In the Supreme Court

Sitting As a Court of Civil Appeals

CA 8573/08

Before: His Honor, President A. Grunis
His Honor, Justice H. Melcer
His Honor, Justice U. Vogelman

The Appellants:

1. **Uzi Ornan**
2. **Uri Avneri**
3. **Itamar Even-Zohar**
4. **Joseph Agassi**
5. **Yehudit Buber Agassi**
6. **Shulamit Aloni**
7. **Alon Oleartchik**
8. **Yosef Barnea**
9. **Ibrahim Dwiri**
10. **Einav Hadar**
11. **Yuval Halperin**
12. **Chen Yehezkeli**
13. **Hubert Yu-Lon**
14. **Ofra Yeshua Lyth**
15. **Yehoshua Sobol**
16. **Yehoshua Porath**
17. **Rivka (Becky) Kook**
18. **Nili Kook**
19. **Adal Kaadan**
20. **Dan Tamir**
21. **Gideon Chapski**

VS.

The Respondents: 1. **Ministry of the Interior**

2. **Attorney General**

Appeal against the judgment of the District Court of Jerusalem (Judge N. Sohlberg) of July 5, 2008, in OM 6092/07

On behalf of the Appellants: Adv. **Yoela Har-Shefi**, Adv. **Yosef Ben Moshe**

On behalf of the Respondents: Adv. **Ruth Gordin**

[**Israeli Supreme Court cases cited:**

[1] CA 630/70 *Tamrin v. State of Israel* [1972] IsrSC 26(1) 197.

[2] HCJ 11286/03 *Ornan v. Minister of the Interior* (20.9.2004).

[3] HCJ 910/86 *Ressler v. Ministry of Defense* [1988] IsrSC 42(2) 441.

[4] HCJ 143/62 *Funk-Schlesinger v. Minister of the Interior* [1963] IsrSC 17(1) 225.

[5] HCJ 58/68 *Shalit v. Minister of the Interior* [1970] IsrSC 23(2) 477.

[6] HCJ 4/69 *Ben Menashe v. Minister of the Interior* [1970] IsrSC 24(1) 105.

[7] HCJ 147/80 *Shtederman v. Minister of the Interior* [1970] IsrSC 24(1) 766.

[8] HCJ 18/72 *Shalit v. Minister of the Interior* [1972] IsrSC 26(1) 334.

[9] CA 448/72 *Shik v. Attorney General* [1973] IsrSC 27(2) 3.

[10] CA 653/75 *Shelah v. State of Israel* [1977] 31(2) 421.

[11] HCJ 264/87 *Shas Movement v. Population Registrar* [1989] IsrSC 43(2) 723.

[12] HCJ *Naamat v. Minister of the Interior* [2002] IsrSC 56(2) 721.

[13] HCJ 6539/03 *Goldman v. Ministry of the Interior* [2004] IsrSC 59(3) 385.

[14] HCJ 769/02 *Public Committee against Torture in Israel v. Government of Israel* [2006] IsrSC 62(1) 507.

[15] HCJ 4481/91 *Bargil v. Government of Israel* [1993] IsrSC 47(4) 210.

[16] HCJ 3125/98 *Iyad v. Commander of IDF Forces in Judea and Samaria* [1999] IsrSC 45(1) 913.

[17] *Temple Mount Faithful Organization v. Prime Minister* [1993] IsrSC 47(1) 37.

[18] HCJ 4877/93 *Victims of Arab Terror Organization v. State of Israel* (12.9.1993).

[19] HCJ 7523/11 *Almagor – Victims of Terror Organization v. Prime Minister* (17.10.2011).

[20] HCJ 9549/09 *Legal Forum for the Land of Israel v. Ministerial Committee for Matters of National Security* (21.4.2010).

[21] HCJ 9056/00 *Kleiner v. Chairman of the Knesset* [2001] IsrSC 55(4) 703.

[22] HCJ 10104/04 *Peace Now for Israel Educational Projects v. Commissioner for the Jewish Settlements in Judea and Samaria* [2006] IsrSC 61(2) 93.

[23] LCA 1287/92 *Bosqila v. Zemah* [1992] IsrSC 46(5) 159.

[24] HCJ 754/83 *Rankin v. Minister of the Interior* [1984] IsrSC 38(4) 113.

[25] HCJ 466/07 *MK Zehava Gal-On v. Attorney General* (11.1.2012).

[26] EA 1/65 *Yardur v. Knesset Elections Committee* [1964] IsrSC 19 (3) 365.

[27] HCJ 9149/10 *Dr. Vatad v. Israeli Knesset* (13.5.2014).

District Court cases cited:

[28] F (Tel Aviv District) 907/70 *Tamrin v. State of Israel* [1970] PM 42 287.

[29] RM (Tel Aviv District) 25477-05/11 *Kaniuk v. Minister of the Interior* (27.9.2011)

[30] OM 6092/07 (Jerusalem) *Ornan v. Minister of the Interior*

International conventions cited:

Universal Declaration of Human Rights, 1948, art. 15

Israeli legislation cited:

Basic Law: Freedom of Occupation, and sec. 2

Basic Law: Human Dignity and Liberty, and sec. 1A

Basic Law: The Knesset, secs. 5, 7(a)(1)

Civil Union for Persons Having No Religious Affiliation Law, 5770-2010

Culture and Arts Law 5763-2002, sec. 2(c)

Law and Administration (Nullification of the Application of Law, Jurisdiction and Administration) Law, 5759-1999, sec. 6

Law of Return 5710-1950, and sec. 4B

Nazi and Nazi Collaborators Punishment Law, 5710-1950

Parties Law, 5752-1992, sec. 5(1)

Penal Law, 5737-1977, sec. 13(b)(2)

Population Registry Law 5725-1965, and secs. 3A, 19C , 2, 4, 5,

Ships Ordinance (Nationality and Flag), 5708-1948

Shipping (Vessels) Law, 5720-1960

Special Cultural Educational Institutions Law, 5768-2008, sec. 2(b)

State Education Law, 5713-1953, sec. 2b

Terminally Ill Patient Law, 5768-2008, sec. 1(b)

JUDGMENT

Justice U. Vogelman

The appellants filed a motion in the Jerusalem District Court for a declaratory judgment that they are of Israeli nationality. This motion was filed in order to serve as a public document for the purpose of officially changing the "nationality[1]" item in their entries on the population registry. The District Court (per Judge N. Sohlberg) denied the motion, determining that this was an issue that was non-justiciable at the institutional level, hence the appeal before us.

1. The appellants are all Israeli citizens. They are registered as having different nationalities in the population registry – most are registered as Jewish, and some as other nationalities: Arab, Druze, Buddhist, Burmese and other. Appellant no. 1, Prof. Uzi Ornan (hereinafter: Ornan), is registered in the population registry as "Hebrew", based on his declaration. More than a decade ago, Ornan

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[1] *Translator's note*: The Population Registry Law translates the Hebrew לאום – *le'om* – as "ethnic affiliation". Throughout the translation of this judgment, the more common, and more versatile translation, "nationality" or "nation", will be used for *le'om/le'umi-* *לאום/לאומי*, but always as distinct from "citizenship", unless otherwise dictated by the context.

set up the "I Am An Israeli" non-profit organization, whose members signed a petition according to which they belong to the Israeli nation. In 2000, Ornan asked the Ministry of Interior to register him, under the "nationality" item in the population registry, as "Israeli". His request was denied on the basis of case law established forty years earlier in CA 630/70 *Tamrin v. State of Israel* [1972] IsrSC 26(1) 197 (hereinafter: *Tamrin Case*), to be elucidated below. Late in 2003, Ornan began a legal battle to change the entry for "nationality" in his case. First, he submitted a petition to this Court, together with other petitioners, but they withdrew their petition in 2004 following the Court's recommendation that they approach the correct forum in order to obtain a public document attesting to their Israeli nationality, in accordance with the requirement of sec. 19C of the Population Registry Law 5725-1965 (hereinafter: Population Registry Law) (HCJ 11286/03 *Ornan v. Minister of the Interior* (20.9.2004)). More than two years later, the petitioners filed a new petition in the District Court of Jerusalem, sitting as a Court for Administrative Affairs, but the petition was transferred, with consent, to the procedural framework of a civil suit, since it involved a request for declaratory relief.

The Judgment of the District Court

2. The Jerusalem District Court (per Judge N. Sohlberg) dismissed the action for declaratory relief, after determining that the matter is not institutionally justiciable. The previous court conducted an extensive, thorough examination of the issue of justiciability, in accordance with the common approach in our system that distinguishes between two principal aspects of the issue: normative justiciability and institutional justiciability. After laying the said foundations, the court applied the criterion adopted in the framework of HCJ 910/86 *Ressler v. Ministry of Defense* [1988] IsrSC 42(2) 441 (hereinafter: *Ressler Case*) as the test guiding the discretion of the court when called upon to decide this question - the criterion of the dominant nature of the subject under discussion. Accordingly, the District Court held that the dominant nature of the requested declaration was public, ideological, social, historical and political – but not legal. In the court's view, the appellants request cannot be viewed as a technical-administrative matter concerned only with registration in the population registry; rather, it is – in actual fact – a request that the District Court of Jerusalem determine that in the State of Israel, a new nationality has developed, common to all residents and citizens, the "Israeli" nationality. This issue, said the District Court, is a political-national-social question, the legal

aspect of which is secondary to the meta-legal main subject. The District Court emphasized that the matter is justiciable from a normative point of view, but it is not justiciable from the institutional point of view, for a determination concerning the existence of an Israeli nationality has far-reaching, momentous ramifications for the image, the nature and the future of the State. This determination is not the type of matter in which the court has a relative advantage over others, and it is not the court's place to make such a determination. The District Court emphasized that we are in fact dealing with the creation of a new status, "a type of legislative act". It further pointed out that the platform proposed by the appellants as the basis for the recognition of an Israeli nationality – the population registry – is not suited for that purpose, for the technical-statistical registration in the registry cannot constitute an alternative to deliberation on the part of the legislative and executive authorities and to public discourse, which are the suitable arenas to promote their ideas. The conclusion of the District Court was that "from the point of view of statute and the law, there is no Israeli nationality, and this Court must not create such a creature *ex nihilo*; legislating rather than adjudicating." The lower court nevertheless stressed that its judgment was not a determination that an "Israeli nationality" did not exist in a person's heart and in his personal belief, but pointed out that this belief –worthy of appreciation and respect – does not require legal validation or approval.

