

# THE INTEGRATIVE ROLE OF THE SUPREME COURT IN ISRAEL — SOME RELEVANT CASES

By JOSEPH BEN MENASHE

The importance of the fundamental and decisive mission the judicature is able to perform in the process of modernization, civilization and progress of developing countries, through the interpretation of the laws of the State, is undoubtable. This mission is still more decisive in such countries where the judicial system grants a dominant place to the theory of precedent<sup>1</sup>. We shall endeavour to analyze here decisions that may show to which extent the Supreme Court of Justice of Israel (from now on S. C.) has fulfilled the said mission and how it was carried out in daily jurisprudence. The judgements to be analyzed refer to two questions which have been the subject of continuous and clamorous social, political and legal polemics, ever since the existence of the State of Israel. The first question is that of Family Law, and more specifically that of the problems arising from the laws concerning civil and religious marriages; the second refers to the registration of nationality by the Registration Officer. Given that the Israeli juridical mosaic is so complicated, and its constitution and function so peculiar, we deem it necessary to offer an introduction regarding some basic facts and concepts which will clarify the quality, range and magnitude of the part played by the S. C. in dealing with the above mentioned questions.

1. Israel does not have a written Constitution. The constitutional principles of the Government, the Rights of Man and of the Citizen, are compiled in ordinary laws and in the decisions of the S. C. Such a legal situation implies a great disadvantage for both the political and social progress of a developing country, since any ordinary law may violate with impunity the Rights of Man and of the Citizen already established in a former law or decision. Nevertheless, this system bears a parallel advantage, for the fact that being the S. C. and not bound to a rigid written Constitution, it is free to give a liberal and progressive interpretation, thus avoiding the effects of retrograde legal dispositions or administrative decisions contrary to the democratic and liberal spirit of the social and political system of Israel.

2. The developing Israeli society is modern, pluralist, open, laic, antiracist, anticlerical and egalitarian as regards the Rights of Man and Woman as well as those of the Citizen.<sup>2</sup>

3. Due to the political, social and security condition, Israel has been governed by unstable Cabinets ever since the establishment of the State, that is, a Cabinet incapable of leaning on a majority that can dispense with the participation of the National Religious Party (from now on NRP). This party hence demanded the enactment of a series of laws of religious nature connected with Family Law and Registration of Marriages, their characteristics being diametrically opposed to those of the Israeli society, as defined above — no Cabinet has been able to avoid their acceptance, so far.

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1 W. Friedmann: *Legal theory*, 5th edition, 1967, pp. 429—430; see of the same author: *Law in a Changing Society*.

2 S. N. Eisenstadt: *Israeli Society — background, development & problems*, Jerusalem 1967.

4. The laws produced by the said coalition government and which govern the Law of Marriage and of Registration are, as already hinted, and as will be explained further on, religious, racist, clerical, coercive; they deny the Rights of Man and equality between citizens, as well as the legal equality between men and women; above all, they were established 4,000 years ago, namely in the XXI C. before the C. A.

5. This being the situation, the S. C. decided in a series of judgements that even though there is not a written Constitution, the laws of the State will be built on the basis of the supreme premise that Israel is a modern, democratic, liberal and progressive State, in which whatever is not forbidden by law expressly, is permitted to be done; a State in which the fundamental Rights of Man are an integral part of its system.<sup>3</sup>

6. The Israeli judicature is independent of the other powers of the State, both in nature and in form, this being a rooted and traditional fact in the Israeli democratic system. An additional guarantee for this independence is afforded by the system of appointment of judges: this is done according to the decision of an appointments committee, composed of three judges of the S. C., two Members of Parliament, two Members of Cabinet and two of the Bar Association. Since the Bar Association is an independent public institution, a majority formed by them, in addition to the judges, is enough to prevent any arbitrary appointment made by the Executive and Legislative powers.<sup>4</sup>

7. The Writ of Mandamus, as well as other Writs, empowers the S. C. to deal with any case it deems necessary, provided it is not under the jurisdiction of any other tribunal. As will be seen further on<sup>5</sup>, the juridical progress helping to solve the problems of marriage registration and nationality was achieved by means of the said Writ.

Within this framework the S. C. had to decide delicate and much argued about issues related to marriages and civil registration, some of which will be analyzed here.

