WHO IS A JEW?

Shalit v. Minister of Interior et al.

The Law of Return (Amendment No. 2), 1970

The Shalit case or, as it came to be popularly known, the case of "Who Is A Jew?", was heard in Israel in the Supreme Court sitting as a High Court of Justice before an unprecedented bench of nine justices. Judgment was delivered on January 23, 1970, after the case had been pending for nearly two years. In a five to four decision, the High Court made absolute an order *nisi* calling upon the Minister of Interior and the Haifa Registrar of Inhabitants to show cause why the petitioner's children should not be registered as being Jewish by "ethnic group" (*leoum*).

The case, surrounded by deep controversy, elicited world-wide reaction. Almost without exception, the comments immediately following the decision were primarily reflections of religious or political bias.[1] Reform rabbis, bitter over the Orthodox Rabbinate's control in Israel over matters of marriage and divorce, praised the decision because it seemed to be an important breach in the Halacha (Jewish Religious Law) and the Israel rabbinate's control. Orthodox rabbis attacked the decision because they believed it rejected the Halachic definition of who is a Jew. Conservative rabbis, most of whom maintain a religiously centrist position, by and large reserved comment.

Similar divisions of opinion occurred between lay religious and secular forces in Israel and abroad.

THE FACTS.

The petitioner, Binyamin Shalit, a Jew, was born in Haifa, Israel in 1935. In 1958, while studying in Edinburgh, Scotland, he married Anne, a non-Jewish Scotswoman who did not convert to Judaism. In 1960, he returned to Haifa with his wife. On March 14th, 1964, a son, Oren, was born to them and Oren was circumcised but not in accordance with the Halacha (Jewish Religious Law). On February 15th, 1967, a daughter, Galya, was born to them.

When the petitioner, who had become an officer in the Israel Navy, came to register his son in accordance with the Registration of Inhabitants Ordinance, 1949, which required that the particulars regarding his son's "religion" (*dat*) and "ethnic group" (*leoum*) be given, he declared nothing for "religion" because he and his wife considered themselves atheists and their son was being raised without religion, and declared Jewish for

---

1. New York Times, January 24th, 1970, p. 1; Winnipeg Free Press, January 28th, 1970, p. 2; Jerusalem Post, January 26th, 1970, p. 4.

"ethnic group". (It should be noted here that the hebrew word *leoum* can be translated as "ethnic group" or "nationality" or "peoplehood". The official Israeli english translation of this term in the Population Registry Law is "ethnic group" and we have therefore, in the main, used this expression for *leoum*. The courts have translated the word *leoum* variously and have interchangeably used: "ethnic group", "nationality" and "people".)

The registration officer changed the petitioner's declaration and registered the son as to religion, "Father Jewish, Mother Non-Jewish", and as to ethnic group, wrote "no registration". He so acted in accordance with the following directive issued in 1960 by the Minister of Interior to all registration officers:

> "Children born of a mixed marriage shall be registered in the particulars of 'religion' and 'ethnic group' according to the following directions:
>
> (a) If the children were born to a Jewish mother and a non-Jewish father, the children shall be registered as 'Jew' in the particular of religion and ethnic group;
>
> (b) If the children were born to a Jewish father and a non-Jewish mother, they shall be registered in the particulars of 'religion' and 'ethnic group' according to the particular corresponding to that of the mother. If the parents objected to registering the children in the particulars of 'religion' and 'ethnic group' according to the corresponding particular of the mother—the children shall be registered in the said particulars according to whatever non-Jewish religion and ethnic group the parents shall declare. If the parents objected, as said above, and will also not declare any non-Jewish religion and ethnic group whatsoever for the children, as said,
>
> 1. There shall be registered for the particular of 'religion', Father Jew, Mother Non-Jewish;
>
> 2. The particular of 'ethnic group' shall not be filled out in the registry and on the identity card.
>
> If it is established that the children were converted by an authorized religious court, they shall be registered in the particular of 'religion' and 'ethnic group'—'Jew'."[2]

The directives of 1960 followed the Halacha which establishes the Jewishness of a child according to the mother's status[3], and looks upon religion and ethnic group as being indivisible.[4] Under the Halacha, no person can be considered Jewish if he was born of a non-Jewish mother unless he had been converted to Judaism in accordance with Halachic requirements. The Halacha provides that true and proper conversion in the case of the male is gained by the acceptance of the authority of the religious law, circumcision and immersion, and in the case of the female, acceptance

2. (1970) H.C. 58/68, p. 45.

3. Mishna Yebamot, Ch. II, 21a; Yebamot 23a; Mishna Kiddushin Ch. III, 61b; Kiddushin 68b; Maimonides, Hilkot Yibum V'Chalitza, Ch. I Hal. IV; Maimonides, Hilkot Isurei Biah, Ch. XII, Hal. 7, Ch. XV, Hal. 4; Shulhan Aruk, Eben Haezer, Section VIII, Par. 5.

4. Rabbi S. J. Zevin in Jewish Identity, edited by Sidney B. Hoenig, p. 29, Sephardi Chief Rabbi Yitzhak Nissim quoted in Jerusalem Post, Jan. 26, 1970, p. 4.

of the authority of the religious law and immersion.[5] Parental assertions alone in the case of a minor or the declaration of an adult himself that he wishes to be known as a Jew, are of no avail.

When the petitioner came to register his daughter in accordance with the Population Registry Law, 1965, which succeeded the Registration of Inhabitants Ordinance, 1949, the registration officer mistakenly confused "religion" and "ethnic group" and reversed the proper order by registering the daughter as to ethnic group, "Father, Jewish; Mother, Non-Jewish", and as to religion, he wrote "no registration". In his answer, however, he specified that he was ready to correct the registration in such a manner that it would be identical with the son's and in accordance with the Ministry of Interior's directives of 1960.

After the petitioner's requests to have the children recorded as being "without religion but Jewish by ethnic group" proved fruitless, he petitioned the Supreme Court which, on February 25, 1968, granted an order *nisi* ordering the respondents, consisting of the Minister of Interior and the Haifa Registration Officer to show cause why the petitioner's children should not be registered as being Jewish by ethnic group.

On the return day, Shalit appeared on his own behalf and Mr. M. Shamgar, the Attorney General, Mr. Z. Terlo, Senior Adviser to the Minister of Justice, and Mr. Y. Barsela, Assistant State Attorney, appeared for the respondents.

The petitioner made two major arguments before the Court. He argued that the registration must be made in accordance with the declaration of the declarant and that the registration officer is not authorized, under the law, to change what is declared.

Second, he also argued that one's ethnic group was a thing separate and apart from one's religion and that one could therefore be Jewish by ethnic group without being Jewish by religion. He stated that the test for determining ethnic group was identification with Jewish-Israeli culture and values. Such identification could be evidenced subjectively and objectively.

Subjectively, it was a matter of the individual's feeling. Quoting Dr. Arthur Ruppin, he said:

> "A man belongs to that nation, that is, to that national group to which he feels the greatest affinity through history, language, culture and common customs. A nation means a community of people who share the same fate and culture."[7]

Objectively, he said:

> "The ethnic group of a person is the place or sociological group, when speaking of a people without a land, which makes up the centre of his life."[8]

5. Yebamot 41-47; Yerushalmi Kiddushin, Ch. III, Hal. 13; Keritot IX-1; Gerim, Chapters I-II; Shulhan Aruk, Yoreh Deah, Section 268, Pars: 1-3.
7. The Jewish Structure for Survival, by Dr. Arthur Ruppin, p. 11.
8. (1970) Petitioner's Written Arguments, H.C. 58/68, p. 10.

His children, he said, were therefore fit to be registered as Jews by "ethnic group". He and his wife intended to live in Israel with their family and to continue to raise their children in the same Israeli-Jewish spirit in which he had been raised. His children already had a history, language, customs and values in common with all their friends.[9]

ATTEMPT AT AVOIDANCE

The High Court, in the first instance, because of the deep split in public opinion and the conflicting ideologies involved in the Shalit case, tried to avoid deciding the case by asking the Government to recommend legislation deleting the particular of "ethnic group" from the Population Registry and the identity card. The nine members of the Court were unanimous in believing that it was not desirable for the Court to decide the controversial question of who is a Jew by "ethnic group".[10] The Government, however, rejected the Court's request.

> ". . . the High Court at the conclusion of its first sitting had turned to the government asking it to initiate legislation which would eliminate the need to fill in so unnecessary a particular in the registry, and it is to be regretted that the government had not listened to our suggestion."[11]

The Court was forced to decide the Shalit case. There were several spoken and unspoken considerations which had seriously divided the public and which the Court had to face. These, as we shall now discuss them, influenced the approach and opinions of the Justices to varying degrees.

REGISTRY LAWS AND THE LAW OF RETURN

The question of who is a Jew had long been the subject of controversy in Israel and had centred about three laws: the Registration of Inhabitants Ordinance, 1949,[12] the Population Registry Law, 1965,[13] which succeeded the Ordinance, and the Law of Return, 1950.[14]

The term "Jew" only appears in one of these three laws — the Law of Return, 1950, and that Law does not define the term.

The Law of Return deals with the right of immigration into Israel and extends special privileges to every Jew. It provides that a Jew is entitled to settle in Israel by virtue of the fact that he is a Jew and as soon as he settles in Israel he automatically becomes a citizen. By contrast, a non-Jew who wishes to settle in Israel must receive permission to do so

9. Ibid, pp. 6, 10.
10. Justice M. Landau, (1970) H.C. 58/68, pp. 48-49.
11. Justice A. Witkon, (1970) H.C. 58/68, p. 67.
12. (1949) I.R. of 5709, Suppl. I, No. 48, p. 164; LSI Vol. II, p. 103.
13. (1965) Sefer Ha-Chukkim No. 466 of 3rd Av, 5725, p. 270. The Law was amended in 1967. Population Registry (Amendment) Law, 1967, found in Sefer Ha-Chukkim of 10th Av, 5727, p. 145.
14. (1950) Sefer Ha-Chukkim No. 51 of 21st Tammuz, 5710, p. 159.

from the State. If he settles in Israel, he may become a citizen only by naturalization after two years of residence.