The Appellants' Arguments

3. According to the appellants, the lower court erred in determining that the dominant nature of the request was not legal, and therefore not institutionally justiciable. They argue that the determination of the issue carries practical implications for the daily life of the individual, in both the domestic legal aspect and the international legal aspect, and the court may not, therefore, refrain from deciding on the matter. According to the appellants' line of argument, the entire citizenry of the state constitutes the nationality that composes the state; therefore, negation of the existence of an Israeli nationality is equal to the denial of the existence of the State of Israel as a sovereign, democratic state. According to the appellants, with the declaration and the establishment of the State of Israel, the Israeli nation, which does not include Diaspora Jewry, was created, and thus the court's determination that "from the point of view of statute and the law, there is no Israeli nationality" is mistaken. In support of their position, the appellants refer to the Declaration of Independence, from which it transpires – so they

argue – that Diaspora Jewry is not a part of the nation that arose in Israel with the establishment of the State, comprised of “the independent Hebrew people in its land” and “members of the Arab people who reside in the State of Israel.” To support their arguments, the appellants also refer to legislation from the early days of the State, which uses the word “nationality”, and from which one can learn that an Israeli nationality exists: thus, for example, in 1948 the Ships Ordinance (Nationality and Flag), 5708-1948 was enacted, and it specified that in the case of a ship registered in the State of Israel, “its nationality is that of the State of Israel”; and subsequently, the Shipping (Vessels) Law, 5720-1960, which replaced the Shipping Ordinance, stated that “the nationality of a vessel registered under this Law is Israeli.” The appellants further point to the fact that in the Israeli passport, the term “nationality” appears, and underneath it appears the word “Israeli”. According to the appellants, “nationality” is not a religious or ethnic nationality, but “a nationality of the state in its legal sense”, the right to belong to which was entrenched in art. 15 of the Universal Declaration of Human Rights, adopted in 1948 by the General Assembly of the United Nations.

In addition, the appellants make two further points. First, they argue that the list of nationalities presented by the Ministry of the Interior, which includes 137 different nationalities, does not constitute a binding legal source in any respect, for it has no statutory basis, and it is not at all clear who was authorized to compile this list. Secondly, it was argued that the fact that the “nationality” item has been removed from the identity card cannot change the situation, for even if the registration is for the purpose of collecting statistics, the information about the declarants’ Israeli nationality ought to be available to the Ministry of the Interior. In this aspect, the appellants emphasized that underlying their request is the assumption that recognition of an Israeli nationality would be a substantive expression of the principle of equal and full citizenship that was entrenched in the Declaration of Independence, for the present situation creates a distinction between nationalities on an ethnic-religious basis.

Subsequently, after the hearing on the appeal and following the comments of the panel of justices, the appellants asked to submit short complementary pleadings relating to two aspects. The first was with regard to the substance of registration in the population registry, in view of the fact that under the common law, it constitutes a statistical-registrational tool of limited significance.

According to the appellants, this legal reality does not present a full picture of the implications of the registration, as they claim that the current registration, which relies on the ethnic-religious component, might be determined, at a future date, to be a violation of the equality between groups of Israeli citizens who are of different ethnic origins. According to the appellants, this situation, whereby Israeli citizens are coercively tagged with a nationality with which they do not identify, is justification for the court to entertain the matter and to grant their request. In reference to another aspect, the appellants asserted that every citizen should retain free choice as to registration of the nationality in which he is interested.

Arguments of the Respondents

4. Respondents nos. 1-2, the Ministry of the Interior and the Attorney General (hereinafter: the respondents), ask that the appeal be denied. In their view, the lower court was correct in holding that the matter is not justiciable as it has dominant social, national and public aspects, which have significant and far-reaching ramifications for the image and the character of the society and the State. In a complementary pleading filed on October 29, 2012 the respondents referred to the writings of various thinkers, from the 19th century to present day, regarding the profound dispute on the question of whether Judaism is a separate nationality from the nationality of the state of citizenship ("a Jew with German citizenship" as opposed to "a German of the Mosaic faith"). The respondents argue that this question must be resolved in the appropriate arenas – in the framework of academic and public discourse – and the Court would do well to stay away from this discussion. The respondents reviewed many other cases in which the Court decided not to entertain a particular issue, relying on the principle of separation of powers and the concern that the public's trust in the judiciary would be damaged, and they sought to draw an analogy from those cases to the circumstances of the present case.

According to the respondents, the judgment does not contain determinations on the merits of the matter, and is therefore seemingly sufficient to accept the argument of lack of institutional justiciability in order to deny the appeal. At the same time, the respondents add that the appeal ought to also be denied on the grounds that the appellants did not meet the burden of proof they bore as those who seek declaratory relief, which requires them to show the existence of an "Israeli nationality". In arguing on the merits, the respondents emphasized that they believe that it is the Israeli **citizenship** that constitutes the expression of the common

self-determination of the residents of Israel, and it is the citizenship that unifies the array of nationalities that have come together in the State of Israel. According to them, the argument of the appellants that an Israeli nationality was created upon the establishment of the State must be dismissed, in view of the fact that the separate classification of the different groups of the Israeli population as belonging to different nationalities existed prior to the establishment of the State and remained thereafter. It was also emphasized that the information concerning nationality appears only in the population registry, which is a statistical database, and it does not even constitute *prima facie* evidence of its accuracy. The respondents therefore argued that in practice, the appellants' request has no real import, and it is wholly a product of the symbolism that they attach to it. As such, so it is argued, the appellants have not shown that granting declaratory relief is justified in this matter.

Following the retirement of President D. Beinisch, who presided over the panel that heard the arguments of the parties, President A. Grunis assumed her place. Later, complementary written pleadings were filed, and now the time has come to rule.

Deliberation

Population Registry Law

5. Let us begin by presenting the normative framework for our deliberations – the Population Registry Law and the acts performed pursuant to it. The Population Registry Law regulates the operation of the population registry, in which the details of Israeli residents are registered. The details that must be registered for each resident are enumerated in sec. 2 of the Law:

(1) Family name, first name and former names;
(2) Parents' names;
(3) Date and place of birth;
(4) Sex;
(5) Nationality;
(6) Religion;
(7) Personal status (single, married, divorced or widowed);
(8) Name of Spouse;
(9) Names, dates of birth, and sex of children;
(10) Past and present citizenship or citizenships;
(11) Address;
(11A) Postal Address […];
(12) Date of entry into Israel;
(13) Date of becoming a resident […].

The registration officers appointed by the Minister of the Interior are responsible for the administration of the registry (sec. 4 of the Law). The resident has a duty to notify the registration officer of his details and the details of minor children in his charge (sec. 5 of the Law), as well as of any change in them (sec. 17 of the Law). In addition, the Law contains particular provisions regarding the duty of notification in relation to birth, adoption, death, leaving the country (secs. 6-14 of the Law), and regarding the updating of certain details at the instigation of the relevant authority or the court (secs. 15-16 of the Law). The powers of the registration officer are specified in chap. 3 of the Law (secs. 19-23 of the Law). Section 3 of the Law states that registration in the registry shall be "*prima facie* evidence of the correctness of the details of registration referred to in items (1) to (4) and (9) to (13) of section 2." The details of registration dealing with nationality (5), religion (6) and personal status (7) – (8), do not have probative weight, and as such – as we will see below – they have been interpreted in the case law as constituting purely "statistical" data.

6. Section 19B of the Law is concerned with the registration of a resident who is registering for the first time ("initial registration"), which will be done on the basis of a public document **or** on the basis of the declaration of the resident or his custodian. The registration officer is authorized to demand that the person making the notification furnish him with any information or document in his possession that is relevant to the details of registration, and to make a written or an oral declaration as to the truth of the information or the document (sec. 19 of the Law). If the registration officer has reasonable grounds to assume that the notification is not correct, he is authorized to refuse to register that detail (sec. 19B(2) of the Law). Section 19C of the Law – which is the relevant section in our case – deals with a change in a registration detail of a resident ("registration of changes"), which will be done, in general, on the notification of the resident accompanied by a public document attesting to the change. In other words, whereas for the purpose of initial registration the registration clerk may be satisfied solely with a notification of the resident or his custodian, in order to change the existing registration of a detail in the registry, presentation of a public certificate is required. As an aside, it will be noted that an address may be changed on the basis of notification by the resident alone, without a public document being required. The Law authorizes (under certain conditions) the Chief Registration Officer to register a resident who is not registered, or to amend a detail of registration in relation to a resident, insofar as the existing

registration is deficient or contradicts another registration or a public document (sec. 19E).

Case Law on the Substance of the Detail "Nationality"

7. As mentioned above, questions of religion and nationality – and especially the question of "who is a Jew?" were raised in this Court early on, in the framework of discussion of the Population Registry Law and the exercise of authority thereunder. The case law consistently accorded an extremely narrow interpretation to the authority of the registration officer and the discretion granted to him in relation to registration of the details of nationality, religion and personal status. This case law began with HCJ 143/62 *Funk-Schlesinger v. Minister of the Interior* [1963] IsrSC 17(1) 225 (hereinafter: *Funk-Schlesinger* Case*)*, in which it was ruled that "the function of the registration officer […] is only that of a collector of statistical data for the purpose of conducting the residents' registry, and he was given no judicial power at all" (at p. 244). As we will see below, the holding that this is a statistical registration, and that exercise of power under the Population Registry Law is technical and not substantive, allowed the Court to afford relief to those turning to it without having to issue iron-clad rulings on the sensitive and complicated questions of "who is a Jew" (for criticism of the *Funk-Schlesinger* judgment and the decisions stemming from it, see Eitan Levontin, "A Castle in the Air – The Funk-Schlesinger Decision and Population Registry Laws", *Mishpat Umimshal* 11(1) (2007), 129 (Heb.).

8. HCJ 58/68 *Shalit v. Minister of the Interior* [1970] IsrSC 23(2) 477 (hereinafter: *the First Shalit* Case) dealt with the case of Mr. Benjamin Shalit, who notified the registration officer that the nationality of his children was "Jewish", but his request to register them as such was refused by the clerk because the children were born to a non-Jewish mother. The Court granted the petition, by a majority opinion, relying on the judgment in the *Funk-Schlesinger* Case and ordered the registration officer to register the petitioners' children as "Jewish" under "nationality", on the basis of their father's declaration. Against the background of the judgment in Shalit's case and the public tempest it aroused, sec. 3A of the Population Registry Law was enacted, which provides as follows:

> A person shall not be registered as a Jew by nationality or religion if a notification under this Law or an entry in the Registry or a public document

> indicate that he is not a Jew, so long as the notification, entry or document has not been controverted to the satisfaction of the Chief Registration Officer or so long as declaratory judgment of a competent court or tribunal has not otherwise determined ”

(Subsec. (b) states that for the purpose of this Law, the definition of “Jew” shall be the same as its definition in sec. 4B of the Law of Return, 5710-1950 (hereinafter: Law of Return): “… a person who was born of a Jewish mother or has become converted to Judaism, and who is not a member of another religion”; see also: Michal Shaked, *Moshe Landau: Judge* (2012), 368-380 (Heb.)).