## I. Registration of Mixed Marriages

### A. The Schlesinger Case

The Schlesinger case is, undoubtedly, the first, basic and most important judgement of the S. C. referring to the local registration of mixed marriages celebrated abroad. The case deals with a civil marriage celebrated in the year 1962 between a Belgian catholic citizen and an Israeli Jewish citizen, both domiciled in Israel. The marriage certificate was forwarded to the Ministry of the Interior where, as usual, they refused to register it (this Ministry is traditionally in the hands of the NRP). Upon it, the Schlesingers asked for an Order Nisi from the S. C., which dealt with the case according to the following pleadings:

Petitioner's pleading:

The Registration Officer has, according to the Registration Act, only to register

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<sup>3</sup> A. Rubinstein: Constitutional Law, p. 98.

<sup>4</sup> Law of the Judges, 1953.

<sup>5</sup> The Court's Law, Art. 7, 1957.

facts and by no means to judge their legal validity. Since the main purpose of this law is purely statistical, the Officer's duty is to register the marriage celebrated in Cyprus, being out of his competence to judge its validity, which can be done by the competent courts solely in case one of the parties of the marriage will apply for. Thus the Registration Officer has to register the marriage even if he considers it null or even if the nullity is evident to him.

Attorney General's pleading:

In the case of a Jew by religion and Israeli by citizenship, the Israeli law accepts only the religious marriage. Consequently Mr. Schlesinger being Jewish and Israeli and his personal law being the religious one, the said mixed marriage is null "ab initio", and therefore cannot be registered.

The S. C. accepted the allegation of the petitioners and ordered the registration of the said mixed marriage. The sentence caused a Cabinet crisis, for the NRP demanded the legislation of an "ad hoc" law abolishing and prohibiting the civil registration of mixed marriages. Mr. David Ben Gurion, then Prime Minister, considered this demand a contempt of the S. C. and refused to support it. Judge Yoel Zussman (at present Vice President of the S. C.), a true pioneer of the progressive, liberal and democratic interpretation, said in his opinion as follows: "The fact that the Mosaic Law does not admit the validity of a mixed marriage does not necessarily imply that when dealing with a matter based on a foreign law we will declare the invalidity of this marriage for the mere fact of its being mixed." — "The marriage will be void if its invalidity stems from reasons of external (international) public order, as has been explained before, that is, that whenever the Israeli judge is to interpret the feelings of the Israeli population he will be compelled to admit that the validity of the marriage in question is contrary to our ways of life, regardless of the place of its celebration. In case of doubt, the marriage enjoys the presumption of its validity." — "The invalidity of the marriage, as is stated in the religious law, is a respectable factor but should not be considered the only one." — "The people of this country are divided into two camps: one which is observant and one which insists on a separation between the law of the State and the religious law. Public policy does not demand that the judge should force the opinions of one camp on the other. On the contrary, the demands of life require an attitude of tolerance towards the opinions of others; so that the judge should aim at finding a balance between the various opinions held by the public."<sup>6</sup> Judge Yoel Zussman established his Doctrine of the Schlesinger case as follows:

- 1) According to the Registration of Inhabitants Ordinance the citizen is obliged to notify any change in his civil state and the Registration Officer
- 2) A "prima facie" evidence is sufficient to oblige the Registration Officer to register the marriage.

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<sup>6</sup> Enriette Anna Caterina Funk Schlesinger against the M. I., High Court, 143/62, cases of the S. C. J., Vol. 18 (I), 1963, p. 225.

<sup>7</sup> *Supra* p. 257.

- 3) The ceremony of the wedding is decisive as to the obligation to have it registered in the Civil Register, whereas the judgement as to its validity is beyond the competence of the Registration Officer.<sup>8</sup>

As from 1963, when the sentence in question was passed, around 500 marriages have been celebrated in Cyprus, while around 320 have been celebrated "per proxy" in Mexico after 1964, all of which were registered by the Ministry of the Interior. It is obvious that from the point of view of strict law, the Registration of Inhabitants Ordinance offers wide possibilities of interpretation; and the S. C. can be granted the historic merit of having chosen the most liberal and tolerant interpretation — certainly contrary to the will of the promoter of the Law of Matrimony and to the administrative policy of the M. I. (traditionally a member of the NRP). In other words the Registration of Inhabitants Ordinance, having left a wide zone of indetermination and having been considered unjust for application by the S. C., the latter was enabled to value the circumstances of the case by using a true ideal, detaching itself from the dominant idea but without leaving the frame of positive law.