The Registration of Inhabitants Ordinance, 1949, and the Population Registry Law, 1945, which succeeded it, include regulations for the registration of a resident's "religion" (Dat) and "ethnic group" (Leoum) in the Registry. The terms "religion" and "ethnic group" are not defined in either law. Under the Ordinance and the Law, the registration officers were authorized to make such registration and to also issue an Identity Card recording, among other things, the particular of "ethnic group". In times of emergency, every male resident was obligated by law to carry his Identity Card with him.

In the absence of any definition of the terms "Jew", "religion", and "ethnic group" in the respective laws, the repeated question that arose was how to define these terms.

RELIGIOUS LAW AND SECULAR LAW

Law in Israel is divided into religious and secular laws and jurisdiction is split between civil and religious courts.

All matters of marriage and divorce are under the authority of the religious courts which rule according to their respective religious law: the Shar'ia Courts for Moslems, the Religious Courts of the various Christian Communities for Christians and the Rabbinical Courts for Jews. There is no civil marriage in Israel.

Wherever the question arises as to whether a person is a Jew, in connection with his marriage or divorce, the religious authorities have exclusive jurisdiction of adjudication.

Where, however, the question as to whether or not a person is a Jew arises in connection with a civil law, jurisdiction belongs to the civil court.

At first blush, the question of who is a Jew for purposes of the Registration of Inhabitants Ordinance, 1949, and the Population Registry Law, 1965, and the Law of Return, 1950, was clearly a question for the secular courts to decide according to secular law in the absence of legislative definitions of the terms: "Jew", "religion" and "ethnic group".

Religious forces, however, argued that the secular courts could only use religious criteria in defining these terms since the term "Jew" was a religious term and when one was said to be a "Jew" it included both religion and ethnic group which were indivisible. Since no division could be made between religion and ethnic group, one could therefore not be Jewish by ethnic group without being Jewish by religion.

> ". . . in Judaism, religion and nationalism go together; none may register as a Jew unless he proves adherence to both by birth or by the prescribed process of conversion."[15]

David Ben-Gurion, the Prime Minister of Israel, in October of 1958 summed up the secular and religious positions in a letter addressed to Jewish scholars:

> "The opinion has been expressed that since the register is a civil one and does not serve for religious purposes (the religious authorities are not obligated to be satisfied with it or to rely upon it, and in general they are not prepared to do so), this registration should not be governed by purely religious criteria. Others say that since 'Religion' and 'Nationality' are inseparable, and since religious allegiance is naturally a religious question, only religious criteria should be followed, both in registering religion and registering nationality."[16]

IMMIGRATION, MIXED MARRIAGES, ASSIMILATION

Throughout the period of the Holocaust, Jewish immigration into what was then called Palestine, was sharply limited by the English Mandatory Power. In May of 1939, the British Government had issued the White Paper which restricted Jewish immigration into Palestine to a maximum of seventy thousand during the succeeding five year period. Even after the Second World War had ended, there was no readily accessible country for the survivors of the Holocaust until the establishment of the State of Israel in 1948.

The Declaration of Independence of the State of Israel promulgated on May 15, 1948, emphasized the importance of a Sovereign Israel in solving the homelessness of the Jew.

> "The catastrophe which recently befell the Jewish people—the massacre of millions of Jews in Europe—was another clear demonstration of the urgency of solving the problem of its homelessness by re-establishing in the Land of Israel the Jewish State, which would open the gates of the homeland wide to every Jew and confer upon the Jewish people the status of a fully privileged member of the comity of nations."

The Declaration went on to further state:

> "The State of Israel will be open for Jewish immigration and for the Ingathering of the Exiles."

Israel's Declaration of Independence on May 14, 1948, was quickly followed by legislation abolishing the Mandatory's restrictions on immigration and proclaiming the right of every immigrant Jew to immediate citizenship. It was realized that "immigration was the purpose of Israel's existence; sovereignty was the means which served the end".[17]

Under the Law of Return more than 1,300,000 Jews immigrated to Israel. In 1948, Israel's population had amounted to approximately 650,-

15. Rabbi Dr. Yechiel Weinberg, letter in Jewish Identity, p. 87.
16. Ibid, p. 13.
17. My People by Abba Eban, p. 489.

000 citizens. By 1968, her population had grown to 2,700,000 citizens. These included survivors of the Holocaust, Jews from Moslem countries, from behind the Iron Curtain and from the Free World. Immigrants came from both backward and progressive countries.

The importance of answering the question of who is a Jew was accentuated in the wake of this diverse immigration which included a good number of mixed marriages and their children.

Many non-Jewish women had come with their husbands and children to Israel in order to live as free Jews. Some of them had suffered persecution, others had endangered their lives to save their husbands and they looked upon themselves and their children as Jews. A number of them refused to convert either out of conscience or because the religious conversion procedure was too rigorous and demanding or because they believed that they were coming to Israel by right and that they and their children were part of the Jewish people by right.

The proponents of a new secular definition of the term "Jew", said that a new definition was necessary in order to merge this continuous stream of diverse immigration with the Jewish community and to avoid internal schism. Furthermore, they emphasized that there was no danger in Israel of the rampant assimilation which took place abroad in the case of mixed marraiges. Since Jews were a majority in Israel, mixed marriages in Israel, they claimed, usually ended by completely joining the Jewish people.[18]

Many Jewish scholars challenged the assumption that Israel provided a different situation because Jews were a majority. Any secular test which was contrary to the Halacha, they said, would create chaos in Israel and open the door to mixed and nameless multitudes that would destroy the identity of the Jewish people. In addition, it would especially weaken the defenses against assimilation abroad and destroy their communal structure. The registration by the State of Israel of children born of non-Jewish mothers as Jews, even if only by nationality, would be interpreted by World Jewry as a mandate from the Jewish state for intermarriage and assimilation.[19]

RUSSIAN IMMIGRATION

Immigration is essential to the survival and growth of Israel. Abba Eban had said, "the driving force in Israel's life is still generated by immigration movements — both those already received and those longingly anticipated."[20]

18. Justice H. Cohn, letter in Jewish Identity, p. 256; David Ben-Gurion, Ibid, pp. 14, 15.
19. Chief Rabbi Israel Defense Forces, Col. Solomon Goren, letter in Jewish Identity, p. 50.
20. My People, p. 191.

The most anticipated immigration has been that of Russian Jewry. There are approximately three million Jews in Russia today. Many desire to immigrate to Israel, but it is thought that a good number of these consist of mixed marriages since Jewish religion and education are greatly restricted in the Soviet Union.

Secularists and others maintained that potential Russian immigrants would be discouraged from coming to Israel by the fear that their children and their non-Jewish wives would not be accepted into the ranks of the Jewish community because of the Halacha which considered their wives and children non-Jewish.

POLITICAL AND LEGISLATIVE HISTORY

(a) Registry of Inhabitants Ordinance, 1949
(b) Population Registry Law, 1965
(c) Law of Return, 1950

In August of 1948, a short time after the formation of the State of Israel, emergency registration regulations were established which provided that every Israeli resident should declare his "religion" (*Dat*) and "ethnic group" (*Leoum*).

In 1949, the Registration of Inhabitants Ordinance was enacted. The ordinance required the registering of a resident's "religion" and "ethnic group" and also provided that each resident was to receive an Identity Card stating certain of the particulars which had been recorded in the Registry. In time of emergency, every male resident was obliged by law to carry his Identity Card with him.

The Minister of Interior was made responsible for the implementation and administration of the Ordinance and registration officers were authorized by law to conduct the registration.

In 1965, the Population Registry Law succeeded the Ordinance of 1949, which it repealed, and the previous registry requirements were continued.

In 1967, the Population Registry Law was amended.

When the Minister of Interior first brought the Registration of Inhabitants Ordinance before the Provisional Council of State in 1949 he stated that the purpose for the registering of a resident's "religion" and "ethnic group" was statistical. Such a statistical index was necessary in order to record the changes in population due to expected immigration and natural indigenous increase as well as to maintain an accessible record of the particulars of every resident.

As regards the particular of religion, he said that it was necessary to

record one's religion so that the Ministry for Religious Affairs could adequately satisfy the relevant needs of the different faith groups.

David Ben-Gurion, when he was Prime Minister of Israel in 1958, said that the reason for retaining the particulars of "religion" and "ethnic group" was for security reasons. The implication being that it was necessary to distinguish between Jew and Arab.

> "In the light of our special situation, when there is no partcical possibility of a thorough and permanent control of the country's borders to prevent the entry of infiltrators from the hostile neighboring countries, who are a source of grave and constant danger to the peace of the country and its population, it is essential that a legal resident in Israel should be able to identify himself at all times by means of a document supplied by an official authority."[21]

In later years, he added that the particular of "ethnic group" could not be removed from the Population Registry because of the unity of the Jewish people. "The Jewish people in Israel is a part, and for the present (and for a very long time to come if not forever, will remain a part) of the Jewish people, and the removal of "ethnic group" from the Identity Card of a Jew in Israel would be the beginning of our denying that we are a part of the Jewish people".[22]

Rapid immigration heightened the problem of mixed marriages and by 1958 the rules for the registration of children of mixed marriages were being carefully examined.

On February 20, 1958, in response to an inquiry from the Ministry of the Interior, Justice Haim Cohn of the Supreme Court stated that in his opinion where both parents in good faith declare that their child is a Jew their declaration should be accepted even though halachically, one of the parents is a non-Jew.