9. HCJ 4/69 *Ben Menashe v. Minister of the Interior* [1970] IsrSC 24(1) 105 (hereinafter: *Ben Menashe* Case) – a sort of a “mirror image” to the *First Shalit* Case - was a case in which the entry under the nationality of the petitioner’s children had initially appeared as “Jewish”, despite the fact that their father asked that they be registered as devoid of nationality. It was ruled that the initial registration was unlawful, for the registration officer was not authorized to make such a registration contrary to the declaration of the petitioner. In HCJ 147/80 HCJ 147/80 *Shtederman v. Minister of the Interior* [1970] IsrSC 24(1) 766 (hereinafter: *Shterderman* Case), the petitioners’ request to delete the entry under nationality as “Jewish” from their registration in the population registry was denied. The petitioners sought to express their discontent with the change in legislation that followed the ruling in the *First Shalit* Case. The petition was denied after the Court ruled that the initial registration was lawful (as opposed to the case in the *Ben Menashe* Case), and a public document was therefore required for the purpose of amending the registry under sec. 19C of the Population Registry Law. Justice H. Cohn noted that the petitioners had not really and truly changed their self-definition, and they do not see themselves as belonging to another nation; therefore their petition lacks substance. Later, the Court denied another petition filed by Benjamin Shalit, in which he sought to register his third son (who was born after the legislation had been changed) as being of “Hebrew” nationality. The Court held that “in actual fact, there is no difference between the Jewish nationality and the Hebrew nationality”, and registration of Shalit’s son as a “Hebrew” would therefore constitute a circumvention of sec. 3A of the Population Registry Law (HCJ

18/72 *Shalit v. Minister of the Interior* [1972] IsrSC 26(1) 334) (hereinafter: *Second Shalit* Case).

10. The *Tamrin Case* was, as aforesaid, an early incarnation of the case at hand. Dr. George Tamrin immigrated to Israel in 1949 from Yugoslavia, and was registered in the population registry as "Jewish" under nationality, and as "without religion" under religion. According to Tamrin's assertion, the enactment of sec. 3A of the Population Registry Law in 1970 – which states that a person will not be registered as "Jewish" in the nationality or religion field if he does not satisfy the definition of "Jew" under sec. 4B of the Law of Return – made him change his feelings about being of Jewish nationality. He therefore turned to the District Court for declaratory relief, to allow him to change the entry under nationality to "Israeli". The District Court of Tel Aviv-Jaffa (per Judge Y. Shilo) denied the petition (F (Tel Aviv District) 907/70 *Tamrin v. State of Israel* [1970] PM 42 287).

In a lengthy, reasoned opinion by President S. Agranat, this Court denied Tamrin's appeal.

First, the Court ruled that in order to issue a declaratory judgment concerning a particular person's affiliation to a particular nationality, proof based on objective criteria is required concerning the existence of that nationality. President Agranat held that "the subjective feeling of a person about belonging to a particular nationality has no significance, unless it is possible to determine, on the basis of some sort of criteria, that that nationality in fact exists" (at p. 201).

Secondly, it was held that it was not proven that in the State of Israel, an Israeli nationality had come into being, separate and differentiated from a Jewish nationality. President Agranat proceeded to examine the question of the nature of nation and nationality, relying on the conclusion of (then) Justice J. Sussman in the First Shalit Case, according to which "an array of objective and subjective factors, taken together, raise a group of people to the status of national group" (p. 514): the feeling of unity that exists amongst the members of the national group, mutual reliance and collective responsibility, as well as ethnic values and cultural heritage that characterize the national group and differentiate it from other national groupings. In applying the said criteria to the Israeli case, President Agranat found that "there is no merit to the claim of the appellant – not even *prima facie* – that there has been a separation from the Jewish nation in Israel, and the creation of a

separate Israeli nation" (p. 205). This holding is based on many historical examples that attest to the existence of a feeling of mutual reliance between Jews living in Israel and in the Diaspora, and on that Tamrin did not show that there is a significant group in Israel who lacks this "feeling of Jewish mutual reliance". President Agranat discussed at length the meaning of the terms "identity" and "identification" in their ethnic-national sense (pp. 203-204), and ruled that the academic essays and the research to which Tamrin had referred in support of his arguments, which dealt with the preference of individuals in the renascent Israeli society for their **Israeli** identity over their **Jewish** identity, do not necessarily attest to the absence of their **identification** with the **Jewish nationality**. That is to say, President Agranat held that even if there are Israelis who prefer the Israeli aspect of their identity to its Jewish aspect, this does not negate their identification with the members of the Jewish nationality.

In addition to this ruling, which relied on the judgment of the District Court in the matter, the President added that in his view, the principle of the right to national self-determination was intended to apply to nations and not to "fragments of nations". In his opinion, recognition of such nationality might lead to national and social fragmentation of the entire nation. The President added that a separatist trend of splitting the Jewish people was unacceptable. In his view, this was not the intention of the legislator in inserting "nationality" as an item in the population registry, and in any case the Court cannot support this (at pp. 217-223). Justice Z. Berinson concurred in the opinion of President Agranat, for the same reasons. Justice Y. Kahan also concurred in denying the appeal, but the main reason for his conclusion was that the relief requested by Tamrin was apparently inconsistent with the definition of "Jew" in sec. 3A of the Population Registry Law.

11. In CA 448/72 *Shik v. Attorney General* [1973] IsrSC 27(2) 3 (hereinafter: *Shik* Case), the Court heard the matter of a person who was registered as a Jew under "nationality", and petitioned the District Court for declaratory relief whereby he is entitled to be registered in the Population Registry without any entry for national affiliation. The intention was for the ruling to serve as a public document for the purpose of amending the registry, under sec. 19C of the Population Registry Law. The District Court denied the application. The Supreme Court allowed the appeal on the denial of the application, holding that a person has the right not to belong to any religion or nationality, and when he makes a declaration to that

effect – and the court is convinced that this declaration is true and sincere – the declaratory judgment must be made, on the basis of which the registration in the registry will be changed. Justice Berenson wrote that no distinction must be made here between the item designated as “religion” and that designated as “nationality”, for –

> … they are both matters of a person’s heart, his faith and his world view, particularly in the case of a person who does not want to belong to any religion or any nation. When a person declares of himself that he belongs to a particular religion or nation, it is still not a certainty that this religion or that nation, according to its laws, will adopt him and recognize him as such. However, lack of faith or heresy of religion, and a person’s desire to view himself as a citizen of the world and free of the constraints of any nationality – that is his business that does not require any consent and any external validation (at p. 6).

In this, Justice Berenson adopted the approach of Justice Sussman in *the First Shalit Case* according to which the determination of a person’s affiliation to a particular religion and nationality stems primarily from the individual’s subjective feeling. At the same time, Justice Berenson confined his ruling to a person who wishes to change the registration in order to **deny** his affiliation to a religion or nationality, and he also noted in his opinion that if the purpose of the request is to change the registration from one nationality to another, the considerations are liable to be different. Justice Berenson added:

> This is not a matter of whim or caprice, that a person can declare himself to be a member of a particular religion or national affiliation and the next day or the day after that as a member of another religion or national affiliation, or as being without religious or without ethnic affiliation …. When a person wishes to change an existing registration, he must convince the court that he is indeed

> serious, his thoughts are sincere and his intention is true (at p. 8).

The Court remarked that weight should be given to the fact that in that matter, the existing registration (Jewish nationality) was based on the notification of the parents when the appellant was a minor, and he has not accepted it ever since he was able to make up his own mind (p. 5). The Court reiterated this ruling in granting declaratory relief according to which Mrs. Johanna Shelah had no religion and was entitled to register without an entry under the **religion** item in the registry (CA 653/75 *Shelah v. State of Israel* [1977] 31(2) 421) (hereinafter: *Shelah Case*); see also a recent decision: RM (Tel Aviv District) 25477-05/11 *Kaniuk v. Minister of the Interior* (27.9.2011)) (hereinafter: *Kaniuk Case*).

12. Whereas in *Shelah Case* the Court – as we said – granted the appellant's request to be registered as without religion, her request to register in the population registry as a "Hebrew" under the nationality item was denied. (Then) Deputy President M. Landau adopted the determination of the District Court whereby there is no difference between the terms "Jew" and "Hebrew", and that uniformity of the registry must be preserved. In his decision, Deputy President Landau also relied on the ruling in the *Tamrin* Case, stating that the appellant had not proven that there exists a Hebrew nation separate from the Jewish nation, and that separatist tendencies to split the nation should not be encouraged. (Then) Justice M. Shamgar concurred in the judgment of Deputy President Landau and in its reasoning. Justice A. Witkon concurred in the conclusion reached by the Deputy President, for the reasons given by the District Court (that the meaning of the term "Hebrew" is identical to that of the term "Jew", and preservation of uniformity of the registry is a proper purpose), but he did not agree with the reliance on the ruling in the *Tamrin* case. Justice Witkon remarked that it was not the job of the authority responsible for the population registry to express an opinion about "separatist" movements – either for or against, and that each person should be able to be registered as he wishes.

13. After a "lull" of several years in cases concerning the dispute over registration of religion and nationality notations, petitions related to the registration of these particulars – religion and nationality – again came before the Court regarding individuals who underwent non-Orthodox conversions (HCJ 264/87 *Shas Movement v. Population Registrar* [1989] IsrSC 43(2) 723) (hereinafter: *Shas Case*); HCJ *Naamat v. Minister of the Interior* [2002] IsrSC 56(2)

721) (hereinafter: *Naamat Case*)). The broad principle that the registration officer is obliged to register in the population registry – in the initial registration – information furnished to him and attested to in a document, with no authority to examine the legal validity of that information, was also applied in our rulings relating to these matters. It should be pointed out that in the framework of the judgment in the *Naamat* Case, a decision was also made regarding the process concerning the amendment of the registration of the items of religion and nationality, items under sec. 19C of the Law, in the framework of which a judgment was sought as a public document. In relation to that process, too, the rule concerning the technical and statistical nature of the registration in the registry was applied (*ibid*., per President A. Barak, paras. 3 and 33). Thus, the Court did not turn away the petitioners empty-handed by determining that this was a non-justiciable issue, but it limited its decision to the technical-registration aspect. To be precise: the Court emphasized that it was not making any determination on the question whether the petitioners were considered Jewish according to the *Halacha* (Jewish Law), and that its decision was restricted to the purposes of the Population Registry Law, and stemmed from the case law relating to the registration of the particulars of religion and nationality in the population registry.