## B. The Haklai Case

The Haklai case is a precedent in the search for a juridical forensic solution of marriages celebrated in the country but forbidden on religious grounds. To understand this case it is necessary to know certain facts and basic concepts which are specific to this peculiar type of marriage: the "private" marriage.

- a) The legal ceremony of the Jewish religious marriage is still a "private" one by nature, in spite of the presence of a rabbi who performs it. According to the Jewish religious Marriage Law — today the official law in Israel — a wedding ceremony celebrated in the presence of two witnesses is valid, even if a rabbi does not participate<sup>9</sup>.
- b) Besides the prohibition of mixed marriages, the Jewish religious law establishes a series of intercommunitarian marriage prohibitions, as is the case of the marriage between a cohen and a divorcee<sup>10</sup> (even if the divorcee had previously been his wife); between a cohen and a converted woman<sup>11</sup>, and a number of other similar prohibitions, the Levirate being the most remarkable instance<sup>12</sup>.
- c) The basic difference between a mixed marriage and an intercommunitarian prohibited one lies in the fact that the first case is void "ab initio", while the second one is valid even though it is subject to a religious sanction seeking dissolution, but the validity of the tie established by the "private" ceremony in the presence of two witnesses is not affected.
- d) The particular situation of the prohibited intercommunitarian marriages was taken advantage of by the couple Cohen-Buslik (cohen and divorcee) in the year 1953. This couple celebrated the marriage before two witnesses, in the presence of Advocate David Ganor. After the ceremony they applied to the M. I.

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<sup>8</sup> Supra p. 258.

<sup>9</sup> Moshe Zilberg; Personal Status in Israel, 1961.

<sup>10</sup> It is considered that if a person bears the name of Cohen or any other name derived from the same root, he is a descendent of the Temple priests caste, and consequently unable to marry a divorcee (repudiated) for it means a profane bond.

<sup>11</sup> A converted woman is considered impure for a cohen, due to her gentile past, in spite of her conversion.

<sup>12</sup> Institution of the Hebrew Law, contained in Numbers, according to which the brother of the late husband from whom she had had no children, is compelled to marry the widow, or else be publically repudiated (halitza), this with an aim to preserve the family descendance. Without the late husband's brother's consent the widow is prevented from remarrying a third person.

for registration, but this was refused. They therefore asked the District Court for a declaratory judgement on the validity of the marriage. The lawyer who celebrated the wedding was accused of public mischief<sup>13</sup>. When the case reached the S. C. via appeal, it declared through the late Judge Z. Hesslin as follows:

“This case appears to me not only as an evasion of the Law but an arrogant attack on the traditional ways of life among Jews which has been legally recognized by custom. Not only a contempt of the competent authorities but, and this is the most important point regarding the present issue, it is also a malicious frustration aiming against the efforts made by the authorities to control the marriages celebrated in the country effectively. It is easy to foresee the disorder that will reign in family life if every lawyer will be able to celebrate marriages, thus converting his office into a mountain to which all those prevented from getting married legally will hasten to . . .” — “summing up: I can see in the facts of the appellant’s behaviour an indecent intrusion in the public administration jurisdiction and an attack on public order; such behaviour means public mischief and can cause a serious moral harm to the population”.<sup>14</sup> This precedent made the 1964 experience a daring one. Nonetheless and given the unbearable legal situation of such couples, and the lack of parliamentary initiative, and considering the affrontery against the Rights of Man due to the prevention of marriages on religious grounds, there was no way out of it but the search of a forensic solution.

The Haklai couple (cohen and divorcee) celebrated the “private” marriage before two witnesses, after which they produced their declaration before the M. I. and were met with the usual refusal, they asked for an “order nisi”. The S. C. dealt with the case on the grounds of the following pleadings:

#### Pleading of the actors:

1. The prohibition of marriage between a cohen and a divorcee is rejected by the majority of the Israelis as being contrary to the principles of democracy, liberty of conscience and the Rights of Man, all of which are accepted by the State of Israel and the jurisprudence of the S. C.
2. This marriage is valid despite the prohibition, and a valid marriage cannot be considered an attempt against public order.
3. The Schlesinger doctrine teaches us that a “prima facie” evidence that the marriage was celebrated is enough to oblige the M. I. to register the marriage, thus a sworn declaration of the witnesses to the wedding will be a sufficient legal document for its registration.