> "Where two spouses declare that their child is a Jew, their declaration must be deemed to be the declaration of the child: according to the Equal Rights for Women Law, 1951, they, both together, are the child's guardians, and they can speak for him."[23]

On March 10, 1958, the then Minister of Interior, Bar Yehuda, a member of the Achdut Ha'avoda-Poalei Zion political party issued a directive which established a new subjective criterion for who was a Jew for both religion and ethnic group:

> "Anyone declaring in good faith that he is a Jew, shall be registered as a Jew and no further proof shall be required."

As could be expected, the directive evoked a public storm and on June 22, 1958, the Government amended the directive to exclude those

21. David Ben-Gurion, letter in Jewish Identity, p. 12.

22. Maariv, Feb. 6, 1970.

23. Justice Haim Cohn, letter in Jewish Identity, p. 247.

who professed another religion other than the Jewish faith and deleted the statement of no further proof being required. The directive read:

> "Anyone declaring in good faith that he is a Jew and who does not profess any other religion, shall be registered as a Jew."

The directive further established that if both parents declare that their child is Jewish, the child shall be registered as a Jew.

The directive thus made one a Jew by a declaration made in good faith so long as the declarant did not profess another religion. The directives were a clear rejection of the Halachic definition. The new subjective definition applied to the Registration Ordinance and the Law of Return.

The response of the Religious forces followed quickly. On July 1, 1958, the Ministers of the National Religious Party, M. C. Shapiro and Y. Burg, left the Government.

In the lengthy debate which followed their departure, it was recalled that there had been previous directives issued on May 22, 1956 and on May 14, 1957 that provided that the "religion" of the child of a mixed marriage was to be registered in accordance with the mother's religion, and if the parents declared a different religion for the child the matter was to be examined by the office of the Registration of Inhabitants or the central office in Jerusalem.

To quiet the raging controversy, on July 15th, 1958, the Government established a Committee consisting of the Prime Minister, the Minister of Justice and the Minister of Interior to examine the rules for the registration of children of mixed marriages, both of whose parents wish to register their children as Jews.

The Government instructed the Committee to consider "statements of opinion by Jewish scholars in Israel and abroad and to formulate registration rules in keeping with the accepted tradition among all circles of Jewry, orthodox and non-orthodox of all trends, and with the special conditions of Israel, as a sovereign Jewish State in which freedom of conscience and religion is guaranteed, and as a centre for the ingathering of the exiles."[24]

On July 21, 1958, the Committee of three decided that local registration officers should not, of their own accord, register children of mixed marriages, but that every such registration should be brought to the Committee. It further ruled that all directives that had been issued since the establishment of the State in the matter of the registration of children of mixed marriages were revoked.

On October 27, 1958, the Prime Minister, David Ben-Gurion ad-

24. Ibid, p. 11.

dressed a letter in accordance with the Government's decision to Jewish scholars in Israel and abroad on the question of registration of children of mixed marriages.

In the Knesset on December 3, 1958, the Prime Minister made it clear the Committee would continue to exist until the replies of the Jewish scholars were received and the Committee made its recommendations to the Government for its final decision.

The Committee received 45 replies from Jewish scholars during the year of 1959 but was unsuccessful in carrying out the Government's instruction to formulate registration rules "in keeping with the accepted tradition among all circles of Jewry".

After the elections for the 4th Knesset (Parliament), on December 16th, 1959, the new government, headed by David Ben-Gurion as Prime Minister appointed H. M. Shapiro of the National Religious Party as the new Minister of Interior replacing Bar Yehuda. The party of Bar Yehuda, Achdut Ha'avoda-Poalei Zion, participated in the new government.

On January 10th, 1960, the new Minister of Interior issued directives on Government authorization for the purpose of three laws: The Registration of Inhabitants Ordinance, 1949; The Law of Return, 1950; and the Law of Citizenship, 1952. These directives established that the following persons were Jewish by "religion" and "ethnic group":

1. Anyone born of a Jewish mother who did not profess another faith.
2. Anyone who had been converted in accordance with the Halacha."[25]

These were a complete reversal of the Bar Yehuda directives. The test, once again, of whether one was a Jew was the halachic test of whether one had been born of a Jewish mother or had been converted in accordance with the Halacha. The one departure from the Halacha was the exclusion of one who professed another faith, though born of a Jewish mother, from being termed Jewish. Under the Halacha, once one is a Jew no apostasy can remove Jewishness — "once a Jew always a Jew". However, it should be noted that many religious people found the idea of, say a Moslem or Christian being a Jew, a contradiction in terms.

In this respect, even such a biblical scholar as Yehezkel Kaufmann of the Hebrew University pointed out:

"The Government has excluded from the Law of Return 'apostates' (Jews who converted to another religion) although they are Jewish by birth. This decision certainly fits the religious concept of apostasy. Admittedly, according to Jewish law, the apostate is a Jew. But he is a Jew in the sense that the obligations of the Torah still apply to him. But he is

25. (1970) Written Argument of the Attorney General, H.C. 58/68, p. 9.

not to be equated with other Jews in regard to Jewish rights and privileges. Thus Tosafot wrote (Abodah Zarah 26b, s.v. "Ani shone) that a Jew is not obliged to support or ransom the apostates of today."[26]

The pivotal point, in my opinion, for the change of directives was political. The religious political forces had been a part of every Government coalition. No Government coalition could exist without their participation.

The National Religious Party, though a minority, exerted formidable political power and they would accept no major change in the definition of who is a Jew that was contradictory to the Halacha. Their position had the support of not only religious Jews, but of a considerable part of the population which respected the traditional ties that had always existed between the people and their religion. Although the directives of 1960 were issued to define who was a "Jew", the term itself remained undefined within the Law of Return as did the terms "religion" and "ethnic group" within the Registration of Inhabitants Ordinance and the Population Registry Law.

The Population Registry Law which succeeded the Registration of Inhabitants Ordinance was enacted on July 22, 1965 and amended in 1967. On both occasions the Knesset refrained from discussing the directives of 1960 which remained in force until the decision in the Shalit case.

THE RUFEISEN CASE

The Law of Return, 1950, as already noted, extends special privileges of immigration by right and automatic citizenship to a Jew.

The purpose of the Law of Return was to realize "the aspiration which the Jewish people have had for two thousand years for the renewal of Jewish Independence through the ingathering of the exiles."[27] Its aim was to therefore provide a home for the homeless and to ensure Israel's survival and growth as a Jewish State by continued Jewish immigration.

The Law of Return is the only one of the three Laws which contained the term Jew, but the term was not defined. Several cases arose as a consequence of this lacuna, the most important of which was the Rufeisen Case.[28]

Oswald Rufeisen, also known as Brother Daniel, was a Polish Jew who saved hundreds of Jews from the Gestapo during the Nazi occupa-

26. Yehezkel Kaufmann, letter in Jewish Identity, p. 143.
27. My People, p. 489.
28. (1962) H.C. 72/62, p. 68.

tion. While hiding from the Nazis in a Catholic convent, he was converted to Catholicism and became a Carmelite monk.

After coming to Israel in 1958, he demanded that he be accepted as a Jew under the Law of Return since he felt himself to be a member of the Jewish nation though Catholic by religion. In his petition to the Supreme Court, Rufeisen declared himself to be a member of the Jewish people in spite of his conversion and asked the Court to affirm his right as a Jew under the Law of Return and also his right to be registered as a Jew by "ethnic group" under the Registration of Inhabitants Ordinance, 1949.

Under the Halacha and its interpretation by halachic authorities, Rufeisen though a convert to Christianity was still a Jew, following the dictum: "Though he has sinned, he remains a Jew".[29]

The Supreme Court in a four to one decision denied Rufeisen's request and discharged the order *nisi*. The majority consisted of Justices M. Silberg, M. Landau, M. Many, Z. Berinson and the minority of Justice H. Cohn.

The majority in the Rufeisen case held that anyone who professed another faith could not be termed a Jew for purposes of the Law of Return or by "ethnic group" for purposes of the Registration of Inhabitants Ordinance, 1949, since by popular meaning and common parlance a convert to Catholicism is not a Jew.

The question of what the Rufeisen case had actually held would arise later and become central to the opinion of several of the Justices in the Shalit case.

The Rufeisen case had left open the question of whether one could be a Jew ethnically by declaration where he did not profess another faith.

OPINIONS AND ANALYSIS

When I met with Justice J. Sussman in Israel, shortly after the Shalit case had been decided, he said that he felt that the majority reasoning had not been brought home in either the Knesset or the newspapers. The majority, he claimed, "didn't go into the question of who is a Jew."

An examination of the majority opinions shows that Justices Cohn, Sussman, Witkon and Many, held that the question of whether a person could be a Jew by ethnic group without being a Jew by religion was not relevant. Justice Berinson, however, dealt with the question for purposes of registration under the Population Registry Law and said that the Halacha was not a valid criterion for defining the particulars of a secular law. The majority opinions follow according to their presented order.

29. Sanhedrin, 44a.

Justice H. Cohn[30]

The only question to be decided, he said, was whether the Minister of the Interior had been entitled to give his directives of 1960 directing registration officers to refuse to register the minor children of a mixed marriage as Jewish by "ethnic group" when they were born to a non-Jewish mother, despite the declaration of the parents to that effect.

He concluded that the Registration of Inhabitants Ordinance, 1949, and the Population Registry Law, 1965, which replaced the Ordinance, did not empower a registration officer to decide the question of ethnic affiliation. Consequently, he held that neither was the Minister of the Interior competent to give him directives on how to reach such a decision. Although the Minister of the Interior was responsible for the administration and implementation of the Ordinance and the Law, and he appointed registration officials, he was only entitled to give them administrative directives which were not of a legislative character.