14. We therefore see that the items of religion and nationality in the population registry were fertile ground for stormy legal debates on matters of "peoplehood and nationality, of religion and state, of Orthodox and non-Orthodox conversion, of who is a Jew and who is not a Jew" (HCJ 6539/03 *Goldman v. Ministry of the Interior* [2004] IsrSC 59(3) 385, at p. 395). These were tempestuous, radicalizing debates, which touched the very core of opponents and supporters – and all of this, even though the registration itself had no stated legal ramifications in practice. Against this background, even in the early case law of this Court on the subject, Justice A. Witkon expressed his displeasure with questions of values in the area of nationality being brought before the Court, and called upon the Government "to initiate legislation that would obviate the need for registration of this superfluous field" (*First Shalit Case,* at p. 532; see also p. 536). After several decades of litigation revolving around the "nationality" item, it seems that the picture has not changed. And indeed, once again a dispute concerning the registration of "nationality" item in the population registry is brought before us.

At this stage, we wish to examine the main reason underlying the decision of the District Court – the question of institutional justiciability.

Institutional Justiciability

15. The District Court held an elaborate and detailed discussion of the question of justiciability in its judgment, and reached the conclusion that the matter brought before it is not institutionally justiciable, for its dominant aspects are meta-legal. The issue of justiciability has been part of our legal system since its early days. The discussion of the scope of issues appropriate for deliberation in this Court, and in the courts in Israel in general, is not new. In the *Ressler Case*, (then) Justice A. Barak distinguished between normative justiciability and institutional justiciability (see also: I. Zamir, "Judicial Review of Administrative Decisions – From Practice to Theory", *Mishpat veAsakim* 15 (2012) 225, 247 (Heb.)). A claim of normative non-justiciability questions the ability of the court to decide a dispute before it using legal criteria. "A dispute is not justiciable in the normative sense, if there are no legal criteria for its resolution" (*ibid.*, at p. 475). In Justice Barak's view, the claim of normative non-justiciability has no legal basis, for there is always a legal norm by virtue of which a dispute can be resolved (see also: HCJ 769/02 *Public Committee Against Torture in Israel v. Government of Israel*, at p. 578 (hereinafter: *Targeted Killings Case*); Aharon Barak, *The Judge in a Democratic Society* (2004) 276-279 (Heb.)). Institutional justiciability comes to answer the question of whether the correct institution for resolving the dispute is the court (as opposed to other arenas, such as the government, the Knesset or public discourse). Justice Barak's approach is that recourse to the doctrine of absence of institutional justiciability should be extremely limited, and confined to special cases in which there is a significant concern of damaging the public trust in judges (see: *The Judge in a Democratic Society*, at p. 275; HCJ 769/02 *Public Committee against Torture in Israel v. Government of Israel* [2006] IsrSC 62(1) 507, at p. 579). The test outlined by President M. Shamgar in the *Ressler Case* for examining the claim of lack of institutional justiciability is that of the dominant character of the subject:

> It may be that the political character is dominant to such extent that the legal implications of the problem will be swallowed up by it or pushed to a corner […]. If the totality clearly and openly

> indicates that the dispute is of a dominantly political nature, the court will not tend to deal with it (at p. 515).

On the basis of this test, petitions that addressed policies relating to the settlement of Israeli citizens in the areas of Judea and Samaria were denied, after it was determined that the dominant nature of the subject is political and not legal (HCJ 4481/91 *Bargil v. Government of Israel* [1993] IsrSC 47(4) 210; HCJ 3125/98 *Iyad v. Commander of IDF Forces in Judea and Samaria* [1999] IsrSC 45(1) 913); for similar reasons, petitions relating to the negotiations conducted by Israel with Syria at the beginning of the 1990s were denied (*Temple Mount Faithful Organization v. Prime Minister* [1993] IsrSC 47(1) 37), and to signature of the Oslo Agreements between the State of Israel and the PLO (HCJ 4877/93 *Victims of Arab Terror Organization v. State of Israel* (12.9.1993)); decisions concerning the release of prisoners and prisoner exchanges (HCJ 7523/11 *Almagor – Victims of Terror Organization v. Prime Minister* (17.10.2011)) and the decisions mentioned in para. 3 of this decision); a decision on the building freeze in Judea and Samaria (HCJ 9549/09 *Legal Forum for the Land of Israel v. Ministerial Committee for Matters of National Security* (21.4.2010)). Another area in which we find reference to considerations of institutional justiciability is intervention in certain intra-parliamentary procedures (HCJ 9056/00 *Kleiner v. Chairman of the Knesset* [2001] IsrSC 55(4) 703; see also Daphna Barak-Erez, "The Justiciability Revolution – An Evaluation", *Hapraklit* 3 (2008) 19-20 (Heb.) (hereinafter: Barak-Erez – The Justiciability Revolution).

Institutional Justiciability and the Question of the Israeli Nationality

16. As stated, the appellants argue that the law established in the *Tamrin Case* is outdated, and direst the core of their argument at the holding of the Court in the *Tamarin Case* that there is no "Israeli" nationality distinct from the Jewish nationality. The appellants are not disputing the validity of the first part of the law established in the *Tamrin Case,* whereby objective proof of the existence of a nationality is a necessary condition for granting declaratory relief, and that a subjective feeling is insufficient for a judicial determination that a particular nationality exists for the purpose of registration of the particular of nationality in the population registry (as opposed to the stance of Justice A. Witkon in the *Shelah Case*, according to which every person should be allowed to register as he wishes). We will not, therefore, discuss an argument that was not

made before us and which is not in dispute between the parties. Moreover, the pleadings seem to indicate that the appellants wished to invoke this first part of the said ruling, for they are asking this Court to render a decision with broad implications: an unreserved declaration of the objective existence of an **Israeli nationality**. Thus, for example, the appellants signed off on their summations in the appeal by noting that they "believe that the Supreme Court will 'restore the Crown to its former glory,' it will raise the Israeli nationality out of its wretched state and in so doing will make a vital contribution to strengthening the foundations of the State of Israel …" (para. 25 of the appellants' summations).

17. Therefore, unlike other matters in which questions relating to the registry were at issue – which we discussed above – we are not required to step into the path of the decision in the *Funk-Schlesinger Case* in a way that would restrict the significance of the registry and the actions performed pursuant to it to a purely technical act based on the declaration of the registrant. Hence the significant difference between the process before us and the other cases in which the Court dealt with questions in the area of the population registry. For the requested relief to be granted, as presented by the appellants and in accordance with the case law which they do not dispute, the Court would have to declare the existence – on the basis of objective criteria – of an "Israeli nationality" to which they belong.

This question has many layers; it is complex from a theoretical point of view and sensitive from the public aspect. We are dealing with fundamental issues that have preoccupied the State of Israel and the Israeli society since the establishment of the State and even prior to that, as we shall see below.

18. The appellants argue, for example, that "it is impossible to define the whole of world Jewry as belonging to the "Jewish nation", for the Jews … are all of the nationality of the states of which they are citizens" (sec. 28 of the statement of appeal). We are dealing with an issue that is sensitive and controversial on the moral level and the historical level, one which has been accompanying the Jewish people for many years, and the Zionist movement from its inception. The conception that Judaism is not only a religious affiliation but also a national affiliation is the foundation-stone of Zionism. Standing contra to this is the conception that Judaism is only a religion, and consequently, the national affiliation of Jews is only to the state whose citizenship they hold. The basic elements of this latter conception lie in the process of emancipation of the Jews in the states of Western Europe, when many of them began to define

themselves as Jewish from the religious aspect only ("Germans of the Mosaic faith"; for a description of this trend amongst German Jews until the rise of Nazism, see Amos Elon, *The Pity of It All: A Portrait of Jews in Germany 1743-1933* (2002)). After the establishment of the State of Israel, this controversy changed its direction. On the one hand, the establishment of the state of Israel is the realization of the Zionist vision to establish a national home for the Jewish people in the Land of Israel. Thus, the Declaration of Independence states that "The Land of Israel was the birthplace of the Jewish People" and that it is the "natural right of the Jewish People to be masters of their own fate, like all other nations, in their own sovereign State." On the other hand, there were those who argued – as do the appellants before us – that with the establishment of the State and pursuant to that process, an Israeli nation was born (or at least, ought to have been born), distinct from the Jewish nation.

19. The ramifications of this discussion are tremendously far-reaching. They touch upon the relations of the State of Israel with Diaspora Jewry, and upon the perceptions and relations of the different groups within the State of Israel. The lower court discussed the possible ramifications of a judicial decision on the dispute:

> A declaration as requested is liable to upset the delicate balance between the national and cultural components of the State, that are based on national identities including ones that are not Jewish, and between the manner in which the religious components find expression.
>
> *Nota bene*: a person cannot belong to two nations. If an Israeli nationality is to be recognized, the members of the Jewish nation in Israel will have to choose between two options: whether they are Israeli, and then they will not be Jewish; or whether they are Jewish, and then they will not be Israeli – the same applies to the members of the minority groups.

In other words, a declaration by the Court as to the existence of an Israeli nationality as an objective reality is likely to impact the question of the registration of the "nationality" item of all citizens of Israel, even those who are not interested in this. In this last context, we would mention the position of the scholars Jacobson and

Rubinstein, who discussed the meaning of such a step in relation to the Arab community:

> In the present situation of two clear national identities within the citizenry, the official – or even unofficial – adoption of the term "the Israeli people" might, rather than including the Arab minority from a national point of view – exclude it from a civil point of view …. Amongst the Arab population, many will refrain from defining themselves as Israelis, or even refuse to do so outright, due to the "lack of national neutrality" of that term, or simply for political reasons (Alexander Jacobson and Amnon Rubinstein, *Israel and the Family of Nations* (2003) 346 (Heb.) (hereinafter: Jacobson and Rubinstein).

20. It will be noted that the appellants' line of argument and the question that it raises are to a great extent derived from the argument regarding the nature of the term "nationality". The definition of the term "nationality" is not simple, and extensive academic writing exists in the field of the social sciences in an attempt to understand its depths, its historical sources, the reciprocal relations between nationality and national state, and between nationality and nationalism (for contemporary writings, see: Ernest Gellner, *Nations and Nationalism* (1983); Erich Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (1991); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1983)). The distinction between several models of nationalities and conceptions of nationalism is generally accepted: **civil nationalism**, in which there is identity between the nationality and the political citizenship, which is based on a social contract and the will of the citizens (the example representing this model is France: see: Jacobson and Rubinstein, at pp. 375-386), and **ethnic-cultural nationalism,** in which the affiliation of the individual to a national group is primarily the result of common objective characteristics (common language, religion, culture and history). This is the conception that prevails nowadays in Israel in relation to the term "nationality", which the appellants before us seek to challenge. That is to say, the appellants' quest to change the notation of "nationality" in the population registry expresses their wish for the population registry to reflect the civil nationality conception, as part of their public battle to establish this as the appropriate model for the State of Israel (see also: Moshe Barnet, *A Nation Like all*

Other Nations – Towards the Establishment of an Israeli Republic (2009) (Heb.); Yosef Agassi, *Between Religion and Nation – Towards an Israeli National Identity* (2nd ed., 1993) [the author is appellant no. 4 in the present appeal – U.V.]).