#### Pleadings of the Public Ministry

1. The “private” marriage — and more so a marriage between a cohen and a divorcee — represents an attempt against public order, as established by the S. C. in the Ganor case in 1953.
2. Even though the marriage were not illegal, the M. I. has the right to demand a public document as evidence of its celebration, or else a de-

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<sup>13</sup> Criminal appeal 208/53 — Ganor against Attorney General, Vol. 8, p. 833.

<sup>14</sup> Supra. pp. 838, 839.

clarative judgement from a competent tribunal (in this case the Rabbinical Tribunal) stating that it is valid.

The S. C. through Judge M. Landau passed the following sentence:

“There is no place for recrimination against the actors for having used a trick in order to celebrate a “private” marriage. Our State ensures freedom of conscience to every citizen. The actors do not observe the religious rules, and according to the laws of the State they are fully entitled to do so. They wish to lead family life and bear children that will not be marked “outlaws”. Today they are facing an impediment which is purely religious-ritual based on the archaic concepts peculiar to the privileged rank of the Priest. To impose this impediment upon whom is not a religious observant is inconsistent with freedom of conscience and with the freedom of action implied in it. And here the religious laws themselves offer them a way out of this labyrinth, why should they be recriminated against if they take advantage of this subterfuge to escape from it.” While the S. C. recognized the „private marriage” from the public order point of view it decided that this marriage could not be registered on the basis of sworn declarations which are only private documents. It required declaratory judgements of the competent tribunal, i. e. the Rabbinical Court, to the effect that the marriage is valid.<sup>15</sup>

Two issues were decided by this decision: the one of public order was decided by a majority of four judges against one, and the one regarding the document necessary for its due registration was decided by a majority of three judges against two<sup>16</sup>. Had this last issue been decided then in favour of the actors it is almost certain that civil marriage would be imposed in the country by today. Apparently some of the judges feared a flood of “private” marriages based on witnesses’s sworn declarations, and thus they decided to stop the inevitable development of events.

Thereupon, the Haklais applied to the Rabbinical Tribunal for a declaratory judgement. This Tribunal dealt with the question most unwillingly, since it was asked to acknowledge the celebration of a forbidden marriage and therefore decided that the couple would be unable to remarry third persons without a previous divorce which means that the couple was considered married. The Registration Officer had to interpret the decision in this spirit and on such ground was the couple registered in August 1964, after a year and a half of forensic battles.<sup>17</sup> The problem got thus a theoretical solution, but in practice it encountered unsurmountable difficulties: each new case brought to the Rabbinical Tribunals faced an administrative wall which delayed the process by means of evasive sentences which implied neither the legalization nor the annulment of the marriage.

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15 Sniza Gurfinkel y Yerahmiel Haklai, High Court 80/63, Cases of the S. C. J., Vol. 17 (3), p. 2069, Judge Landau.

16 The Four Judges: M. Landau, Z. Berenson, A. Vitkon and A. Mani. The Three Judges: M. Zilberg, M. Landau und Z. Berenson. The Two Judges: A. Vitkon and A. Mani.

17 File 465/64, Cases of the Israeli Rabbinical Courts of Jurisprudence, Vol. 5, p. 219.

### C. The Rudnizki Case

This case deals with a cohen and a divorcee. Their marriage was celebrated "privately" before two witnesses in 1965. After the usual refusal by the Registration Officer they applied to the Rabbinical Court following the Haklai doctrine. This Court refused to determine the civil status of the couple. The Supreme Rabbinical Court to which the appeal was next taken decided merely that in the case of a cohen and a divorcee it refused to give a declaratory judgement, since it is contrary to its religious convictions.

In 1969 the case reached the S. C. with a new "Order Nisi". The Court faced a serious legal problem. In 1953 the Law had granted the Rabbinical Tribunals the sole competence in marriages and divorces between Jews in Israel<sup>18</sup>. On the other hand, the Court had decided in the Haklai case that a couple of a cohen and a divorcee was entitled to celebrate a "private" marriage. But the problem was how to save five years of waiting which anyway led to an impasse.

Once again the Court dealt with all the questions concerning "private" marriages, based on the pleadings of both the Public Ministry and the actors:

The Public Ministry pleaded:

1. The Rabbinical Tribunals are the sole and exclusive tribunals empowered to pass sentence regarding the validity of marriages.
2. This case proves the flaws in the Haklai doctrine: if the couples will be acknowledged that the couple is married and consequently the M. I. cannot register the said marriage.