Insofar as the duty of the registration officer, under the law, it was to register the declaration given him in good faith. The cases bore this out, he said, and the amendment of 1967 to the Population Registry Law amounted to statutory approval when it provided that a registration officer may not correct an entry, or fill in an omission in the register in respect to ethnic affiliation, religion or personal status, save with the consent of the person to whom the entry relates or on the basis of a declaratory judgment of a District Court.

Additional statutory evidence was to be found in the Population Registry Law itself which deprives the particulars of ethnic group, religion and personal status of any probative value. Under Section 3 of the Law, such entries do not provide even *prima facie* evidence of their correctness. The registration could not therefore create a *fait accompli* which would be repugnant to religious law and the religious court's jurisdiction over marriage and divorce. The term "ethnic group" was not a concept applied to the Jewish people alone but equally applicable to all peoples and could therefore stand separate and apart from any definition of religion.

In any case, however, the standard of Halacha that the registration officer used to determine the question of "ethnic group" was invalid since the Rufeisen case held that the religious law was not a valid standard for interpreting a secular law.

> "All the justices who sat on the Rufeisen case agreed that the question of whether Rufeisen was a "Jew" for purposes of the Law of Return or what was his "ethnic group" for purposes of the Registration of Inhabitants Ordinance, 1949, could not be decided according to the Jewish religious law; the Law of Return is a secular law, and the Registration of Inhabitants

30. (1970) H.C. 58/68, pp. 1, 10.

> Ordinance is a secular law, and there is no relationship whatsoever between any religious law and the interpretation of the secular law."[31]

Justice Cohn's conclusions in Shalit were predictable. He had already enunciated his subjective test in the Rufeisen case. But in Rufeisen and in previous writing he also gave the reasons for his general approach, which he failed to do in Shalit because he had said the question of who is a Jew was not before the Court. These reasons, in my opinion, were nevertheless a major factor for his holding in Shalit and bear examination.

In 1962, in his minority opinion in the Rufeisen case, he said that the change in status of the Jewish people from a minority to that of a fully privileged member of the family of nations was a revolution that had made it imperative "that we revise the values according to which we were educated in our exile."[32] Rufeisen, a Catholic, should therefore be admitted as a Jew under the Law of Return because times had changed and Rufeisen had said: "I am a Jew" and he regarded Israel as his fatherland.

The same subjective test applied to the Registration of Inhabitants Ordinance, 1949. "The registration officer is not a judge or one who has to make decisions, he is merely one who registers; and he registers only that which the citizen who is under a duty to be registered tells him to register."[33]

Rufeisen, he held, could therefore register as a Jew by nationality and as a Christian by religion since the registration merely proved that the person had requested such. In any event, the declaration and the registration "effected pursuant thereto cannot bind any judicial or administrative authority before which the actual question of what are the nationality and religion of the particular applicant may arise."[34]

As far back as February 10th, 1959, Justice Cohn had expounded his position in response to a letter from David Ben-Gurion, the Prime Minister of Israel, which had been addressed to Jewish scholars and solicited their opinions on the issue of registration of children of mixed marriages.

In his response, Justice Cohn says that on February 20th, 1958, he had written the Director-General of the Ministry of the Interior that the registrar "has to content himself with the declaration of the parents that their child is a Jew." Furthermore: "As far as the administrative agencies are concerned, the boundaries, which divide the binding law from the non-binding religious prescriptions are the very basis of a democratic state and of the fundamental rights of its citizens."[35]

31. Ibid, p. 10.
32. (1962) H.C. 72/62, p. 27.
33. Ibid, pp. 36, 37.
34. Ibid, p. 37.
35. Justice H. Cohn, letter in Jewish Identity, p. 250.

Of vital interest in his scholarly rejection of the Israel rabbinate's interpretation of the Halacha: He denies that under the Halacha a son's Jewish status is necessarily determined by his mother's status; he claims that halachically there is a presumption that children in Israel are fully qualified Jews — and that until this presumption is duly rebutted by two competent witnesses testifying before a competent court, they are to be regarded as Jews; he says that under the Halacha everybody in Israel is prima facie Jewish since the majority of the people are Jews and there is therefore also no necessity to coordinate the Halacha applicable to Israel with that abroad since the rule would differ depending on whether a majority of the population is Jewish. In all these instances, Justice Cohn is reinterpreting and changing the traditional halachic interpretation.

Lastly, he points out in his letter that the mixed marriages that had recently come to Israel could not be compared to those of past generations who had led their husbands away from Judaism and Israel. The present mixed marriages were comprised of women who had suffered persecution and had returned to Israel with their husbands and children to live as Jews. The rabbis of Israel who required conversion, effected by ritual immersion, had erred for Jewish Law really provided that "a foreign woman who is being seen conducting herself always as a Jewess, as well as a foreigner who is conducting himself always as a Jew, are presumed to have duly been converted to Judaism, though they have no witnesses to testify to that effect. It is true that 'conduct' as a Jew, in this context, means the orthodox observance of the whole ritual; but what usual Jewish conduct was at that time, is no longer the usual conduct of Jews today. It stands to reason that the test to be applied should be, whether the woman conducts herself as Jewish women nowadays usually conduct themselves, and not whether she conducts herself as especially orthodox Jewish women still may do."[36]

Basic to Justice Cohn's position is his belief that different facts and changing times require a subjective test for determining Jewishness or presumptions even under the Halacha that make almost everybody in Israel Jewish. Israel and Judaism should be open to all who wished to enter — and he was ready to reconstruct the Halacha to achieve this end.

> "This is the spirit of true Israeli tradition. God does not reject any creature; He accepts everybody. The gates are open at all times, and anybody wishing to enter may enter."[37]

Justice J. Sussman[38]

The sole question, he said, was the registrar's duty under the law —

36. Ibid, p. 257.
37. Ibid, p. 261.
38. (1970) H.C. 58/68, pp. 27, 44.

must he register the children as Jewish by ethnic group and without religion in accordance with the declaration of the parents?

His conclusion on the basis of precedent was that the registrar must register the facts declared to him in good faith unless he can show that the facts are patently false — such as an adult claiming to be five years of age.

Since this court decision taken in 1962[39] however, he added that the Knesset had enacted the Population Registry Law, 1965, and its amendment in 1967 and under the latter, a registration officer must register the particulars contained in a notification of birth (or any other notification) unless he had reasonable grounds for believing that they are not correct.

In this case, the registration officer refused to register the children as of Jewish "ethnic group" on the ground that the objective test for determining "ethnic group" was the Halacha. This criterion was improper since the Rufeisen case decided that the Halacha is not the proper standard for the purpose interpreting secular laws such as the Law of Return and the Registration of Inhabitants Ordinance, 1949.

Legislative purpose, he added, also established that the registration officer had no reasonable grounds for refusing to believe the petitioner. The purpose of including the particulars of "religion" and "ethnic group" in the Registration Ordinance was said to be statistical by the Minister of the Interior in 1949 and it is impossible to attain absolute accuracy with such particulars as religion and ethnic group which are based on subjective feelings and generally cannot be examined objectively. The legislation itself gives additional statutory evidence of this fact when it deprives the registration of these particulars of any probative value.

The changes in directives from 1958 to 1960 — from the subjective to the Halachic definition — did not make the petitioner's declaration which relied on the 1958 directives unreasonable since the change in directives reflected political changes and not legal ones.

Finally, the petitioner acted in good faith because he based his evaluation of his children's ethnic identity on reasonable considerations.

Justice Witkon[40]

He felt that the only way to avoid deciding who was a Jew for purposes of the registration laws was to order the registration officer to register the particulars in accordance with the notification given him by the citizen in good faith.

39. (1963) H.C. 143/62 (Funk-Schlesinger v. Minister of Interior).
40. (1970) H.C. 58/68, pp. 66, 73.

He held that the directives of the Minister of the Interior of 1960 contradicted the legislative purpose of the registration laws which were purely statistical and therefore only required that the registrar register what was declared to him.

The directives of 1960 sought to impose parochial opinions on others and negated the freedom of the individual. They were also discriminatory since they could deprive a person of the right to regard himself as a member of the Jewish nation, affecting him and his family spiritually, legislatively and economically and even force him to leave the country.

He therefore adopted the secular subjective test of Cohn and Sussman because he believed it was ideologically neutral.

The question of who is a Jew could not be decided by any court or by the legislature since neither had the power to impose ideological obedience. The only question they could decide was who should be registered as a Jew.

> "From all these considerations we conclude, in my opinion, only one thing. If the law is not amended and the particular of "ethnic group" is not deleted (as I still hope), then we have only one way of leaving the question of who is a Jew undecided. The way is to interpret the law according to its original purpose, and to order the registration officer by an absolute order, to make the registration in accordance with the notification given him in good faith. This is also the only way of saving all of us from gratuitous hatred."[41]

Justice Many[42]

He held that: 1) The Ordinance and the Law did not empower the registration officer or the Minister of the Interior to lay down criteria for deciding the question of whether any particular person is a member of any particular "ethnic group". 2) He added "that in the circumstances of the case under consideration and for the reasons set out by his honoured colleagues, Justices Sussman and Cohn, that the registration officer had no alternative but to register the petitioner's children's ethnic group in accordance with the notification given him."

Justice Berinson[43]

Justice Berinson was the one member of the majority who discussed the question of who is a Jew and who, I believe, did so because of the view he had expressed in the Rufeisen case.