21. Thus, we have seen that in order for the Court to grant the request of the appellants for a declaratory judgment to the effect that they belong to the Israeli nation, they must, according to the case law, prove by means of objective criteria the existence of this nation. This discussion involves basic questions about the State of Israel, the Jewish people, Zionism, and different conceptions of nation and nationality. The complexity involved in dealing with these questions – upon which we have barely touched– hardly needs to be stated. Answers to some of these questions may perhaps be found within the public consensus, and some are still subject to heated debate. The natural venue for these discussions is not within the courtroom, but in other arenas of public debate and academic literature. The Court would do well to exercise great restraint in relation to these issues (Aharon Barak, *Judicial Discretion* (1987), 289-291).

22. The above notwithstanding, I cannot entirely accept the conclusion of the lower court, namely, that this is an issue which is not justiciable from an institutional point of view. First, as we saw, this Court has often dealt with issues that relate to the contents of the "religion" and "nationality" fields in the population registry, despite the public sensitivity of these questions. The view that these questions are institutionally non-justiciable remains a minority one (see the opinion of Justice I. Englard in the *Naamat Case*, at p. 755). Rather, the Court has chosen to examine a narrow and technical aspect of the significance of the information recorded in the entries on religion and nationality in the registry, to interpret narrowly the authority of the registration officers to examine the contents of the detail that was registered by virtue of a person's declaration.

23. Indeed, our case law has repeatedly emphasized that the population registry and the actions performed within its framework pursuant to the Population Registry Law are not the appropriate arena for deciding on complex moral questions in the area of religion, national identity and personal status. So, in the words of Deputy President M. Cheshin in one of the cases:

> The Population Registry Law is, in the main, a technical law, and if we load upon its narrow shoulders a heavy burden of fateful questions, it will not be

> able to bear it. The Population Registry Law was not intended, at base, to embrace questions of people and nation, of religion and state, of Orthodox and non-Orthodox conversion, of who is a Jew and who is not a Jew (HCJ 6539/03 *Goldman v. Ministry of the Interior* [2004] IsrSC 59(3) 385, at p. 395 (hereinafter: *Goldman Case*)).

I agree with this statement unreservedly. Nevertheless, it cannot be concluded that the Court washes its hands of the concrete questions that are presented to it in cases involving the Population Registry Law and the actions performed pursuant to it. It is the legislator who determined that "nationality" would appear in the population registry, and in consequence, various issues arise for our consideration. As pointed out by Deputy President M. Cheshin in the *Naamat Case*, "Where the legislator makes legal norms that apply to the individual – rights and duties, immunities, privileges and other such legal relations between people – dependent upon the existence of a particular thing, by the very same flourish of the pen does he, as a matter of principle, make that "thing" justiciable where before it may not have been so" (*ibid*., at pp. 761-762). In other words, were the nationality item not included in the Population Registry Law, it could easily have been decided that this was an issue that, by its nature, ought not to be decided in court, for the reasons elucidated by the District Court. But this is not the situation. This becomes even more clear in the case at hand, for the issue that was laid at the doors of the District Court – the question of the existence of an "Israeli nationality" – has already been examined and discussed, on its merits, by this Court in the *Tamrin Case*.

Is a Reexamination of the Holdings in the Case of Tamrin Justified?

24. Within the contours of their argument, the appellants face a high hurdle – the need to convince the Court that justification exists for ordering a change in the holdings in the *Tamrin Case*., by pointing to a substantive change in circumstances or other reasons that justify so doing (and cf.: HCJ 10104/04 *Peace Now for Israel Educational Projects v. Commissioner for the Jewish Settlements in Judea and Samaria* [2006] IsrSC 61(2) 93, at p. 151). Let us recall that "it is not sufficient that an earlier ruling does not seem to the judge to be good in order to justify a departure from it" (per President A. Barak in LCA 1287/92 *Bosqila v. Zemah* [1992] IsrSC

46(5) 159, at p. 172). This is even more pertinent in our case, against the background of the institutional considerations that we discussed. Even if the said considerations do not tip the scales in favor of a determination that this is an issue that is institutionally non-justiciable, the Court may – in the framework of exercising its judicial discretion – reach the conclusion that there is no room to depart from the holdings in the *Tamrin Case*, after weighing additional considerations on different planes. To be precise: the institutional considerations **do not stand alone,** and their weight changes according to the circumstances of the matter. In the present case, additional considerations exist that justify the determination that renewed discussion of the question that was decided in the *Tamrin Case* is not warranted.

25. First, the appellants barely dealt with the holdings of the Court in the *Tamrin Case*. The sources to which the appellants referred were directed primarily at indicating that Israeli nationality was already created in 1948, with the establishment of the State of Israel, as part of the civil-national conception in which they believe. However, the judgment in the *Tamrin Case* – and its holdings – was handed down over twenty years after the establishment of the State of Israel. The arguments on principle that the appellants raise were therefore considered by the Court in the *Tamrin Case*, and were dismissed on the merits.

Secondly, the appellants do not deal with the existence of deeply-rooted conceptions in the Israeli public and in the case law in relation to the interpretation of the term "nationality" in Israeli law. The appellants' argument is therefore a normative one, to the effect that there **ought** to be recognition of the existence of an Israeli nationality as derived from Israeli citizenship, and the existence of other nationalities amongst Israeli citizens should be rejected. The hurdle that the appellants must overcome is, as stated, on the objective plane. However, apart from elucidating their coherent world view on the matter, the appellants have not presented a factual basis for the contention that the general public's approach to the concept of "nationality" has changed between the judgment in the *Tamrin Case* and nowadays.

Thirdly, the appellants have not dealt with the distinction that exists within the Population Registry Law between the **nationality** item (sec. 2(a)(5) of the Law) and that of the **citizenship** item (sec. 2(a)(10) of the Law). Many of the sources to which the appellants referred in support of their arguments about the existence of an Israeli **nationality** refer to nothing other than Israeli **citizenship**.

Thus, for example, the term "Israeli nationality" in the Ships Ordinance means only citizenship, and this is also the meaning of the term "nationality" that appears in the Israeli passport. The distinction between **citizenship** and **nationality** is not new to us. The substantive item of the two is, of course, the citizenship. **Citizenship** creates an ongoing legal connection between the individual and his state (HCJ 754/83 *Rankin v. Minister of the Interior* [1984] IsrSC 38(4) 113 (hereinafter: *Rankin Case*), at p. 117; and see Amnon Rubinstein and Barak Medina, *The Constitutional Law of the State of Israel*, Vol. 2: *Governmental Authorities and Citizenship* (6th ed., 2005), 1071 (Heb.)). This connection is important in broad areas of law. From the citizen's point of view –

> It has the capacity to accord him rights, to grant him powers, to impose duties upon him and to recognize his immunity in various, varied matters. Citizenship is connected to the right to vote in the elections to the Knesset, to hold various public offices, to the jurisdiction of the courts, to matters of extradition and many and varied matters …(the *Rankin Case*, at p. 117).

A person's **citizenship** is registered, as stated, in the population registry according to sec. 2(a)(10) of the Law, and this registration does constitute proof of its accuracy. *Nota bene*: it is crystal clear that the reliance of the appellants on statutory provisions in Israeli and international law relating to citizenship does not stem from a confusion of terms on their part. As we saw, the appellants' desire to bring about a unification of these two terms is the ideological underpinning of their motion and the conception of nationality that they support. At the same time, when they asked the Court to depart from the case law, they did not grapple with the existence of the said distinction in the Law.

26. At the same time, and possible even more importantly: in my view, the existing law affords the appellants a possible course of action that may bring about the desired result from their point of view, even if only partially, without the Court having to depart from the decision in the *Tamrin Case* by declaring the objective existence of an Israeli nationality. This is by way of registration in the population registry as Israeli citizens only. Such a course of action is based on the ruling in the *Shik Case*, where it was held that when a

person asks to leave the "nationality" field **blank**, he need only prove the sincerity of his request (this, similar to the recent decision of the Tel Aviv-Jaffa District Court in RM (Tel Aviv District) 25477-05/11 *Kaniuk v. Minister of the Interior* (27.9.2011), in the framework of which the court granted Kaniuk's request for declaratory relief that enabled the deletion of the word "Jewish" from the "religion" field). In the *Tamrin Case* the appellant sought relief of this type – a declaration that he is not part of the Jewish nation – as alternative relief as part of his summations. This request was dismissed *in limine*, for it appeared for the first time in the framework of the summations at the appeal stage, and had not been raised in the District Court or during the hearing on the appeal itself. However, President Agranat added that the request ought also to be denied on the merits, since the only reason underlying it is the appellant's desire to express his disapproval of the statutory amendments that were made pursuant to the *First Shalit Case*. In this, the Court reiterated the holdings in the *Shtederman Case* judgment. It would seem – *prima facie* – that this is not the situation in the present case. The appellants, some of whom are registered as Jewish in the "nationality" field and some as being of other "nationalities", are not seeking to express their objection to the limitations set in the legislation on registration of a person as "Jewish" by nationality; rather, they wish that true expression be given to their subjective self-definition. Even if the sought-after relief is not granted in full, it would appear that adoption of the course of action established in the *Shik Case* could, to a certain extent, serve their purposes. On the one hand, they will no longer be "labeled" as belonging to a nation to which they do not wish to belong according to their declaration (whether it is "Jewish", "Hebrew", "Arab" or other). On the other hand, they can continue to define themselves – to themselves and to the whole world – as Israelis according to their Israeli citizenship, which will continue to be registered in the population registry. If the appellants' wish is that the registry reflect their approach whereby citizenship is the appropriate characteristic for inclusion in the definition of a person's identity, then omission of the contents of the "nationality" field in the entry that relates to them, while leaving the citizenship in place, can serve this purpose faithfully.

True, the circumstances in the present case are somewhat different from those in the *Shik Case*. There, the discussion was of the matter of a person who declared that he does not belong to any nation ("negates nationality altogether and sees himself as a cosmopolitan who does not belong to any nation"), whereas in our

case, the appellants claim that they belong to the Israeli nation. At the same time, if this Court is convinced of the sincerity of the declaration of the appellants that they no longer wish to appear as being of the nationality under which they are presently registered, it would seem that this ruling might be applied to them as well. In my view, this is the inevitable outcome of the principle of human dignity, for in labeling a person as a member of a nation to which he feels no connection we violate his right to self-determination, which the Court already discussed in its early judgments (the *Shik Case*, at p. 7, per Justice Berenson; the *First Shalit Case,* at p. 511, per (then) Justice Sussman). Needless to say, this has been reinforced following the enactment of Basic Law: Human Dignity and Liberty, which accords human dignity constitutional status.

