-granting state. A rare study of the situation in the Russian city of Brest showed that the size of the self-declared Jewish population doubled between 1989 and 1996, the precise moment of heavy out-migration of Jews to Israel and Germany (quoted in Muenz and Ohliger 1998:42-43, fn.41).

A third feature of ethnic-priority immigration policies is their susceptibility to a “liberal” challenge, even in proverbially ethnic states like Israel and Germany. This is because such policies conflict with constitutive principles of liberal stateness, such as public neutrality and equality (see Dworkin 1978). At the academic level, liberals have usually argued in favour of open borders (Carens 1987), and a policy that makes closed borders more permeable for some should not further incense them—if those “some” had not been singled out according to ascriptive group criteria, which entails discriminations for other immigrant and minority groups. Since ethnic-priority immigration is, after all, “immigration,” it has also provoked a restrictive challenge, which addresses the economic and cultural costs of immigration in general; in particular, the restrictive challenge is premised on questioning the veracity of co-ethnicity claims, as a result of which returning co-ethnics are refashioned as ordinary immigrants. Interestingly, while obviously differently motivated, the liberal and restrictive challenges have “synergetic” effects, one reinforcing the other. The liberal position is usually not against the entry of putative co-ethnics as such, but against their *exclusive* or *preferential* entry, opting instead for an ethnically neutral immigration policy. In turn, the restrictive position is usually not about seeking to keep out “true” co-ethnics, but to keep in check “creative” re-identifiers, and resenting to give them entitlements that exceed those of the domestic population, particularly in the context of slimming welfare states. However, in their “synergetic” confluence the liberal and restrictive challenges can grow into a severe threat to ethnic-priority immigration as such. This has been the German experience, in which the combination of the restrictive and liberal

challenges in the Asylum Compromise of 1992 led to the death in principle of ethnic-German immigration. Likewise, the unwillingness of the mainstream political forces in Israel to change the Law of Return in a restrictive direction (as demanded by orthodox-religious circles) was encouraged by the fear that this might also promote a full-scale liberal attack on the Law of Return as such, and thus endanger the Jewish character of the state.

Turning to our second objective, to explain divergent outcomes in Israel and Germany, we argued that for historical and geopolitical reasons the political space for raising the liberal and restrictive challenges was differently wide in both cases. *Historically*, the very encounter between Germans and Jews under Nazism had compromised ethnic statehood in Germany, allowing only for a temporally and spatially qualified ethnic-priority immigration policy. By contrast, the Holocaust has provided a powerful founding myth for Israel as the place for the “Ingathering of the Exiles”, without any temporal or spatial limitations.<sup>59</sup> As we saw, the Holocaust motif was also effectively used to deflect the restrictive-religious challenge to the Law of Return in its current, expansive form. *Geopolitically*, Israel’s interest in Jewish immigration is enduringly tied up with the national conflict with the Palestinians, whereas Germany’s interest in ethnic-German immigration was temporally confined to the Cold War context. In addition, Germany’s privileged position in the heart of uniting Europe, with no territorial disputes between rivalling ethno-national groups, has deprived ethnic-priority immigration of all secondary, strategic purposes, next to complying with an individual right of the ethnic claimant; on the contrary, this geographic position allowed Germany to partake in a general trend toward de-ethnicized state- and nationhood, which, for instance, is expressed in the liberalization of nationality laws across the member states of the European Union (see Hansen and Weil 2001). By contrast, Israel’s precarious position as a Jewish state in the Arab Middle East gave



rise to a demographic imperative of such magnitude that all liberal or restrictive challenges to ethnic-priority immigration have (so far) come to nil.

The full scale of Germany's turn away from ethnic-German immigration, and Israel's continued commitment to Jewish immigration, may be illustrated by two contemporary vignettes. Just about the time when the German government went about to restrict the admission of ethnic Germans, it opened the doors widely for Jewish immigrants from the former Soviet Union. Since the passing of the 1991 Quota Refugee Law, some 115,000 Russian Jews have seized the opportunity of immigrating freely (without numerical restrictions and without individual screening) to Germany, quadrupling the size of the small Jewish community in the *Land der Taeter* (Laurence 2000). In a delicate twist, the Israeli government has repeatedly urged the German government not to grant automatic refugee status to Russian Jews, claiming the latter for its own nation-building purposes. Already in 1987, the same conservative government that would soon restrict the entry of ethnic Germans refused such pressure by Israel: "In view of her historical past, Germany does not want to close her borders for Jews from the Soviet Union," said a government official (quoted in Harris 1998:117). Admitting Jewish immigrants is the latest instance in this country's politics of *Wiedergutmachung* (reparations), in which Jews obviously take a higher order of priority than co-ethnics.