In Rufeisen he had held (1) that the term "Jew" as used in the Law of Return must be construed as it was "understood by those who enacted

41. Ibid, p. 73.
42. Ibid, p. 128.
43. Ibid, pp. 172, 178.

the Law or, more correctly according to the meaning of that term in common parlance in our times";[44] and, (2) that the competent authority for the issuance of immigration certificates under the Law of Return is the Minister of the Interior and not the Government and that he has to decide who is a Jew. "The Knesset did not choose to express a clear opinion as to who is considered a Jew for purposes of the Law of Return and left this question to the Minister of the Interior, and, in the last resort to the Court".[45]

In applying his objective test in Rufeisen, of defining "Jew" according to common parlance, he found that popular opinion held that one who had embraced another religion had withdrawn himself not only from the Jewish faith but also from the Jewish nation and could therefore not be termed a "Jew" for purposes of the Law of Return or the Registration of Inhabitants Ordinance. Proof that this was popular opinion, could be found in the decision of the Government of July 20, 1958, which provided that: "Anyone declaring in good faith that he is a Jew, and who does not profess any other religion, shall be registered as a Jew" — and he stated, "the Government reflects the view of the majority of the members in the Knesset which represents public opinion in the land".[46]

Interestingly, he nevertheless candidly says, that were he free to follow his own inclination he would have complied with Rufeisen's request to be considered a member of the Jewish people because of Rufeisen's particular circumstances of sharing the same origin, language, history and country as other Israelis. Vast changes had taken place in the life of the Jewish people and "Nation" and "Religion" were divisible and a common religion, in his opinion, was not necessary to all the members of a nation.

In Shalit, Justice Berinson makes several important departures from his Rufeisen opinion. The Minister of the Interior is no longer competent to decide who is a Jew for purposes of the law. The objective test of Rufeisen, of determining the meaning of a term according to common parlance in the absence of a definition within the law itself is changed to interpreting the term of ethnic group "according to the spirit of the times and according to the conception of the enlightened section of our population".[46b] He rejects the halachic definition in Shalit, overlooking the fact that the directives of 1960, which embodied the halacha, had tacit Government approval and therefore should have been valid since in accordance with his own opinion in Rufeisen "the Government reflects the view of the majority of the members in the Knesset which represents public opinion in the land".

44. (1962) H.C. 72/62, p. 57.
45. Ibid, p. 58.
46. Ibid, p. 69.
46b. (1970) H.C. 58/68, p. 174.

The major reason for Justice Berinson's revised approach seems to be the absurd results and tragic consequences he believes the halachic definition lead to in the particular circumstances of Shalit.

> "According to this halachic conception, the head of the saboteurs (the Fatah) from East Jerusalem, the offspring of a Jewish woman and a Moslem man, who has sworn his soul to kill, destroy, and lay waste the state of Israel, is deemed to be a member of the Jewish faith and of the Jewish people, while the son and daughter of a Jewish major, who fights the battles of Israel, are deemed to be non-Jewish by ethnic group. One's soul is literally horrified to think of such a result in the state of Israel".[47]

Another unfortunate result of the halachic definition, he says, takes place with mixed marriages in Israel. In the case where Jewish women marry non-Jewish men, the children are halachically Jewish, yet, in these cases the women usually cut off all ties with their people and follow their husbands. On the other hand, the child of a non-Jewish mother is non-Jewish halachically even if born, brought up and educated in Israel as a Jew like all other Jews.

Turning to Russian Jewry he finds that the halachic conception would also result in discouraging potential Russian immigrants who were mixed marriages from coming to Israel because of the fear that their children and their non-Jewish wives would not be accepted into the ranks of Jewry.

He concludes his decision in Shalit by stating that the halachic conception of ethnic group cannot serve as a basis for rulings by secular courts nor for defining secular laws.

He closes by concurring with his colleagues of the majority who narrowly construed the registration laws.

> "In any event neither the registration officer who fulfills a strictly technical role, nor his Minister, are the ones to decide such questions. The registration officer has the duty to make the registration in accordance with the declaration given to him in good faith as long as it is not patently ridiculous".[48]

THE MINORITY

The minority went into the question of who is a Jew. They raised many issues besides the narrow issue of the meaning of the Registration Law.

Justice M. Silberg[49]

He failed to deal with the implications of the registration law, insisting that the question before the Court was whether ethnic affiliation and religion could be separated — that is, whether one could be a Jew by "ethnic group" without at the same time being a Jew by religion. Actually,

47. Ibid, p. 174.
48. Ibid, p. 178.
49. Ibid, pp. 11, 26.

Silberg said, we are asking whether any other test besides that of the Halacha may be applied to determine the ethnic group of a Jew since the Halacha treats religion and ethnic group as being indivisible.

He believed that this question should have been properly addressed to the whole of the Jewish people or to a representative body of world Jewry. Under the circumstances, the High Court had to therefore determine, to the best of its ability, the attitude of Jewry to the question.

> "It is incumbent upon us, then, to delve deeply into this matter, to plunge into it to the very source and to ascertain to the best of our ability, what the attitude of Jewry is to the question being decided in this case."[50]

In examining the possible tests for determining ethnicity, he emphatically rejects the test the petitioner had favoured of "identification with Jewish-Israeli culture and values"[51] since the Jewish ethnic group does not solely consist of the small Israel community (two and a half million out of 13 million Jews); there is no established Jewish-Israeli nationality since the State is young and the population has been in constant flux due to continuous and diverse immigration; even if such a Jewish-Israeli nationality did exist it was not necessarily a strictly secular one since more youth were discovering their ancient ties with their heritage.

In any case, the petitioner's test could not be used for defining ethnic affiliation under the Population Registry Law. For every Jew who comes into the country, and especially if he immigrates on the basis of the Law of Return, declares as soon as he disembarks that his ethnic group is Jewish. At that moment, he would most certainly not have had time to become assimilated into the petitioner's secular Jewish-Israeli nationality. It was therefore obvious that the term "Jew" for the particular of "ethnic group" in the Population Registry had to also apply to Jews whose national identity was different from that professed by the petitioner.

Turning to the consequences of adopting the petitioner's new subjective secular definition of Jewishness, he claimed that they would be clearly catastrophic, destroy the unity and threaten the survival of the Jewish people. Shalit's subjective definition was a new test which constituted an absolute denial of the Jewish past. Christians and Moslems, if they felt a close affinity with Israeli-Jewish culture and values, could under the petitioner's definition be registered as ethnically Jewish. This would also threaten Jews abroad by weakening their defenses against assimilation and by destroying their communal structure.

Under the circumstances, there was no alternative but to dismiss the test of the petitioner and to adopt the Halachic test, even though the Registration Law was a secular law. The Halachic test was the simplest

50. Ibid, p. 11.
51. Ibid, p. 14.

and easiest way of determining ethnic affiliation of a Jew, regardless of where he came from or whether he was very religious or atheistic.

As to the petitioner's charges that the Halachic definition would discourage Russian Jews from coming to Israel because many of them who were mixed marriages would not be deemed Jewish, he observed that such immigration was only in the realm of hope. In any case, should mass immigration take place, he felt some Halachic solution would be found since the Halacha was the servant of the people.

He responds to the petitioner's claim that the Halachic definition made it possible for the head of the Fatah, born of a Jewish mother to be deemed Jewish ethnically, while his own son born of a non-Jewish mother but of a Jewish father who was prepared to sacrifice his life for his country was considered a non-Jew. Jewishness, he states, is a religious legal description bestowed only under certain specific conditions and not a prize to be awarded for one's efforts on behalf of the Jewish people.

Justice Silberg's opinion in Shalit was later attacked[52] because of his ruling in the Rufeisen case that the term "Jew" in the Law of Return had to be interpreted according to its popular meaning and not in its halachic sense since the term was found in a secular law. In the Shalit case, however, he applied the Halacha to interpret a secular law because he had held that the Jewish nation and its religion could not be separated.

When I met with Justice Silberg in Israel, he maintained that he had been consistent in both cases. In Rufeisen, he said, the question had been whether Rufeisen, though a convert to Christianity was a Jew who could enter under the Law of Return. The Court decided, he maintained, that we do not follow the Halacha but the plain meaning of the word "Jew". Since most Jews don't usually consider an apostate Jew as a Jew, therefore we do not recognize Rufeisen as a Jew. In Shalit, we were being asked what is the plain meaning of the word "Jew". Most Jews usually consider a "Jew" to mean one who meets the Halachic definition. The plain meaning and the Halacha happen to coincide and since no other definition met the objective test of plain meaning, we had to use the Halachic definition.

Justice Silberg also felt that the approach in Shalit of some members of the majority in using the Rufeisen case as precedent had been wrong. Rufeisen, he stressed, considered himself to be a Jew although he was not a member of the Jewish faith. The majority in Rufeisen decided that we don't follow the subjective feeling of the individual, but we objectively examine whether this assertion is correct in terms of the opinion of most Jews.

Unfortunately, he hadn't discussed this point in his opinion since he

52. Jerusalem Post, January 26, 1970, p. 16.

did not have the written opinion of the other justices before him when he wrote his own. His opinion had been the second submitted, immediately following that of Justice Cohn's. He couldn't attack Cohn for adopting the subjective test that the majority had rejected in Rufeisen since Cohn had been the disagreeing minority opinion in the Rufeisen case.

Justice Agranat, however, who had written his opinion later and was therefore able to comment on the other opinions of the majority, he observed, took up this very point:

> "The judicial solution, which my honoured colleague, Justice Cohn accepted, and which according to him determines for the matter of the registration of "ethnic group" of the notifying resident, that in his bona fide declaration, is not appropriate in my opinion, to the particular case before us. Nor was the solution propounded by my honoured colleague, Justice Sussman, which establishes that the bona fide declaration of the notifying resident plays a decisive role, in the matter of the registration of the said particular, as long as it is based on reasonable considerations. It is sufficient to note, in this connection, that the Rufeisen case, in which the majority approved the refusal to grant him an identity card indicating in the particular of "ethnic group", that he was a Jew, teaches that we do not consider his declared wish to be so registered, if it becomes clear that there is an objectively recognizable sign that obliges us not to see him as related to the Jewish nation. As you will recall, in that case it was decided by the majority, that according to the opinion of the Jewish people, since Rufeisen converted to Christianity, he therefore left the Jewish community."[53]

Justice Silberg's approach in the Shalit case was neither new nor startling. He had already made his position clear in response to the letter of David Ben-Gurion of October 27th, 1958, which solicited the opinion of Jewish scholars on the issue of registration of children of mixed marriages, both of whose parents wished to register their children as Jews under the Registration of Inhabitants Ordinance, 1949, under the heading of "Religion" and "Ethnic Group".