Nota bene: relief such as this was not requested in the proceedings that were the subject of the appeal, for this was not the declared wish of the appellants, and therefore there is no room to grant this relief in the framework of the present discussion. Nevertheless, the existence of this possible course of action for erasing the entry of the nationality entry – in reliance on the decision in the *Shik Case* – is in my view an important consideration amongst the whole array of considerations leading to the conclusion that a departure from the law as decided in the *Tamrin Case* is not warranted.

Conclusion

27. The appellants seek a declaratory judgment that will serve as a pubic document for the purpose of amending their registration under the "nationality" field in the population registry to "Israeli". The lower court denied the request, ruling that this was an issue that was not justiciable.

We discussed the theoretical complexity and the institutional sensitivity involved in examining the question of the existence of "Israeli nationality", which is tied to fundamental questions about the State of Israel and the Jewish people: the relationship between religious identity and national identity; competing theoretical conceptions of the term "nationality" and their application in our case; the connections between the State of Israel and Diaspora Jewry; the relations between different sectors of the citizens of the State and their national affiliation. Indeed, this sensitivity necessitates restraint in exercising judicial discretion. The natural place for these discussions is not in the courtroom, but in other

arenas of public discourse and scholarly writing, hence the reliance of the lower court on the doctrine of institutional justiciability.

At the same time, I cannot adopt the holding of the lower court on the question of institutional justiciability. As we have seen, issues connected to the contents of the fields of religion and nationality in the population registry (and in particular, the question of "Who is a Jew") have been brought before this Court since its inception. The Court has indeed repeatedly emphasized that the population registry is not the appropriate forum for deciding on the sensitive issues of religion and nationality, and has explained that its holdings on these issues do not settle the questions on their merits. Nevertheless, the view that these issues are not justiciable has remained a minority view.

Relying on the case law relating to the technical nature of the act of registration in the population registry, the Court has not refrained from extending relief to those who turn to it, even when in the background there were "sensitive" issues of conversion, Jewish law, religious identity and national identity. And more importantly, in the *Tamrin Case* discussed above, this Court deliberated the issue brought before it on the merits, and ruled that the existence of an Israeli nationality had not been proven by objective criteria. As such, we have been asked to **reopen the discussion** on this question, after it has already been decided by this Court.

Even though the institutional considerations cannot lead to a determination that the issue is non-justiciable, they can impact on the willingness of this Court to **reopen the discussion** of this matter. Therefore, if the appellants seek to depart from the decision in the *Tamrin Case*, they bear a significant onus that requires – at least – the presentation of arguments that were not considered at the time by this Court and that clearly indicate that there is a need for a change. Such arguments were not, as explained, presented before us. In addition, I found that even without changing the *Tamrin Case* ruling, the existing law provides the appellants with a course of action that would allow them to define themselves – to themselves and to the whole world – as Israelis according to their Israeli citizenship, which would continue to be registered in the population registry, without any connection to the "nationality" item. This could be done by following the appropriate procedure for erasing the registration of "nationality", in accordance with the law as decided in the *Shik Case*.

In the balance between the various considerations, I have concluded that the appellants have not lifted the onus that they bore to justify a departure from the holdings in the *Tamrin Case*. I will therefore propose to my colleagues that the appeal be denied, with no order for costs, and I will clarify that denial of the appeal in no way detracts from the principled battle of the appellants, born of their personal convictions, and from the discourse that will continue in the public domain.

Justice H. Melcer

I concur in the comprehensive, carefully-crafted judgment of my colleague, Justice U. Vogelman, in which he dismissed the claim of institutional non-justiciability in the present case, and reached the conclusion that the appellants did not lift the burden that they bore to show justification to depart from the judicial determinations made in the *Tamrin Case*. I also agree with the result at which my colleague arrived, whereby the appeal should be denied, with no order for costs.

Nevertheless, due to the importance of the questions that arose in this case, and in view of the fact that on several matters, my opinion differs slightly from that of my colleague, I will permit myself to elucidate my approach to the questions on which we do not entirely agree. I will focus only on the legal aspect, for the issues that the appellants seek to raise obviously also touch on deep disagreements in public, philosophical and historical areas, although in my view, as in that of my colleague, this does not lead to normative or institutional non-justiciability of the legal issues involved in the questions arising here (see and compare the deliberations and the different results that were obtained, pursuant to changes in the legislation, in each of the Shalit cases – the *First Shalit Case* in 1970, and the *Second Shalit Case* in 1972).

2. It seems to me that the fact that decades have passed since the judgment in the *Tamrin Case* entitled the appellants to initiate new proceedings (HCJ 11286/03 *Ornan v. Minister of the Interior* (20.9.2004)), and OM 6092/07 in the Jerusalem District Court, the object of this appeal, pursuant to the judgment in HCJ 11286/03 above) and to argue for factual and normative changes that justify, in their view, a departure from the *Tamrin Case* decision insofar as they are concerned. In relation to the considerations that allow for the "opening" of constitutional issues that have been settled

(particularly with respect to the validity of laws, but regarding other matters as well), see my opinion in HCJ 466/07 *MK Zehava Gal-On v. Attorney General* (11.1.2012).

3. Against the background described in para. 2 above, I have reached the conclusion that the appellants have not succeeded in showing that over the many years that have passed since the decision in the *Tamrin Case* was handed down, an "Israeli nationality" has developed (factually or legally) in Israel, as they claim, to which members of different religions, or those without religion, or those who belong, or belonged, to various ethnic groups are meant to belong.

And indeed, a people and a nation are not easily created. Even Amir Gilboa, in his famous "Song of the Morning", which in its first verse and the chorus refers to a situation in which –

> "Suddenly a man wakes up in the morning
> He feels he is a people and begins to walk
> And to all he meets on his way he calls out 'Shalom!'"

qualifies himself as the song continues, and writes – **out of historical awareness** – thus:

> And he laughs **with the strength of generations** in the mountains,
> And shamed, the **wars bow down** to the ground,
> To the glory of **a thousand years** flowing forth from the hiding places,
> **A thousand young years in front of him**
> Like a cold stream, like a shepherd's song, like a branch.
> (Emphasis added – H.M.)

Hence the appellants, even though they are wise and have attained impressive personal achievements, and have contributed to Israeli society (and this indeed is my opinion of them), and all feel subjectively that they belong to the "Israeli nation", cannot establish (at this stage, at least), a **legal entity** of an "Israeli nationality". At this point two comments are in order:

(a) The list of nationalities recognized by the Ministry of the Interior, which includes some 140 items (appendix 4 of the appellants' statement of claim in the District Court) is in fact **substantively different** in its characteristics from that which the appellants are seeking (this list contains nationalities that are defined

according to sovereign states (such as Italian nationality, Belgian nationality, Polish nationality etc.), nationalities with no sovereignty (such as Kurdish nationality), nationalities of religious-ethnic groups (such as Samaritans, Druze etc.), and even Hebrew nationality, which was recognized with respect to the members of the "Young Hebrews" Movement (so named at the time by their opponents, the "Canaanites"), when this movement emerged in Israel (this was before the enactment of sec. 4B of the Law of Return, and prior to the "constitutional revolution")).

(b) Appellant no. 1, Professor Uzi Ornan, registered at the time by virtue of his declaration as being of "Hebrew nationality", and now, with the passage of the years, he asks to "change nationality" and to be considered as belonging to what he defines as "Israeli nationality". This requested change from one nationality to another nationality attests, in itself, to the fragility of the distinctions proposed by the appellants.

4. Neither do the legislative changes that have occurred since the decision in the *Tamrin Case* support the appellants' approach: the opposite may even be true. I will deal with this point forthwith; before that, however, I would point out that I do not accept the central legal proposition of the appellants, which is as follows:

> A 'Jewish sovereign entity in the Land of Israel' does not exist, but rather a sovereign entity called Israel, and its decisions are made by the Israeli nation – the entire citizenry only, without distinction of race, religion or sex …"

(para. 17 of the appellants' written arguments; at the end of that paragraph, the appellants added another statement in relation to what, in their view, is an inevitable disconnection from Jews outside of Israel; below, therefore, I will discuss separately the connection between Israel and Diaspora Jewry).

The above basic proposition is problematic in several respects:

(a) The proposition ignores the "constitutional given" (this expression is borrowed from the opinion of President Agranat in EA 1/65 *Yardur v. Knesset Elections Committee* [1964] IsrSC 19 (3) 365, at p. 386), by virtue of which Israel is defined at the constitutional level – at least since 1992 – as a "Jewish and democratic state", in the framework of the provisions that were then introduced into the Basic Law: Human Dignity and Liberty and in Basic Law: Freedom of Occupation. For the significance of this, see:

Hanan Melcer, "The IDF as the Army of a Jewish and Democratic State", *Mishpat ve-Asakim* 14, *Mishpat ve-Adam Festschrift for Amnon Rubinstein* (2012) 347) (hereinafter: Melcer, *IDF as the Army of a Jewish and Democratic State*). See also: Menachem Mautner, "The National Identity of Israel and the Problem of Equality", in *Arab Politics in Israel at the Crossroads*, 111-112 (1995), who stated that "the process of victory of 'Judaism' over 'Hebrew-ism' received symbolic expression in 1992" (in the above two Basic Laws), and added:

> … We recognize the power of the law to determine the culture … the law also determines identities. Identities of persons, and identities of groups. The two Basic Laws of 1992 are an example of laws that seek to determine national identity.

Elaboration of these subjects is found in Prof. Mautner's book, *Law and Culture in Israel at the Beginning of the Twenty-First Century*, Chap. 2, and pp 31-32, 298, 365, 345, 420, 565-566 (2008)(Heb.) (hereinafter: Mautner, *Law and Culture in Israel*). It is noteworthy that Prof. Mautner, both in his above article and in his above book, supports the adoption of an inclusive element of identity that is "Israeli-ism" in the constitutional conception of the state, but in his view, too, this is the **ideal law, and not the existing law** (as opposed to the approach of the appellants, who believe that their request is grounded in the existing law).