A partial structural equivalent on the Israeli side would be restrictions on Jewish immigration, and an open-door policy for Palestinians. The "right of return" for the 3.5 million Palestinian refugees actually was a central stake in the recent aborted peace negotiations between the late Prime Minister Barak and the Palestinian leadership. It was overwhelmingly rejected even by liberal Israeli intellectuals and peace activists. An open letter "to the Palestinian leadership" by Amos Oz and other leading Israeli intellectuals declares that "(w)e shall never be able to agree to the return of the

refugees to within the borders of Israel. The meaning of such a return would be the elimination of the state of Israel.”<sup>60</sup> Should Israel acknowledge the “right of return” for Palestinians, worries another liberal intellectual, they might become “the biggest population group in a state whose essence and symbols they had always rejected, and whose extinction had been their highest aim”: “Therefore—no thank you, I do not want to be a Jewish minority in Israel.”<sup>61</sup>

This wholesale rejection of the Palestinian “right of return” invokes the demographic imperative not to be outnumbered by Arabs, which has been a central element in the resilience of Jewish-priority immigration in Israel. It also shows that the definition of Israel as a Jewish state prevails; no “civic” transformation of Jewish-Israeli nationhood is in the making. By contrast, the decline of ethnic German immigration is closely linked to the rise of a new civic-territorial identity in postwar Germany (see Levy 1999). If there still is an “ethnocultural idiom of nationhood” (Brubaker 1992) in Germany, it is not readily visible in the disparate treatment of ethnic Germans and Jews for immigration purposes, and at best has taken on strangely inverted forms.<sup>62</sup>

We started with the (mouthful of a) promise that the study of ethnic-priority immigration opens up a window into the constitution and contestation of the boundaries of the national community. This raises the question, Are ethnic-priority policies merely expressive of (otherwise determined) boundary definitions, or do they shape these definitions themselves? The answer is: both. In the same vein, Daniel Levy (1999: abstract) argued that the scaling-down of ethnic-German immigration both “reflect(s) and reinforce(s)” the rise of a civic identity in contemporary Germany. Because we took ethnic-priority immigration policies as dependent variable, our focus was naturally on the expressive rather than generative side of these policies, with the reservations, of course, that we made regarding drawing a “straight line” between reified national identities and ethnic immigration policies. However, once a policy has been set, it in turn affects the boundary definitions

that helped it into being. After the demise of ethnic-German immigration, which will be complete only in a generation or so, a major institutional expression of ethnic stateness will have disappeared in Germany. The default result of this must be the further strengthening of the civic notion of nationhood that had already played a (however circumstantial) part in bringing down ethnic-German immigration. Conversely, the resilience of Jewish immigration is not just expressive of, but reproducing the ethnic self-definition of the Israeli state as a Jewish state. Note the superb irony that this is attained through admitting also Halachic or even self-defined non-Jews, which might eventually lead to the rise of a minority identity of the Russian newcomers, and thus add to the already considerable challenges to the Jewish definition of Israel. Conditioning and conditioned at the same time, the boundaries of the national community are not fixed but fluid, among other things, as a result of a state's ethnic immigration policies.

## **Endnotes**

<sup>1</sup>. These dimensions are inductively derived from a study of eight countries, which is currently conducted by XXX.

<sup>2</sup>. Examples of citizenship (or country-of-origin)-based ethnic-priority policies are the national origins quota in place in the United States until 1965; or, to cite a contemporary example, the preferences in the Portuguese immigration and nationality laws and policies for citizens from Lusophone countries.

<sup>3</sup>. The distinction between "civic" and "ethnic" nationhood is a central topos in the nations and nationalism literature. Going back to the German historian Friedrich Meinecke, it has found its most concise sociological formulation in Rogers Brubaker's (1992) now classic comparison of France and Germany.

<sup>4</sup>. Primordialism of this sort is admittedly more widespread in normative political theory than in empirical sociology. In normative political theory the argument goes like this. Borders, while arbitrarily set, do not lack moral significance. They allow political communities to flourish, which in turn provide security, meaning, and liberty to the individual. These communities are necessarily bounded and particularistic, and they are free to select new members that reinforce their respective

self-conceptions. Primordial reasoning on the normative dimension of immigration policy can be found both among communitarians (Walzer 1983) and—more implicitly—among liberals (Kymlicka 1995). An excellent critique of the “genteel vision of politics” underlying Kymlicka’s (implicit) account is Laitin (1998). On the side of empirical sociology, even the stellar and highly differentiated approach by Brubaker (1992) succumbs to the pitfalls of primordialism when he says: “The French understand their nation as the creation of their state, the Germans their nation as the basis of their state” (p.184), from which he derives Germany’s “marked openness toward ethnic Germans” (p.165). Brubaker recognizes empirical pressures on this linkage, but cannot conceptually account for them within his overall culturalist approach. Much less sophisticated exemplars of historical-sociological primordialism are Schnapper (1994) and Fulbrook (1996); an anthropological variant, which grounds state behaviour toward immigrants in strangely unchanging family structures, is Todd (1994).