In his reply, Silberg defined the question as he did in the Shalit case, stating that the first duty was to clarify the abstract question of who is a Jew.

> "Indeed — and I have reservations regarding this — we, the respondents, must first clarify the general and abstract question of 'Who is a Jew?' "[54]

He analyzes the question in terms of the law of the State of Israel which is divided into secular law and religious law. He believes that there is an intimate connection between them and that we must investigate how proposed regulations under either law will affect the other. Though registration as a Jew ethnically in the identity card would not give rise "to any change in the *real* judicial status of the person", such registration would make him "into a full-fledged Jew as far as he and others are concerned". Yet, since there is no civil marriage in Israel and Jewish marriages have

53. (1970) H.C. 58/68 p. 129.
54. Jewish Identity, p. 262.

to be conducted according to Jewish religious law, such a person would not be able to marry, since under the Halacha the offspring of a non-Jewish mother is non-Jewish and no marriage can be had or be valid between Jew and non-Jew.

> "The answer to the question I was asked is that a child of a mixed marriage of a Jewish father and non-Jewish mother must not be registered as a Jew in any official document. Otherwise, if we register him as a Jew, not only will we never facilitate his absorption into the life of Jewish society, but we shall be laying a trap and snare for him in his future career."[55]

The most important part of his response is his acceptance of the halachic definition for determining who is a Jew, though also remarking that perhaps certain modifications and dispensations could be made, under the Halacha, particularly with respect to conversion procedure.

Justice Landau[56]

Justice Landau said that he would not limit the question to the matter of the technical registration, for the effect of the registration could not be minimized since it really posed the question of what constituted Jewish nationality.

> "And in truth, how is it possible to belittle the importance of the registration from the political and social point of view which is no less important than the narrow technical point of view, in light of the fact that the Knesset had spent long and bitter sessions in discussing this issue?"[57]

From the technical point of view of the relevant cases and the legislation itself he concludes that the law is concerned with the correctness of the particulars given by the declarant. Thus Section 19B (b) of the Law as amended in 1967, says:

> "Where the registration officer has been requested to enter a particular of registration on the basis of a notification only, and after exercising his powers under section 19 he has reasonable grounds for believing that the notification is not correct, he shall refuse to make an entry on the basis thereof; . . . ."[58]

The Ordinance and the Law do not therefore make it mandatory upon a registration official to accept the declared particulars as correct only because the declarant is convinced in good faith that they are correct.

The correctness of a particular can only be ascertained objectively and not by personal subjective ideas. In Rufeisen, he says, the majority rejected the subjective approach for purposes of registering Rufeisen as a Jew by "ethnic group" because of an objectively recognizable fact, which was

55. Ibid, p. 267.

56. (1970) H.C. 58/68, pp. 44, 65.

57. Ibid, p. 57.

58. (1967) Sefer Ha-Chukkim of the 10th Av, 5727, p. 145.

his conversion to Christianity, which the majority of Jewish people today would consider to have removed him from the category of Jewishness.

The subjective approach of Cohn and Sussman however, that one's being a member of the Jewish nation is a question of the individual's feeling is itself in dispute and is far from being accepted. In Rufeisen, the majority rested their holding on an objective fact recognized by the people. Here, the arguments of the petitioner have no such basis.

Justice Landau adopts a neutral attitude on the idealogical dispute between the secular and religious on the question of who is a Jew. His decision is based on the opinion that in the absence of any statutory definition or any clear cut public opinion, he had to conclude that the directives of 1960 were valid since they had been given tacit approval by the Knesset and the registration officer therefore had reasonable grounds for concluding that the petitioner's declaration was incorrect.

His reasoning was that the registration officer was bound to act in accordance with the directives of the Minister of the Interior and thus had reasonable grounds for concluding that the petitioner's notification of his children's ethnic affiliation was incorrect. The Minister of the Interior was empowered to issue these directives by virtue of his appointment as Minister in charge of implementing the Registration Ordinance and Law. Legislative history shows that the Knesset gave its implied consent to the directives issued from time to time by the Minister of the Interior. The last such directive was issued in 1960, after the failure of David Ben-Gurion's appeal to world Jewish scholars to find some satisfactory solution to the problem of registering the children of mixed marriages. The present Minister of the Interior was empowered by the Government to issue such a directive in 1960 and subsequently in 1965 and 1967 when the new Population Registry Law and the amendments were introduced it refrained from discussing this directive. This silence on the part of the Knesset must be deemed to have been implicit approval of the 1960 directive.

Furthermore, these directives did not go contrary to the law as Justices Cohn and Sussman had argued because they seemed to think that the value of the population register was so minimal that no possible harm could be done by allowing every person to register his ethnic affiliation and that of his children according to his fancy; and because the application of the *Halachic* test violated the right of self-determination of the citizen.

The value of the population register, Justice Landau said, was not a trivial matter for behind the seemingly technical matter was the question of what constituted Jewish nationality. As to the question of self-determination, the Ordinance and the Law did not make it mandatory for the registration official to accept the particulars declared as correct only because the citizen is convinced in good faith that they are correct.

Justice J. Kister[59]

Justice Kister noted that although according to Section 3 of the Population Registry Law, 1965, the registration of the particulars of "ethnic group" and "religion: did not even provide *prima facie* proof of their correctness, this did not justify an incorrect registration nor the issuance of identity cards containing particulars which the authorities knew to be incorrect.

There was an assumption attaching to a registration that what was noted in a public identity card had been examined and was correct especially so when one recalled that there were people in Israel and abroad, who did not know that the particulars had no probative value.

He denied that any right of the citizen was violated if the authorities refused to register a particular declared in good faith if it was incorrect or inconsistent with issued directives.

His opinion stressed Legislative History:

The directives of 1958 which provided that the offspring of a mixed marriage from a non-Jewish mother was to be registered as Jews if both parents declared him in good faith to be Jewish showed that the Government of the time wished to introduce a new type of Jew who was not a Jew according to Torath Yisrael. This, he held, was evident from the letter the Government had addressed to Jewish scholars as a result of the storm aroused by the directives of 1958. In this letter, David Ben-Gurion, the then Prime Minister had tried to distinguish Israel from abroad by claiming that mixed marriages who come to Israel merged with the Jewish people because Jews were a majority in Israel.

He questions this assumption and observes that at least Jewish women who married Arabs in Israel ended by turning away from their people.

He declares that of the 45 replies received from Jewish scholars to Ben Gurion's letter, that the vast majority opposed the registration of children of mixed marriages born of a Jewish mother as Jewish on the declaration of both parents. The Government also, subsequently withdrew the directives of 1958 and replaced them with the new directives of 1960 which adopted the Halachic definition.

These directives were not repugnant to the laws of Israel and even if the petitioner's children were not registered as ethnically Jewish, this would not affect their rights as citizens of the State, since Israel treats all its citizens equally.

He held that the only acceptable manner in which to register births

59. (1970) H.C. 58/68 pp. 73, 128.

in Israel so that the registry should be consistent with the true state of affairs, was for the registration officer to register the ethnic affiliation of the child in accordance with official documents presented by the child's parents.

Finally, he emphatically states that there can be no such thing in Israel as a Jew by ethnic affiliation, who was not at the same time a Jew according to Halacha. No other definition aside from the Halachic could be used for "ethnic group". Modern, ephemeral conceptions could not be applied to an ancient people like Israel, and no court with the limited means at its disposal, could decide that there had been such a change in the character of the people, its beliefs and laws, that the existing definitions and rules no longer applied to it. As to anticipating the future and deciding that changes in the definition of who is a Jew would be for the good of the nation that was not a matter for a secular court to decide.

Justice S. Agranat, President of the Court[60]

Justice Agranat rejected the judicial solution advocated by Justices Cohn and Sussman. The Rufeisen case, he pointed out, rejected the subjective test. Rufeisen had declared himself to be a Jew by ethnic affiliation but the majority of the High Court had rejected such registration on the basis of the objective test which was how the term "Jew" was understood by the Jewish people.

He noted that during the long course of Jewish history, the Jewish nation, as an ethnic concept and the Jewish religion had been inseparable and that the Jewish law also considered religion and ethnicity inseparable.

The only question left for the court, therefore, was to decide whether this close association between religion and ethnic affiliation was binding in the present even for so narrow a statistical purpose as registration of ethnic affiliation in the Population Registry or whether it was possible to conclude that modern Israel was basically a secular society where it could be assumed that the children born of a non-Jewish mother would in the course of time become affiliated with the Jewish nation among whom he was brought up, even without a formal act of conversion. This question, he held, fell into the field of ideology where there was no common approach and upon which the population was deeply split. He therefore took a neutral ideological attitude and said that the question was not for the court to decide. For this reason plus those given by Justice Landau he was of the opinion that the court should not interfere with the decision of the registration officer to leave Shalit's children's ethnic affiliation blank and the court therefore discharge the order *nisi.*

60. Ibid, pp. 129, 171.

THE LAW OF RETURN (AMENDMENT No. 2), 1970[61]

The decision of the Supreme Court in the Shalit case brought about a major crisis in Israeli politics. Though the majority, with the exception of Justice Berinson, had rendered their decision on narrow grounds in construing the pertinent legislation and avoided the question of who is a Jew, their decision was widely interpreted as creating a Jew by declaration.