The actors pleaded as follows:

1. Even though the Rabbinical Tribunals never declared that the couple is married, they never declared that these men and women are single. In the course of five years they only tried to evade the matter, for due to religious reasons they refused to admit what is clear to them: from the religious point of view the ceremony performed is valid.
2. This case proves the flaws in the Haklai Doctrine: if the couples will be left in the hands of the Rabbinical Courts exclusively, they will have to wait for centuries before they will be able to obtain a declaratory judgement.
3. Thus, in cases like the present one, in which the Rabbinical Courts refuse to give a Declaratory Judgement, it is for the S. C. to decide on the validity of the marriage and its subsequent registration.

The S. C. decided with a majority of four judges in favour of the parties and one against, establishing as follows<sup>19</sup>:

1. Whenever the Rabbinical Tribunal will refuse to exercise its powers due

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<sup>18</sup> Law of the Rabbinical Tribunals Jurisdiction, 1953.

<sup>19</sup> The four Judges: Y. Zusman, at present Vice-President of the S. C., M. Landau, Z. Berenson, A. Mani, Y. Kister was the fifth Judge.

to religious public order reasons, contrary to the laic convictions of the S. C., this last will give a declaratory judgement as to the validity of the marriages, based on the general powers granted by the writ of Mandamus, on which grounds the M. I. will register the marriage according to the Registration of Inhabitants Ordinance.

2. According to the Israeli Law of Marriage the couple that celebrated the ceremony is married.<sup>20</sup>

The above sentence marked the end of a five year long forensic battle. The condition of the couples in similar circumstances changed fundamentally. What in 1953<sup>21</sup> was considered a public mischief and an affront to public order is now being dealt with by the S. C. which gives a declaratory judgement compelling the M. I. to register the act. This was not only a precedent as concerns family rights but to all the other rights as well. It was one of the very few declaratory judgements passed by the S.C. in the course of 25 years.

## II. Registration of Nationality

### A. The Shalit Case

The Registration of Inhabitants Ordinance establishes that all the inhabitants of the country are to notify their general particulars, including nationality<sup>22</sup>.

The concept of nationality in this Law is not identical to the concept of citizenship<sup>23</sup>. In Israel the legal and defined concept of citizenship is circumscribed by the Israeli citizenship, which is granted to citizens of different races or religions (Jews, Arabs, Druse, etc.) as established in the Law of Citizenship. The concept of nationality in the said Law of Citizenship is of a sociological nature, bearing racial and religious characteristics and being difficult to be defined legally. The registration is made in the Book of Population of the State. The fact that the registration of nationality is inserted in the Identity Card (which according to the Law, every citizen has the obligation to carry and produce whenever required by the circumstances), is of still greater importance. The population of Israel is formed by immigrants who come from the four corners of the world: they belong to communities of different cultural levels and to different religions, of different races but with a historical common past which is, at the same time, different. All this gave place to national polemics of such magnitude that every time a case is brought to Court the question of registration of nationality arises again and the shadow of a new Cabinet crisis threatens the existence of the coalition cabinet.

The problem has been defined in the secular question: "Who is a Jew?" It can be answered in two ways, according to convictions pervading in the Israeli population:

1. A Jew is one who is considered as such by the Jewish religion, that means, a child of a Jewish mother or,

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<sup>20</sup> High Court, 51/69, Rudnizki v. Rabbinical Supreme Tribunal and M. I., Cases of the S. C. J., Vol. 24 (I), p. 704.

<sup>21</sup> See note 14, supra.

<sup>22</sup> Registration of Inhabitants Ordinance, 1965.

<sup>23</sup> Law of Citizenship, 1952.

2. A Jew is one either of whose parents (father or mother) is Jewish and he himself considers himself Jewish, given his convictions, and he declares it so before the competent authorities.

In the famous Shalit case this problem arose with all the characteristics of national polemics and Cabinet crisis.

Mr. Shalit, a lieutenant in the Israeli Navy, Jewish and married to a gentile, requested to have his two children registered as Jews, in spite of the fact that their mother is a gentile. After the M. I. declined Mr. Shalit's petition, the latter presented a petition for a writ of mandamus before the S. C.<sup>24</sup>. The S. C. dealt with the case in plenum, namely nine judges. The first step the Court took, once the hearing of the Case was over, was to recommend to the Government to abolish the registration of nationality, with a view to avoid the "kulturkampf" the case was exciting and the intense and useless polemics as well as a Cabinet crisis. This was intended, besides, to enable the Court not to pass a sentence of either pro-religious or pro-laic contents<sup>25</sup>. The democratic point of view shows no other solution but to eliminate a concept which is not only legally undefinable but is in constant crisis of definition, above all in our time. The registration of nationality being tightly connected to the concepts of race and religion, it is totally superfluous and antidemocratic, discriminative and racist. Its registration in a society which is completely against these qualifications is an unforgivable anachronism. As it could be expected, the Government gave in to the pressure exercised by the N.R.P. and rejected the proposition of the S. C., leaving no alternative to the Court but to face the problem and decide according to the merits of the case.