<sup>5</sup>. We say “at best”, because revisionist immigration historians have convincingly refuted the Tocqueville-Myrdalian “anomaly” view of the racist citizenship and immigration laws in force until 1952 and 1965, respectively, showing instead the (most often invisible) racial boundedness of the melting-pot ideal and of American republicanism (Jacobson 1998; Ngai 1999; King 2000).

<sup>6</sup>. We admit that the ethnic-civic distinction has mostly been made at the nation-, not the state-level, that is, at the level of culture, not of political institutions. In this vein, Hans Kohn defined nationalism, with Zangwill and Weber, as “a state of mind.” However, he continues that this is a state of mind “striving to correspond to a political fact” (Kohn 1944:19), that is, to find embodiment in a state. Looking at it from the result, this permits an application of the ethnic-civic distinction to the state, as we wish to do in the following. We also use the notions of civic and liberal stateness interchangeably.

<sup>7</sup>. Law of Return (5710-1950). The English text of the Law can be found in the website of the Israel’s Ministry of Foreign Affairs ([www.Israel-mfa.gov.il](http://www.Israel-mfa.gov.il)). The term *oleh* refers to a Jewish immigrant to the Land of Israel.

<sup>8</sup>. Knesset Records, 3 July 1950. Vol. 6, p. 2037. The perception of Jewish immigration not as “immigration” but as “return” is reflected also in the Hebrew word chosen for it: not *hagirah*, the Hebrew word for immigration, but *aliah*, an ideologically charged expression that literally means “ascension”.

<sup>9</sup>. Knesset Records, 3 July 1950. Vol. 6, p. 2035-2048.

<sup>10</sup>. David Ben-Gurion, in Knesset Records, 3 July 1950. Vol. 6, p. 2037.

<sup>11</sup>. The goal of increasing fertility among the Jewish population has occupied a prominent place in the discourse about social policy in Israel, and some policy initiatives, such as the increase of child allowances during the sixties and seventies, have been linked to that goal, though mainly at the declarative level. Nevertheless, due to a rising standard of living, fertility rates among the Jewish population, except in the ultra-orthodox community, have steadily decreased.

<sup>12</sup>. Most notably in terms of the Bund fuer Heimatvertriebene und Entrechtete (BHE), which entered the federal parliament in 1953 with 5.9 percent of the national vote. Successful expellee reception and integration contributed to its demise by 1957.

<sup>13</sup>. In the year of the world economic crisis (1929), the Weimar government was simply short of money to accommodate the would-be resettlers. After protests by ring-wing parties, among them

Hitler's NSDAP, some 5.600 German-Russian peasants still had to be admitted (see Otto 1990:17).

<sup>14</sup>. A weak equivalent to demographic considerations in Israel is the pointing out by some conservative voices in Germany's immigration debate that the size of its immigrant population had to be kept small, because the Federal Republic was "a state created by the German people for the German people with the purpose of national reunification" (Uhlitz 1986:145).

<sup>15</sup> This does not mean that there were no internal costs to (West) Germany's ethnic orientation as an "incomplete" nation-state geared towards "reunification": they were shouldered, for instance, by second- or third-generation Turkish "guestworkers" who, until the early 1990s, remained excluded from the citizenry by an ethnic citizenship law. See Koopmans (1999).

<sup>16</sup>. Article 79 (3) of the Basic Law explicitly invests the human rights catalogue in Article 1 to 20 with a *Ewigkeitsgarantie*, that is, immunity from future revision or amendment.

<sup>17</sup>. Ethnic interpretations of the Basic Law, which draw their ammunition from the unity mandate in the Preamble and the ethnic refugee clause in Article 116 (e.g., Uhlitz 1986), ignore the temporariness of these provisions.

<sup>18</sup>. The 1986 Expulsion Pressure Guidelines are reprinted in Liesner (1988:97-107).

<sup>19</sup>. Ibid., p.102.