The National Religious Party threatened to resign from the Government Coalition unless the Knesset (Parliament) amended the law and provided a definition of the term "Jew" in accordance with the Halacha. As a consequence, the Israeli Cabinet recommended an amendment which had been prepared by the Minister of Justice. The recommendation meant certain passage since more than 100 of the 120 Parliament members belonged to parties in the governing Coalition.

The Amendment as finally passed went far beyond the narrow question of ethnic affiliation raised in the Shalit case.

The Amendment consists of two additional provisions and one amending provision to the Law of Return, 1950, and one additional provision to the Population Registry Law, 1965.

(1) The most important part of the Amendment is the new definition of "Jew" enacted as Section 4B of the Law of Return for the purposes of the Law and as Section 3A (b) of the Population Registry Law, 1965, for the purposes of the Law and every registration or certificate thereunder.

The new definition says:

> " 'Jew' means anyone who was born to a Jewish mother or who has been converted, and who is not a member of another religion".

The definition defines who is a Jew in accordance with the Halacha in establishing the criterion of maternal descent. One cannot be registered as a Jew by ethnic group or religion unless he meets the halachic requirement of having been born of a Jewish mother or of having been converted. The objective biological test, of birth from a Jewish mother, is the same for nationality as for religion which are now treated indivisibly — as under the Halacha. This changes the subjective test of Shalit and is in accordance with the objective halachic test the minority in Shalit had advocated.

The Amendment however, is more restrictive than the Halacha in that, following the rule of the Rufeisen case, it excludes an apostate from being Jewish for purposes of the Law of Return and registration. Justice Minister Shapira made this point clear in the Knesset:

61. Sefer Ha-Chukkim 586 of March 19, 1970.

> "In doing so it bases itself on the Rufeisen judgment which refused to embody the halachic principle of 'once a Jew, always a Jew' in the Law of Return."[62]

In the Jewish religious courts which administer the Halacha and have jurisdiction over marriage and divorce, an apostate can still be considered a Jew. Nevertheless, although some have consequently already interpreted the exclusion of an apostate as a weakening of the position of the religious forces because it runs counter to the Halacha, this does not follow. Religious forces never really protested the Rufeisen holding by taking threatening political action as they did following the Shalit decision. As a matter of fact, even prior to the Rufeisen Judgment in 1962, they had helped formulate the directives of 1960 which embodied the halachic definition for 'Jew' but excluded an apostate from that term. Too much should therefore not be made of this point since, speaking practically, even for most religious Jews, the idea of an apostate still being a Jew is repugnant — as was pointed out by Justice Silberg in the Rufeisen case. We have also already noted that even considering the matter in the purely halachic sphere, such an Israeli scholar as Yehezkel Kaufman had said that the exclusion from the Law of Return of apostates, although they were Jewish by birth, fitted the religious concept of apostasy. "Admittedly, according to Jewish law, the apostate is a Jew. But he is a Jew in the sense that the obligations of the Torah still apply to him. But he is not to be equated with other Jews in regard to Jewish rights and privileges."[63]

The primary argument that was used for urging passage of the Amendment containing the definition was the threat of inter-marriage and assimilition of Jews abroad. The argument of Justices Silberg and Kister in Shalit that the acceptance of a new subjective secular definition of "Jew" would only serve as a license to inter-marriage abroad, prevailed. The Prime Minister, Mrs. Golda Meir, marked this in the Knesset after pointing out that the rate of inter-marriage among American Jews was an alarming 20%:

> "The time has not yet come when we here in Israel with our two and a half million Jews, can tranquilly accept the thesis that the existence of Jewry is *not* threatened. We are faced with a great and very substantial danger from assimilation."
>
> "I do not support this law for the sake of Government unity, or the welfare of the religious parties. Nor do I believe that if it is passed, intermarriage will cease in the Diaspora. But at least the Diaspora will know that Israel has not established a license to inter-marriage."[64]

Opponents of the halachic portions of the Amendment definition of 'Jew' charged that the definition was discriminating and coercive in that it imposed religious standards on those who were not necessarily religious.

62. Jerusalem Post, February 16, 1970, p. 10.
63. Jewish Identity, p. 143.
64. Jerusalem Post, February 16, 1970, pp. 10, 13.

It was, they claimed, a breach of the principles of freedom of religion and freedom of conscience which were guaranteed in Israel. This was denied by Prime Minister Golda Meir who, referring to the directives of 1960, said that no coercion was involved since the same situation had been accepted for 10 years down to the Shalit judgment. She pointed out that the Amendment only returned the situation to that prevailing before the Shalit Judgment while correcting an important *lacuna* affecting immigrants' rights.[65]

(2) In one important respect, however, the new definition is much broader than the Halacha which it seriously breaches when it uses the general term "converted" and not "converted according to Halacha".

An immigrant, will now be entitled to the rights under the Law of Return and to registration as a Jew under the Population Registry Law, even if he has been converted by a non-orthodox rabbi and not necessarily in accordance with the Halacha. This was plainly stated by Minister of Justice Shapira on behalf of the Government in the Knesset:

> "The fact that the Amendment talks of 'conversion', and not of 'conversion according to Halacha', constitutes one of the significant steps forward. An immigrant presenting a conversion certificate of any kind whatsoever from any Jewish community in the world will be registered as a Jew and will receive full immigrants' rights."[66]

Non-orthodox religious movements have already looked upon this as a major breach in the orthodox rabbinate's control in Israel. Rabbi Ralph Simon, President of the Conservative Rabbinical Assembly of America, in a letter dated February 27th, 1970, reported to Conservative American rabbis about the discussions he and a representative of the Reform movement had held with Government officials in Israel during the period of debate on the Amendment to the Law of Return:

> "During this period of debate and discussion it was my privilege as your President to hold conferences with three officials of the government — Golda Meir, Moshe Kol, and the Minister of Justice Shapira. I was accompanied by a representative of the Reform movement and we spoke in behalf of the non-orthodox religious movements in Israel. I am happy to be able to clarify much of the confusion which has surrounded this issue. What is more, I can give this statement with the assurance that it represents the official view of the government of Israel.
>
> On February 11, 1970 the Knesset approved the amendment to the Law of Return. It grants full immigration rights under this law to Jews (unless they have apostasized to another faith), their spouses (even non-Jewish) and children. It also recognizes the Jewish status of converts to Judaism for purposes of immigration, nationality registration, and religious classification. The orthodox parties wanted to include the phrase 'giyur al pi din Torah' (converted according to the Halacha). The Cabinet insisted on striking out these words and interpreted valid conversion as one which took place outside of Israel under any recognized Rabbinate in that locality — orthodox, conservative, or reform. The department dealing with immigration and registration will now grant full recognition to the legitimacy of

65. Ibid, p. 13.
66. Ibid, p. 10.

> documents dealing with marriage and conversion emanating from non-orthodox Rabbis in the diaspora. The question of personal status (marriage and divorce of persons in Israel) is still in the hands of the office of the Chief Rabbinate. The officials we interviewed were exceedingly pleased that a breach had been made in the wall of orthodox monopolistic control without the dissolution of the Cabinet during a period of crisis. The revision of the system of marriage regulation within Israel will await other times and more propitious circumstances."[67]

It must be emphasized, however, that such conversion under the Amendment, will still only have value for purposes of the Law of Return and the Population Registry Law. It will have no probative value in matters of marrriage and divorce which are under the jurisdiction of the religious courts where Halacha applies. In no way does it affect the jurisdiction of the Jewish religious courts.

Orthodox forces in Israel however, have already expressed their violent opposition to the acceptance of conversions not performed in accordance with Halacha, even for the purposes of the Law of Return and registration.

Israel's chief Rabbinate's Council on Thursday, June 4, 1970, announced to the press[68] that it very seriously viewed the "dangerous situation" created by the absence in the legislation of a requirement that conversions only be recognized if they are executed according to the Halacha. It claimed that the present law would create a schism in the Jewish nation. The National Religious Party has already demanded a special law that would outlaw non-Halachic conversions and correct the omission in the Amendment, but to date, this demand has not been met.

What seems clear, at the moment, on the basis of statements made by Justice Minister Shapira and Law sub-committee chairman Haim Zadok is that the Law of Return will recognize every form of Jewish religious conversion, whether Orthodox, Conservative or Reform performed abroad. Whether or not the Mandatory Conversion Law, which makes the Rabbinical Courts the arbiter in matters of conversion, will prevent non-orthodox conversions in Israel, remains uncertain.

Since no definition of the term "converted" is included in the text of the Amendment, the construction of that term will remain for the courts to decide. But as cases do arise, we can expect sharp religious political reaction — as has, in fact, already begun to take place in Israel.

(3) For purposes of the Law of Return if either spouse of a mixed marriage is Jewish — but excluding, "a person who was a Jew and voluntarily changed his religion" — all the rights of immigration and citizenship are extended not only to the Jewish spouse but also to his or her spouse, children and grandchildren. Of great importance, is the fact

67. The Rabbinical Assembly letter, February 27, 1970, "Report From Israel".
68. Jerusalem Post, June 8, 1970, p. 4.

that these rights are not conditioned upon the Jewish person, by virtue of whom the right is claimed, being still alive or having immigrated into Israel. It has also been observed that since the law speaks in the present case rather than the future, it is open to retroactive construction in favour of those immigrants already in Israel.