(b) The proposition displays a certain confusion of concepts on the part of the appellants. Israel is defined internationally (since the United Nations decision on the "Partition") and internally (at least since the enactment of the above two Basic Laws, and even prior to that, by virtue of what emerges from the Law of Return – 1950) hereinafter: law of Return) and the Declaration of Independence), as the **nation-state** (*medinat hale'om*) **of the Jewish People.** The fact that it is also the national-state (*medinat ha'umah*) of its Israeli citizens – whoever they may be – does not negate its identity as the nation-state of the Jewish people (the term "nationality" (*Le'um*) refers to the components of the People that lives in the state, whereas the concept of "nation" (*Umah)* relates to the citizens of the state. And see: Mautner, *Law and Culture in Israel*, at p. 32). See also: Prof. Ruth Gavison, "The National Rights of the Jews" (hereinafter: Gavison); Sir Martin Gilbert, "An Overwhelmingly Jewish State": From the Balfour Declaration to the Palestine

Mandate; Prof. Shlomo Avineri, “Self-Determination and Israel’s Declaration of Independence” – all from: *Israel’s Rights as the Nation State of the Jewish People*, Alan Baker (ed.), 2012, at pp. 8, 22 and 32 respectively (Heb.)).

In her article, Prof. Gavison argues that a distinction must be made between a national-ethnic identity and a national-civil identity (a distinction that the appellants ignore). She explains that in many contexts, nationality does not refer to civil identity, but to the desire of a particular ethnic (national) group to achieve political independence. She explains her position as follows:

> …For otherwise, it would be illogical to talk of “national minorities” because by definition such minorities could not exist within any state. (*ibid.,* at p. 12).

And she further clarifies:

> The argument that the Jews are a nationality distinguishes between citizenship and cultural-national identity. All Israelis – both Jews and Arabs – share citizenship and a number of cultural characteristics … Nevertheless, Arabs and Jews both aspire for recognition as belonging to their national (Jews as opposed to Arabs) and religious (Jews, Muslims, Druze and Christians) group (*ibid.,* at p. 12).

Furthermore, in her view –

> There are also significant differences within these religious and national groups. Each of these identities is likely to entail practical implications. Jews who are citizens of other states do not aspire for those states to recognize their national rights. It is quite possible that they will choose to migrate to the only national (ethnic) state in the world of the Jews and thereby realize their national rights. They are also likely to maintain their non-Jewish (civil) nationality, and to recognize their cultural ties with the

> only country in the world that is the nation state of the Jews (*ibid*., at p. 12).

(c) The proposition seeks to read the **Declaration of Independence** in a new way and to say that by virtue of the **Declaration**, the "Israeli" nationality was established, comprised of members of the "independent Hebrew people in its land" and members of the "Arab people who are citizens of the State of Israel." This approach was already rejected in the *Tamrin Case*, based on an analysis of the **Declaration of Independence** – see p. 221 of the opinion of President Agranat, who stated, *inter alia*, as follows:

> The Declaration [states – H.M.] that 'the State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles' – this incorporates … the mission of a melding of the diasporas into 'one people'…. I have only mentioned this … in order to stress that the great event that was the establishment of the State of Israel … did not happen to us so that a split would occur in the midst of the nation – Jewish on the one side, and 'Israeli' on the other.

This position expressed by President Agranat has become even more pertinent as the Basic Laws now refer, directly and explicitly (alongside their definition of the State of Israel as Jewish and democratic) – to the **principles of the Declaration**. See: Rubinstein and Medina, Vol. 1, at pp. 41-43 (6th ed. 2006) (hereinafter: Rubinstein and Medina). These principles include recognition of the legitimacy of the existence of the State of Israel as a Jewish State, based – as Rubinstein and Medina say –on three central foundations:

(1) The United Nations Resolution of 29 November 1947, according to which a Jewish State will be established in the Land of Israel.

(2) Moral recognition of the right of the Jewish people to self-determination in a national framework.

(3) The practice in nation states, accepted by other democracies in the world, which negates the contention that a democratic system requires a "neutral state" from a national point of view.

(*ibid*., at pp. 322-323; for an elaboration of these issues, see: A. Yakobson and A. Rubinstein, *Israel and the Family of Nations – The Jewish Nation State and Human Rights* (2003); R. Gavison, *Israel as a Jewish and Democratic State: Tensions and Chances* (1999) (Heb.)).

Prof. Chaim Gans, whose general approach is entirely different, also does not dispute the fact that in the **Declaration of Independence,** expression was given to a three-fold justification for Zionism and its realization in the State of Israel. According to him, these three justifications, that were mentioned in the **Declaration,** included:

(1) The historical connection between the Jews and the Land of Israel;

(2) The right of Jews to stand on their own like every other people, i.e. their right to national self-determination;

(3) The defense of necessity, which is learned from the persecutions of the Jews and from the Holocaust.

According to Gans' approach, these justifications constitute the moral skeleton of the Israeli Declaration of Independence, if they are read in such a way that only **the three together** can provide legitimacy for the establishment of the State of Israel. See: Chaim Gans, "The Threefold Justification for Zionism", *Ha'aretz, Weekend Magazine,* 30.8.2013, pp. 66-69 (Heb.) (for elaboration, see: Chaim Gans, *Political Theory for the Jewish People – Three Zionist Narratives* (2013), and the references to the **Declaration of Independence**, *ibid.*, as per the Index).

The appellants were unable to respond to these interpretations, which, even if they stem from different world views, reflect a significant degree of agreement with respect to the contents of the Declaration of Independence in these contexts, and its significance for their arguments.

5. Following the above preliminary remarks, I will now turn from the general principles to a **description of the extant law,** and I will emphasize that the combination of "**Jewish and democratic state"** has indeed brought about an extremely significant change here, gaining recognition in every normative arena in which the constitutional law of Israel is shaped. For various reasons, this phrase emerged in 1992 from the "stage of obscurity" (which was reflected in the expression, **"Rock of Israel"** that appeared in the Declaration of Independence – see: Yoram Shahar, "The Early Drafts of the Declaration of Independence", *Iyunei Mishpat* 26

(2002) 523, 526-530 (Heb.); Yizhar Tal “Declaration of Independence – A Historical, Interpretative Study” *Mishpat Umimshal* 6 (2003) 551, 564-565 (Heb.); Pinhas Shifman, *One Language, Different Tongues – Studies in Law, Halakhah and Society* (2012), 20, 27-28 (Heb.)) and entered the “the stage of declarations”. See Melcer, *The IDF as the Army of a Jewish and Democratic State*, 351. This has a direct impact on our matter, for the appellants wish to raise objections, as we have said, to the significance of the Jewish nation and to Israel being the Jewish nation state. In this context I would like to further remark that in addition to sec. 1A of Basic Law: Human Dignity and Liberty and sec. 2 of Basic Law: Freedom of Occupation, which refer to the values of the State of Israel as a Jewish and democratic state, sec. 7(a)(1) of Basic Law: The Knesset also refers and characterizes Israel as a **“Jewish and democratic state”, the existence of which as such may not be denounced**. These approaches also found expression in regular legislation – see: State Education Law, 5713-1953, sec. 2(b); Electoral Parties Law 5752-1992, sec. 5(1); Culture and Arts Law 5763-2002, sec. 2(c); Special Cultural Educational Institutions, 5768-2008, sec. 2(b); and Terminally Ill Patient Law, 5768-2008, sec. 1(b).

Due to the importance of the above change in relation to the constitutional characterization of the State, a great deal has been written on the various aspects of the significance of the combination “Jewish and democratic state”, and in particular, on the tension between the “Jewish state” and the “democratic state”, and on the ramifications of the “Jewishness” of the State. See, for example, a select sample: Haim H. Cohn, “The Value of a Jewish and Democratic State – Studies in Basic Law: Human Dignity and Liberty” *Hapraklit, Jubilee Volume* 9 (1993) (Heb.); Ariel Rosen-Zvi, “A Jewish and Democratic State: Spiritual Paternity, Alienation and Symbiosis – Can the Circle be Squared?” *Iyunei Mishpat* 19(3) (1995), 479 (Heb.); Asher Maoz, “The Values of a Jewish and Democratic State”, *Iyunei Mishpat* 19(3) (1995), 547 (Heb.); Ruth Gavison, “A Jewish and Democratic State: Political Identity, Ideology and Law”, *Iyunei Mishpat* 19(3) (1995), 169 (Heb.); Ruth Gavison, “A Jewish and Democratic State: Challenges and Risks”, *Multiculturalism in a Jewish and Democratic State – Ariel Rosen-Zvi Memorial Volume* (Menahem Mautner, Avi Sagi, Ronen Shamir eds., 1998), 213 (Heb.); Asa Kasher, “Jewish and Democratic State – a Philosophical Sketch”, *Ruah Ish* 13 (2000) (Heb.); Mordechai Kremnitzer, “The Image of the State of Israel as a Jewish and Democratic State” in *The Jewish Character of a Democratic State*

(Aviezer Ravitzky and Yedidia Stern, eds., 2007), 395 (Heb.); Aharon Barak, "The Values of the State of Israel as a Jewish and Democratic State" in *Aharon Barak – Selected Writings*, vol. 1 (Haim H. Cohn, Yitzhak Zamir eds., 2000) 445 (Heb.); Aharon Barak, *Legal Proportionality: Constitutional Rights and their Limitations* (2010), 302-316 (Heb.); Yitzhak Zamir, *Administrative Authority* vol. 1 (2nd ed., 2010) 59-72 (Heb.); Amnon Rubinstein, "The Curious Case of Jewish Democracy", *Techelet* (2010) 41, 78 (Heb.); Melcer, *The IDF as the Army of a Jewish and Democratic State*; see also all the papers in *Israel as a Jewish and Democratic State* (Asher Maoz, ed., 2011). As for the case law, the term "Jewish and democratic state" has been mentioned to date, in various contexts, in hundreds of judgments of this Court.

For our purposes it is important to emphasize that the "constitutional Jewishness" of the state negates the legal possibility of recognizing an "Israeli nationality" which is distinct, as it were, from the "Jewish nationality", as so succinctly elucidated by President Agranat in his decision in the *Tamrin Case* even prior to these Basic Laws (even more so - this the inevitable conclusion after their enactment). Moreover, negation of the other nationalities in Israel and the inclusion of all of them in one "Israeli nationality" is contrary to the **democratic nature** of the State.

6. The appellants are apparently aware of the above conclusions, and they are therefore attempting to blur the distinction between **citizenship** and **nationality** (or alternatively, to omit the "**nationality**" item from the population registry). Nevertheless, they are not able to explain why, under the extant law, these two must be entered **separately** in the population registry under sec. 2(a) of the Population Registry Law, 5725-1965 (hereinafter: Population Registry Law). I therefore agree with my colleague, Justice U. Vogelman, that all the appellants' arguments concerning the existence of **Israeli nationality** in fact relate to **Israeli citizenship**. To the examples he cited in par. 25 of his opinion I will add that even the appellants' argument in relation to the Law and Administration (Nullification of the Application of Law, Jurisdiction and Administration) Law, 5759-1999 (hereinafter: the Referendum Law), does not support their contention. The appellants attempt to deduce from the institution of "referendum" and from the provisions of the Referendum Law that within the bounds of "the people" – as a collective noun –all Israeli citizens of the state are included, as one nationality. However, the Referendum Law states, in sec. 6, only that –

> A person shall have the right to participate in a referendum **if he would have had the right to participate in elections to the Knesset** had these been held at the time of the referendum. (Emphasis added – H.M.)