<sup>20</sup>. The directive was deemed applicable also to the definition of Jewishness within the Law of Return.

<sup>21</sup>. Law of Return (Amendment 2, 5730-1970).

<sup>22</sup>. Knesset Records, 9-10 February 1970. Vol. 56, pp. 723-747, 751-785. 10 March 1970. Vol. 57, pp. 1118-1145.

<sup>23</sup>. Quoted in Liesner (1988:99).

<sup>24</sup>. BVerwG 52, 167, 177, as quoted in the Expulsion Pressure Guidelines (Liesner 1988:99).

<sup>25</sup>. Before the occupation of Poland, in September 1939, already more than ten million people had been "Germanized" this way, in Austria and Czechoslovakia (Otto 1990:64).

<sup>26</sup>. Quoted in Liesner (1988:81).

<sup>27</sup>. Membership and a commitment to the Zionist movement (including immigration to Israel) also did not count as indicator against German *Volkszugehoerigkeit*.

<sup>28</sup>. Referred to in BVerfGE 59, 139.

<sup>29</sup>. BVerfG 59, 128 (Decision of 16 December 1981).

<sup>30</sup>. Ibid., p.159.

<sup>31</sup>. The Jerusalem Post, 4 April 2000.

<sup>32</sup>. Knesset Records, 3 November 1999 ([www.knesset.gov.il/tql/knesset/knesset15/](http://www.knesset.gov.il/tql/knesset/knesset15/)).

<sup>33</sup>. Knesset Records, 7 July 1999.

<sup>34</sup>. The right-left political spectrum in Israel is mainly defined according to the parties' positions concerning the national conflict with the Palestinians and Arab countries, and other political issues such as the state-religion relationship. The left wing endorses more moderate positions concerning the national conflict, the right wing a more militant stand. With respect to state-religion matters, the left wing tends to endorse more secular postures. It is in these terms that Meretz is considered the most "leftist" Zionist party.

<sup>35</sup>. Knesset Records, 1 December 1999.

- <sup>36</sup>. There is also controversy over the immigration of Christian Ethiopians of Jewish descent or with Jewish family connections (known as Falas Mura). Despite the demands of Jewish-Ethiopian activists in Israel, the state refuses to recognize them as entitled to immigrate under the Law of Return. Some of them are being allowed to immigrate under special schemes of family reunification (see Kaplan and Salamon 1998).
- <sup>37</sup>. The Jerusalem Post, 28 October 1999; 17 November 1999.
- <sup>38</sup>. Central Bureau of Statistics, Press release 108/2000, 8 May 2000.
- <sup>39</sup>. The Jerusalem Post, 20 July 1990; 28 November 1990.
- <sup>40</sup>. See Meetings of the Knesset Committee on Immigration, Absorption and Diaspora Affairs, 9 November 1999; 24 January 2000; and Knesset Records, 24 November 1999.
- <sup>41</sup>. See for example Chairperson of the Knesset Committee on Immigration, Absorption and Diaspora Affairs Naomi Blumenthal and Knesset member Tzipi Livni, both from Likud party, in Meeting of the Knesset Committee on Immigration, Absorption and Diaspora Affairs, 6 December 1999; Minister of Justice Yossi Beilin from the Labor party, in Meeting of the Knesset Committee on Immigration, Absorption and Diaspora Affairs, 24 January 2000.
- <sup>42</sup>. The Jerusalem Post, 5 December 1999.
- <sup>43</sup>. The Jerusalem Post, 3 December 1999.
- <sup>44</sup>. Knesset Records, 24 November 1999.
- <sup>45</sup>. Meeting of the Knesset Committee on Immigration, Absorption and Diaspora Affairs, 9 November 1999.
- <sup>46</sup>. See for example, Knesset member Moshe Arens and Knesset member Michael Nudelman, from the Russian immigrants' party Yisrael Beiteinu, in Meeting of the Knesset Committee on Immigration, Absorption and Diaspora Affairs, 9 November 1999; Knesset Speaker Abraham Burg, Knesset Records, 8 December 1999.
- <sup>47</sup>. The Jerusalem Post, 29 November 1999.
- <sup>48</sup>. Meeting of the Knesset Committee on Immigration, Absorption and Diaspora Affairs, 24 January 2000.
- <sup>49</sup>. At first, regarding Poles who claimed to be ethnic Germans because of their (ethnically Polish) parents or grandparents' forced inclusion into the Nazi *Volkstlisten* (Der Spiegel, no.52, 1989, pp.50-58). Later, the suspicion of lacking ethnic credentials met mostly non-German speaking Russians. In a 1992 survey of the Allensbach Institute, less than one-third of respondents considered the newly arriving resettlers as "Germans"; the rest was either undecided (40 percent) or not considering the newcomers as "Germans" (29 percent) (quoted in Levy 1999:141f).
- <sup>50</sup>. Quoted in Frankfurter Rundschau, 7 November 1988, p.1.
- <sup>51</sup>. Ibid.
- <sup>52</sup>. Before the issue became politicized in the late 1980s, for instance, expellee authorities granted ethnic-German status to ethnic Poles whose (grand)parents had been forcibly incorporated in the Nazi *Volkstliste 3*, rendering ad absurdum the "confession" component of the recognition procedure. In addition, dubious Nazi credentials, such as "service" in the murderous Waffen SS, helped one to attain ethnic-German status.
- <sup>53</sup>. Erika Trenz, "Einwanderung gestalten," Das Parlament, 25 August 1989.