The decision was taken by a majority of five against four votes<sup>26</sup>. The majority opinion did not define who is a Jew, neither had it been done by the registration of Inhabitants Ordinance, but it framed a very legal solution, a progressive one if judged by the results obtained. The S. C. again established the "ratio" of the Schlesinger case, which applied to the Registration of Inhabitants says<sup>27</sup>: "The Registration officer is incompetent to define who is a Jew. His obligation consists in registering as Jews Mr. Shalit's children and any other who considers himself as such according to his conscience and that declares it so in good faith<sup>28</sup>." From a substantive point of view, the S. C. evaded the serious problem of a definition which is contrary to both laic and religious convictions but in stating that the Registration Officer is compelled to register Mr. Shalit's children as Jews it undoubtedly gave the only democratic, liberal and progressive answer the tradition of the S. C. dictated.

## B. The Ben Menashe Case

Although the S. C. gave a liberal and democratic answer to the problem of registration of children whose parents required it for different and obvious reasons, the ulterior purpose, i.e., the abolition of registration remained still unsolved. When the three children of the party in the present case were born, the party

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24 Shalit against M. I., High Court 58/68, 26. II. 68, Cases of the S. C. J. Vol. 23 (2), p. 477.

25 Published in all the newspapers after the first session of the High Court, 58/68, 26. II. 68.

26 The five Judges: Y. Zusman, Z. Berenson, A. Vitkon, H. Cohen and A. Mani.

The four Judges: S. Agrat — President, M. Zilberg — Vice-President, M. Landau and Y. Kister.

27 See notes 8,9 and 10 (supra).

28 Judge Zusman, p. 516, see note 24, supra.

appeared successively before the Registration Officer requiring to abstain from filling out the particulars on religion and nationality. In each case the Registration Officer replied that the particulars are to be filled out, despite the parents' refusal to declare them. In the year 1967, immediately after the recommendation of the Shalit case by the S. C., the party presented a petition for an "Order Nisi" against the M. I.<sup>29</sup> The S. C., composed of three Judges, decided unanimously that the Schlesinger doctrine is applicable to the case in question, basing the decision on the following arguments:

1. The Registration Officer has no rights to register any particular not declared by the declarant.
2. Everyone has the right not to declare or not to define his nationality.

This case opened the doors to a forensic solution, but not to a parliamentary one of the problem. The solution lies in the created legal possibility which enables any inhabitant not to declare his nationality. In this way, racial and religious discrimination caused by the compulsory registration is automatically abolished.

### C. The Helen Zeidman Case

Helen Zeidman's case was the third renowned one related to registration of nationality according to the Ordinance (previous to its amendment). Mrs. Helen Zeidman was converted to judaism by the reform rite and applied for registration as Jewish, based on her conversion and declaration. The M. I. refused to register her as required, on the grounds that the orthodox conversion is the only acceptable one. The arguments of the party were based on the Shalit case, namely that a "bona fide" declaration, that according to her conscience she is Jewish, will suffice. If besides this, Mrs. Zeidman got converted to judasim, even if by the reform rite, her rights to be registered as Jewish are strengthened. The plead convinced the Attorney General of the State who replied, in the "Order Nisi" against the M. I., that according to the Ordinance as interpreted in the Schlesinger case, Mrs. Zeidman should have been registered as Jewish. This answer caused a dramatic and ridiculous development. The N. R. P. threatened to abandon the coalition if the S. C. ordered the M. I. to register Mrs. Zeidman as Jewish on the basis of her reformist conversion. In order to prevent the above, an orthodox conversion was carried out in a few hours, enabling her registration as Jewish on the grounds of her orthodox conversion and not of her reform one — something which had never happened before in Israel.