Section 5 of Basic Law: The Knesset, provides in this context as follows:

> Every **Israeli citizen** of or over the age of eighteen years shall have the right to vote in elections to the Knesset, unless the court has deprived him of that right by virtue of any Law; the Elections Law shall determine the time at which a person shall be considered to be eighteen years of age for the purpose of the exercise of the right to vote in elections to the Knesset. (Emphasis added – H.M.)

From the above it transpires that in the Referendum Law also (the validity of which is now being examined in a petition before us in HCJ 9149/10 *Dr. Vatad v. Israeli Knesset* (13.5.2014)), eligibility to participate in a referendum is contingent upon **Israeli citizenship** (as well as majority), **and not** on affiliation to one nationality or another.

7. Here I will also remark that in relation to the connection between Israel and Diaspora Jewry, from which the appellants wish to dissociate themselves in order to isolate the "Israelis" from the "Jews" and vice versa, the appellants were not sufficiently precise from a legal point of view. One of the characteristics of Israel as a Jewish state is –

> … its responsibility for the fate of the Jewish people as a whole, because it was established as an expression of universal Jewish solidarity. In view of this responsibility, it has the right and the duty to employ the tools of collective state action for the protection of Jews who are harmed "qua Jews." (See: Prof. Moshe Halbertal, "Is a Jewish Democratic State Possible" (Ha'aretz Weekend Magazine, 22.4.2013).

A manifestation of this may be found in sec. 13(b)(2) of the Penal Law, 5737-1977, which applies Israeli penal law to foreign offenses against "the life, body, health, freedom or property of a Jew, as a Jew, or the property of a Jewish institution, because it is such." This provision attests to the general approach of the legislator in relation to the protection of world Jewry that Israel is expected to provide. See: Melcer, "*The IDF as the Army of a Jewish and Democratic State*", at p. 354.

This is also the view of Prof. S.Z. Feller and Prof. Mordechai Kremnitzer in their article: "Reply to the Article 'Against Extra-Territorial Application of Penal Law on National Grounds' by Y. Shachar", *Plilim* (1996), 65-69 (Heb.), and see especially what the authors write on p. 88:

> The most serious anti-Jewish events … in which so many Jews were murdered and injured and so many institutions throughout the world damaged only because they were Jewish – for example in France, Italy, Belgium, Austria, Turkey, Argentina …. It seems that the Jewish people, which has been persecuted most cruelly throughout its long history, has accumulated a feeling of solidarity in its heart, irrespective of the citizenship of each individual Jew, which obligates Israel, as a Jewish state, to spread the net of its penal law to such injuries, whether or not they were successful, and to ensure that being brought to justice for these deeds will not encounter any legal consideration that is based on foreign law, or on an act of a foreign court.

This logic also underlies the Nazi and Nazi Collaborators (Punishment) Law, 5710-1950.

8. I shall now proceed from the general to the specific, and deal with the relevant specific legislation. In this aspect, the appellants did not attempt to engage the compelling argument voiced at the time by (then) Justice Y. Kahan in the *Tamrin Case*, who referred to sec. 3A of the Population Registry Law. This section today provides as follows:

3A (a) A person shall not be registered as a Jew by nationality or religion if a notification under this Law or another registration in the Registry or a public document indicates that he is not Jewish, so long as the said notification, registration or document has not been controverted to the satisfaction of the Chief Registration Officer or so long as declaratory judgment of a rabbinical court in an action of a litigant who is a resident concerning matters of marriage and divorce in accordance with sec. 1 of the Rabbinical Courts Jurisdiction (Marriage and Divorce) Law, 5713-1953, or of a court, provided that he is not a member of another religion.

(a1) If in the opinion of the Registration Officer, the notification, registration or public document as aforesaid in sec. (a) above were not presented to the rabbinical court or the court that made the determination as aforesaid in that section, he may approach the rabbinical or civil court, as relevant, and present the above to the court, and he is entitled to defer the registration, its amendment or change thereof until a decision is rendered by the rabbinical or civil court.

(b) **For the purposes of this Law and any registration or document by virtue thereof, "Jew" – within its meaning in sec. 4B of the Law of Return, 5750-1950.** (Section 4B of the Law of Return defines "Jew" as a person who was born of a Jewish mother, or who has converted to Judaism, and who is not a member of another religion.)

(c) Nothing in this section shall derogate from any registration that was made prior to its coming into force."(Emphasis

and comments in parentheses added – H.M.)

Hence, (then) Justice Y. Kahan deduced, in the *Tamrin Case*, that a Jewish person's affiliation to the Jewish nation, for the purpose of registration, must be determined in principle according to a single criterion, i.e., whether the conditions for the definition of a Jew in the Law of Return have been met (here I must comment that in these contexts, questions remain on the meaning of "converted to Judaism, and who is not a member of another religion"; however, these questions are not relevant to the dispute before us. Moreover, even the monikers "the Jewish People" and "the Hebrew People" have undergone changes and taken on various meanings over the ages. See: Meir Sternberg, *Hebrews Between Cultures: Group Portraits and National Literature* (Indiana Uni. Press, 1998); Eric Nelson, *The Hebrew Republic: Jewish Sources and the Transformation of European Political Thought* (Harvard Uni. Press, 2010).

The appellants did not furnish a satisfactory response to the above approach of Justice Y. Kahan (and I will add that the legislative amendments brought about in sec. 3A of the Population Registry Law since the decision in the *Tamrin Case* have no bearing on our matter), and it therefore remains valid today. Hence, for the purposes of **changing** the item of nationality, the subjective feelings and views of the person requesting the change are unimportant; what is important is the provisions of the law and the accepted definitions of nationality. Nevertheless, the need may arise in the future to introduce certain legislative changes, in the framework of which it may also be possible to recognize some "local" nationality, one which will be created with the years, even if only in relation to the thousands who immigrated to Israel (as the relatives of Jews) by virtue of sec. 4A of the Law of Return, similar to the process behind the enactment of the Civil Union for Persons Having No Religious Affiliation Law, 5770-2010. It would be possible to include the appellants and those like them within this framework.

9. From what has been said to this point, and particularly in view of the argument discussed in para. 8 above, it is clear that I cannot agree to the course that my colleague, Justice U. Vogelman, described in para. 26 of his opinion for the appellants to consider adopting in the future. First, I cannot accept this because it was not something that the appellants requested in the framework of this process – the subject of the appeal before us – and my colleague indeed mentions this. To this I will add that in the *Tamrin Case*,

even though the appellant there did make a request of this type in the framework of the appeal process, the Court decided not to accept it. This applies here *a fortiori*, where such alternative relief was not even sought. Needless to say, we have not heard arguments on this matter. Moreover, one can also argue about the distinctions that my colleague drew in these contexts (in view of the decision in the *Shik Case*). I will therefore confine myself to commenting that as distinct from citizenship and from religion, which can be "renounced" or changed, and for which there is also usually an institution or a "ceremony" by means of which, or with the authorization of which, the "renunciation" or "change" are performed – it is usually very difficult to renounce one's nationality (just like a child cannot, in principle, "renounce" his parents). I will not go into the question here of whether one can hold "dual nationality" (like "dual citizenship") and in what cases precisely is it possible to be a "universal person" lacking any nationality – a status claimed by Isaiah Shik, and which was granted to him.

10. Beyond all that has been said so far, I believe that President Agranat's conclusion in his monumental decision in the *Tamrin Case* – in which all the other justices on the panel concurred – according to which, as Justice H. Cohn said there, "It was not proved that legally, an 'Israeli nationality' exists, and we ought not to encourage the creation of new national 'fragments'" – **is still valid**.

11. Before concluding I would emphasize that the most that can be said in the context of the appellants' position was expressed in the concluding paragraph of the opinion of the District Court (per (then) Judge N. Sohlberg), who stated:

> There is nothing in this decision to say that there is no Israeli nationality – in a person's heart, in the platform of a group of people, amongst a particular sector in the state. On the contrary, Prof. Uzi Ornan, like the other petitioners, believes that he is a member of the Israeli nation. This belief deserves respect and appreciation from those who share his view and those who oppose it.

My colleague, Judge Sohlberg, added "this belief does not require legal approval"; I however, believe that according to the prevailing legal situation, **the subject is justiciable, but the demands of the appellants cannot be grounded in the existing law.**

12. What emerges at this time from all the above is that in the current legal situation, **citizenship is one thing, and nationality is another**. Together with this basic position, several additional conclusions must be drawn:

(a) With respect to the members of different nationalities who reside in Israel – at this point the separate nationalities should not be "unified" and legally gathered into a new, inclusive "Israeli nationality", for this controverts both the **Jewish** and the **democratic** character of the state (with respect to **all the nationalities** in our country, including Jewish nationality).

(b) Insofar as the Jewish nationality is concerned – it has been proved thus far that the Seer of the State, Dr. Benjamin Zeev Herzl, was right when he wrote in his book, *The Jewish State* (1896):

> I think the Jewish question is no more a social than a religious one, notwithstanding that it sometimes takes these and other forms. It is a **national question** ... **We are a people – one people**. (Emphasis added – H.M; from the Introduction to the book, *The Jewish State* (in Hebrew, see: http://benyehuda.org\herzl_003.html)

(c) The State of Israel was established and exists as a Jewish and democratic state as a solution for the Jewish people, which has suffered severe persecutions over the centuries and was mortally wounded in the Holocaust, and this is also one of the reasons for its definition – constitutionally – as such. There is therefore no legal basis for the appellants' desire to negate the "Jewishness" of the State and to make all its citizens members of an "Israeli nationality". The said determination does not, of course, detract from the obligation of the State, as derived, too, from the Jewishness of the State and from its democratic character, to protect and to grant full equality to all its citizens, residents and those over whom it has control, irrespective of nationality, race, religion, ethnic group and sex.

President Grunis

I concur in the opinions of my colleagues, Justice U. Vogelman and Justice H. Melcer, that the decision in the *Tamrin Case* applies to the matter which is the subject of the appeal, and that it has lost

none of its validity. As such, I see no need to address the question of whether the District Court was justified in dismissing the appellants' request on the grounds that the issue is non-justiciable from an institutional point of view. And another remark in relation to the proposal of my colleague, Justice U. Vogelman, that the nationality field in the population registry remain blank in the case of the appellants (para. 26 of his opinion): since this possibility was never raised by the appellants, I explicitly refrain from relating to it.

Appeal denied, with no order for costs.

28 Tishri 5774

October 2, 2013

Amended: 2 Heshvan 5774

October 6, 2013