<sup>54</sup>. In 1989, the average pension for male resettlers was 1.778 DM—which is 221 DM higher than the average pension of male natives (Otto 1990:298).

<sup>55</sup>. BT-Drs., Stenographische Berichte, 260. Sitzung vom 16.4.1953, S.12660.

<sup>56</sup>. “Ergebnisse der Verhandlungen zu Asyl und Zuwanderung,” Sueddeutsche Zeitung, 8 December 1992, p.5.

<sup>57</sup>. BVwG 102, 214

<sup>58</sup>. Ibid., p.220.

<sup>59</sup>. The State of Israel’s declaration of independence proclaims that it “will be open for Jewish immigration and for the Ingathering of the Exiles.” The English text of the declaration can be found in the website of Israel’s Ministry of Foreign Affairs ([www.Israel-mfa.gov.il](http://www.Israel-mfa.gov.il)).

<sup>60</sup>. The Hebrew original appeared in Haaretz, 2 January 2001. Quoted in “The Palestinian right of return,” The Economist, 6 January 2001, p.32.

<sup>61</sup> David Grossman, “No right of return” (Kein Recht auf Rueckkehr), Frankfurter Allgemeine Zeitung, 10 January 2001, p.43.

<sup>62</sup> Laurence’s (2000) informative study of the divergent treatment of the Jewish and Turkish immigrant communities in Berlin shows that the better treatment of Jews is partially justified in ethnonational terms, as facilitating the “return” of Jews to their presumed cultural *Heimat*.

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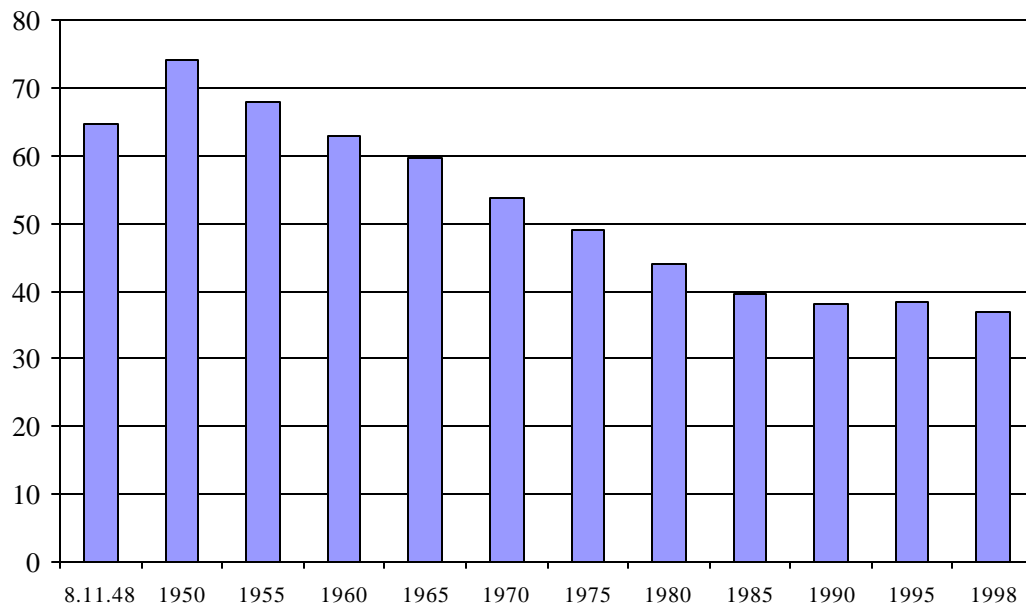
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**Figure 1: Percentage of foreign-born among Jewish population in Israel**



Source: Central Bureau of Statistics, different years.