The provision in effect recognizes the extreme importance of immigration from Russia and other countries and the problem of mixed marriages among these immigrants. Justice Minister Shapira stated this in the Knesset:

> "Mixed marriages inevitably create problems, religious as well as cultural, Mr. Shapira (Justice Minister) said. But the country must show its readiness to face them by first bringing the mixed couples in with full rights, then tackling the rest."[69]

(4) No one can be registered as a Jew by nationality or religion if a notification under the Population Registry Law, 1965, or another entry in the Registry or a public document shows that he is not a Jew. In such a case, the burden of proof rests with the applicant and requires the obtaining of a different determination by a declaratory judgment of a court of law or a competent religious court in order to be registered as a Jew by nationality (ethnic group) or religion. As noted above, nationality and religion are now treated indivisibly and defined objectively by the halachic test of maternal descent. The law therefore rejects the subjective test of the majority in Shalit and its treatment of "ethnic group" and "religion" as separate terms.

CONCLUSION

The amendment to the Law of Return performed what the majority in the Shalit case had refused to do — it defined who is a Jew.

Unquestionably, the Supreme Court of Israel had had a difficult task to perform in the Shalit case. The term *Leoum* was a very shadowy word. It could be translated as "ethnic group", "nationality" or "peoplehood". Jewish ethnicity had always been objectively recognized by affiliation with the Jewish religion. But the creation of the State of Israel and changed circumstances had given new importance to the concept of nationality in Israel. The Shalits', in refusing to convert their children to the Jewish religion and in demanding that they be registered as belonging to the Jewish ethnic group, were arguing that Jewish nationality in Israel need not be contingent upon religious affiliation. For most of world Jewry, however, Jewish ethnicity could not possibly be defined in terms of Israeli-Jewish criteria alone.

69. Jerusalem Post, February 16, 1970, p. 10.

Some of the Justices in the Shalit case, chose to avoid this issue and limit the question very narrowly to what was the duty of the registration officer under the law. Their ruling, that the officer was required to register the particulars given to him in good faith by a resident and that the Population Registry Law did not vest him with any power to change these particulars on his own initiative or to question them unless they were patently false, could not possibly avoid the question the Shalits' had raised. This should have been plain. Justice H. Cohn as early as 1958, had already expressed his views on the question of who is a Jew. Justice Berinson of the majority stated his opinion in the Shalit case. The majority approach in Shalit also entailed a change of the administrative practice laid down by the directives of 1960 which had been in effect for ten years and which followed the Halachic definition. The furore which had attended the Shalit case during the two years it had been pending, the pressure of the Chief Rabbinate upon the Court, and the attempt of the Court to avoid the question in the first instance by asking the Government to recommend the deletion of "ethnic group" from the Registry, made the judicial attempt at avoidance useless. This is best evidenced by the fact that the Shalit judgment was delivered on January 23rd, 1970 and the Amendment, in the wake of intensive political pressures, was hastily prepared and was voted by March 17th, 1970.

Neither the Shalit case nor the Amendment can be clearly grasped, in this writer's opinion, unless the often repeated assertion that Israel is a Secular State is critically examined. We observe in this respect that the State has generally lent its support to all religious groups. She has afforded her Arab and Christian citizens every opportunity of maintaining their own culture and law. Every religious community has been free to worship in its own way, administer its own internal affairs, observe its own Sabbath and holy days and has been entitled by law to have its children educated in State schools or others of its choice. The State has given the respective religious courts exclusive jurisdiction over their adherents in matters of personal status such as marriage and divorce and politically, Arabs and Christians have been effectively represented in the Legislature. In 1965, there were three Moslems, three Christians and one Druze in the Knesset and over eighty-five percent of Arab electors voted in the 1965 election. Our point, however, is to propose that after everything is said, about the State's general support of religion and parts of religious law, that the State's character is specifically Jewish in addition to its secular character. Jewish culture and religious influence are pervasive. The great majority of Israel's inhabitants are of the Jewish faith. The Jewish Sabbath and Festivals are official state holidays and public transport is prohibited on the Jewish Sabbath which starts at sundown on Friday and ends at nightfall on Saturday. Hebrew, a language limited in the past to Jewish religious literature, is the official State language which unifies immigrants from

every origin. Hebrew is taught in Arab schools from the fourth grade on. State education is based by law "on the values of Jewish culture and the achievements of science; on love of the Homeland and devotion to the State of Israel and the Jewish people; . . ." The Bible which is the basis of Jewish law and culture takes up 20 - 30 percent of the school curriculum. The Jewish religious dietary laws are observed in all Jewish units of the Israel Defense Forces and in all Government and public institutions.

The right of every Jew to live in Israel and upon settling there to become an immediate citizen is a fundamental principle of the State given statutory sanction in the Law of Return enacted in 1950. And the National Anthem of Israel, the Hatikvah, speaks exclusively of Jewish hopes:

> So long as still within our breasts
> The Jewish heart beats true, . . .

Insofar as the Jewish religious courts are concerned, they have been given exclusive jurisdiction over Jews in matters of marriage, divorce and alimony and they also share jurisdiction with the secular courts in the matter of other questions of personal status where the parties agree to their jurisdiction. The Chief Rabbinate rules on the interpretation of Jewish law and supervises Jewish religious courts. Politically, the views of the Chief Rabbinate and of Jewish religious forces are often given voice by the religious political parties. But it is important to note, in this instance, that the National Religious Party is necessary to the Government coalition and therefore exerts pivotal political power far beyond the number of the elected religious representatives in the Knesset.

In view of these factors, the State cannot, in my opinion, be accurately described as a Secular State alone. The State clearly has a "Jewish" character beyond its secular character. The repeated use of the single term "secular" in describing the State, only confuses the issue and leads to faulty comparisons.

The implication of this Jewish-Secular character of the State is that since the State has lent its authority to a part of the Jewish religious law and to Jewish tradition, that it has thereby recognized their importance and that the attempt should be made to harmonize the secular law, where it specifically pertains to Jews, with that part of the religious law that it has supported, rather than to treat them as repugnant.

The majority in the Shalit case treated the secular law and the religious law as mutually exclusive. In their view, the Halacha was not a valid criterion for defining Jewish ethnicity in the secular law of the Population Registry — even where the halachic principle was grounded in history and tradition and, in terms of world Jewry, the most accepted definition. The Amendment clearly rejects this opinion by largely embodying the halachic definition of the term "Jew" and thus establishing the very important

fact that the Halacha can apply to a secular law, at least where the question is one of Jewishness.

In proposing that the general character of the State is Jewish as well as Secular, we propose more than that a vital relationship can exist between religious and secular law. The Amendment, it should be remembered, in essentially adopting the Halachic conception, is embodying a definition that is also most accepted among world Jewry. Jewishness for most Jews is still defined in terms of religious affiliation, no matter how loose that affiliation may be and, as Golda Meir pointed out in the Knesset, the Amendment and its definition lets Diaspora Jewry know that Israel has not established a license to assimilation. Furthermore, the Amendment in retaining the particular of "ethnic group" (*Leoum*) in the Registry does so because its recognizes, as David Ben-Gurion, the former Prime Minister of Israel did, that *Leoum* could not be struck because the Jewish people are one people. The Jewish character of the State can therefore not be limited to the national boundaries of Israel. Here again, the Amendment emphatically rejects Shalit's attempt to separate Jewish ethnicity in Israel from Jewish ethnicity the world over. The one test, for determining Jewish peoplehood, the Amendment implies, is the same for one Jewish people. In this general Jewish sense, the Amendment reaffirms the historical origin of the State in the Balfour Declaration which viewed with favor "the establishment in Palestine of a national home for the *Jewish people*", and its proclamation in its Declaration of Independence that "the land of Israel was the birthplace of the *Jewish people*".

In viewing the Jewish character of the State as transcending national boundaries and the secular character of the State as largely dealing with national Israeli circumstances, so called "compromises" of the Amendment, take on new meaning. The major part of the public controversy surrounding the question of who is a Jew, aside from the specific question raised in Shalit, has occurred because the religious authorities have not responded adequately to certain needs of the State while the secular law has been a relatively dynamic instrument responding to the needs of the people. The problem has been compounded by the intensive pressures of orthodox forces outside of Israel who have urged the Chief Rabbinate not to permit any compromises or deviation that might open the door to dissident Judaism in Israel or lend support to dissident Judaism abroad. By the same token, secular forces in Israel have often been overzealous in rejecting any and all religious criteria regardless of their values and American dissident religious forces have begun to use political pressure upon Israeli governmental authorities to breach the unitary orthodox control of religious matters in Israel.

The State in order to thrive and maintain its Jewish character requires continued immigration and integration of its immigrants. Jewishly, it is

also faced with the fact that orthodox Jews constitute a minority abroad and in Israel. It has had to consider that dissident Judaism is a powerful movement in North America, which is the stronghold of Diaspora Jewry — and that Judaism in North America is pluralistic. In the face of the failure of the Chief Rabbinate to adequately meet the problem of immigration in the case of mixed marriages and the need of their rapid integration, the Amendment has thrown the gates of Israel wide open not only to the Jew or Jewess of a mixed marriage, but also to his or her spouse, children and grandchildren. In doing this, it has not enlarged the term "Jew" but given the same rights that a Jew has, under the Law of Return, to a non-Jew in cases of mixed marriage. The Amendment deals with the problem of immigration and integration by providing for the acceptance of religious conversions performed abroad which do not necessarily meet Halachic requirements. It assumes with David Ben-Gurion, in this respect, that since Israel has a majority of Jews and a pervasive Jewish culture and history that mixed marriages and immigrants will merge with the Jewish community in Israel. In all of the above particulars, the Amendment recognizes Jewish facts abroad as well as the unique problems and Jewish-Secular character of the State.

In the absence of a written constitution, the State of Israel will continue to develop its general Jewish-Secular character. The Shalit case and the Amendment are two important steps in that continued development.

RABBI DR. LAWRENCE S. NESIS*

* J.D. Columbia School of Law, Member New York Bar and Manitoba Bar Association, Senior Rabbi, Shaarey Zedek Synagogue, Winnipeg, Manitoba.