### D. The Amendments to the Registration of Inhabitants Ordinance

Following the Shalit sentence, the N. R. P. demanded the amendment of the Ordinance to be drafted in such a way that it would leave no place for doubt as to the fact that a Jew will be considered as such only according to the religious Laws, and as such should be he registered. The amendment was promulgated under the usual threats of the party that it would quit the coalition, in spite of the war situation of the country<sup>30</sup>. This amendment establishes that a person will be registered as

<sup>29</sup> Anat, Damir and Hagar Ben Menashe v. M. I., High Court 5/69, Cases of the S. C. J. V. 24 (I) p. 105.  
<sup>30</sup> Law of Return (Amendment No. 2), 1970.

Jewish if born to a Jewish mother, or if converted. The amendment does not specify if the conversion is to be orthodox or reform. It is sure that if a similar case will be brought before the S. C. this will again be an operative factor in the solution of the problem. It should be remarked that despite the demands of the N. R. P. to have the Shalit and Ben Menashe doctrines abolished, the Government did not consent to it and today, despite the abolishment of the amendment of the Shalit doctrine, every inhabitant has the right not to declare the particulars regarding religion and nationality.

## **Conclusion**

Summing up all the decisions dealt with in the present article, the Parliament abolished only the Shalit doctrine, but the Schlesinger, Haklai, Rudnizki and Ben Menashe doctrines still remain valid. The elements of facts and cases in the present article could have been studied from different angles. One of them is the citizen's struggle in a democratic developing country with the aim to contribute to the conquest of his rights, in this instance, the struggle of those couples and individuals who were involved in the forensic battles in order to defend their rights to get married and to live according to their beliefs and not according to the religious coercion imposed by the N. R. P. and the various Cabinets that supported it. Another remarkable aspect is that of the mission of the legal profession in a developing country, which shows the immense possibilities open to the initiative, the determination and the faith of a lawyer in a democratic system when he is guided by the mission of justice and progress. Finally, I chose to discuss the aspect of the mission of the judiciary, since if it helps clarify the two previously mentioned points, it would have made a substantial contribution to democracy.

autonomy, Jewish religious affairs are settled bureaucratically and there is little contact between public opinion and the rabbinate. A special difficulty results from Jewish non-orthodox minorities.

As a result of the existing set-up the state intervened in matters of religious education, national service of women, Sabbath, rabbinical jurisdiction and the election to rabbinical office. Rabbinical courts have disputed the legality of state laws dealing with woman's equality, age of marriage, anatomy, national service of women and impediments of marriage.

In spite of the difficulties in combining Jewish religion with liberal democracy, the author rejects separation of state and religion as being inadequate to the special character of Israel.

### **The Integrative Role of the Supreme Court in Israel — some Relevant Cases**

By JOSEPH BEN MENASHE

The judicature, particularly in countries where the judiciary system depends largely on precedent, can play an important role in the process of modernization. This paper examines the specific role played by the Supreme Court of Justice in Israel in this context with regard to two problems: civil and religious marriages and registration of nationality. Both problems are paradigmatic for the modernizing process and have given rise to intense political and religious controversy. Both questions have been affected by religiously orthodox, "clerical, racist and coercive" legislation forced upon cabinet and parliament by a powerful (i. e. indispensable for coalition building) minority. The author analyzes the most important recent cases on this subject.

### **Constitutional Amendments in Turkey — A Reply**

By BASSAM TIBI

In 1924 the nationalist movement led by Atatürk succeeded in dissolving the Sultanate — Caliphate and in establishing the republic. Until 1950, when they had to cede to the party of the Turkish bourgeoisie, the Democratic Party (DP), power was held by the Kemalists, i. e. the Republican Peoples Party (CHP). The latter's policy of reform and the experiment in transforming society from above through decree, were ended. The DP broke up the state industrial projects, stopped attempts at secularization and suspended democratic freedoms. In 1960 the military intervened, displaced the DP and introduced constitutional freedoms. This liberalization led to the rise of a powerful opposition which fought for social change. Interposing again, the military this time did away with the freedoms guaranteed by the constitution through changing the latter. Their obvious intention was to render the growing opposition illegal. E. E. Hirsch interprets this constitutional change as the attempt to disarm the "enemies of freedom", by which term he means: any opposition. The present paper challenges this interpretation. It confronts the statements made by Hirsch with historical developments and proves the former to be untenable. It shows that the 1971 amendments to the Turkish constitution do not constitute a "protection of democracy" as claimed by Hirsch but, by revoking democratic fundamental rights, its dissolution.