Israeli Supreme Court rejects Israeli Nationality Status: Excerpts from Ruling

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For the analysis, please see Court denial of Israeli nationality reinforces discrimination by Ben White on middleeastmonitor.com

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MEMO
MIDDLE EAST MONITOR

Judge Uzi Vogelman:

The appellants had turned to the District Court in Jerusalem, asking for a declaratory ruling that they are members of the Israeli nationality, and this for the purpose of the ruling to be used as a public certificate for changing their nationality entry in the population registry. The District Court (the Hon. judge Noam Solberg) rejected their request, ruling that the matter is institutionally nonjusticiable. This has brought about the appeal before us.

1. The appellants are all Israeli citizens. They are registered under various nationalities in the population registry - most of them are registered as Jews and some as members of other nationalities; Arab, Druze, Buddhist, Burmese and more. appellant no. 1, Professor Uzi Ornan, is registered as “Hebrew”, and this by his declaration.

Ornan established the “I am an Israeli” association more than a decade ago. Its members have signed a petition stating that they belong to an Israeli nationality.

In 2000, Ornan appealed to the Minister of Interior, asking to be registered as “Israeli” in the population registry’s nationality entry. His appeal was rejected, based on a ruling from 1970, Tamarin vs. The State of Israel. At the end of 2003, Ornan filed a petition with this court ... , was advised to address the proper legal instance ...[and] after more than two years appealed to the Jerusalem District Court.

2. The Jerusalem District Court rejected the request for declaratory legal support, ruling that the issue is institutionally nonjusticiable. The court conducted an extensive discussion of justiciability, following the accepted view in our legal system, which distinguishes between two main aspects - normative justiciability and institutional justiciability...the court proceeded to apply the test adopted by the High Court of Justice (HCJ) in the Ressler vs. The ministry of Defense 1986 ruling - [namely] determining the dominant nature of the issue on hand. Doing so, the court ruled that the dominant nature of the desired declaration is public, ideological, social, historical and political - but not legal. According to the court, the appellants’ request is not to be regarded as a technical-administrative matter whose purpose is mere registration in the population registry, but - in fact - a request that the Jerusalem District Court rule that in the State of Israel, a new nationality, common to all its citizens and residents, has been formed, namely the Israeli nationality. This issue, says the court, is normatively justiciable, but not institutionally, since a ruling on the existence of an Israeli nationality would have far reaching and crucial implications for the identity of the state, its character and its future … The court ruled that the technical-statistical act of registration cannot provide a substitute for a debate among the legislative and executive powers and the public.

...

3. According to the appellants, a decision on the issue has practical implications for the individual’s daily life, on the level of internal law as well as that of international law, and therefore the court cannot shy away from ruling. According to the appellants’, the entire citizenry of Israel amounts to its constituent nationality, and therefore, negating the existence of an Israeli nationality is tantamount to negating the existence

of the State of Israel as a sovereign democratic state. According to them, the Israeli nationality was formed with the declaration and establishment of the State of Israel, and it does not include diaspora Jews, and therefore the District Court's decision that "legally and judicially - there is no Israeli nationality" - is wrong. To corroborate their position, the appellants refer to Israel's Declaration of Independence, from which it follows, so they argue, that diaspora Jews are not a part of the nationality established in Israel with the founding of the state, which comprises "members of "the independent Hebrew nation in their land" and "members of the Arab nation who reside in the State of Israel". In addition, the appellants corroborate their position with reference to legislation from the state's early days, employing the term "nationality", from which it can be inferred that an Israeli nationality does exist: For example, in the 1948 Shipping Ordinance, it was stated that [if] a ship [is] registered in the state of Israel "Its nationality is of the State of Israel"; and in the 1960 Shipping Law, which superseded the Shipping Ordinance, it was stated that "The nationality of a ship registered according to this law is Israeli". The appellants also point out that the term 'Nationality' appears in the Israeli passport, under which the word "Israel" appears. According to the appellants, a "Nationality" is not a religious or ethnic nationality, but the "the state's nationality in its legal sense", with the right to belong to it having been grounded in article 15 of the Universal Declaration of Human Rights accepted by the United Nations general Assembly in 1948.

…

According to the appellants, the current registration, based on a religious-ethnic component, may, in the future, bring about violations of the equality between groups of Israeli citizens of different ethnic descent(s). This state of affairs...under which an ethnic labelling is forced on Israeli citizens when they do not identify with it, justifies consideration of the matter and granting them their request. In another aspect which the appellants have addressed, they clarify that every citizen should be given a free choice as to her/his desired nationality registration.

The respondent's arguments

4. Respondents 1 and 2, the Ministry of Interior and the Attorney General, ask that the appeal be overruled. They argue that the District Court was right in ruling that the issue is nonjusticiable, since it has dominant public social, national, and public aspects whose implications for the shape and character of society and the state are significant and far-reaching … The respondents refer to the writings of various authors from the 19th century to the present, which pertain to the deep disagreement on the question of whether Judaism is a nationality separate from the nationality of the citizenship state (between "a Jew who is a German citizen" and "a German who shares Moses' religion"). They argue that this issue should be resolved in the appropriate forums - as part of the public and academic discourse, and the court had better stay clear of discussing it. The respondents also argue that the appellants have not met the burden of proof which had been assigned to them as seekers of declaratory judicial support, namely demonstrating the existence of an "Israeli nationality". Addressing the issue, the respondents have stressed that in their view, it is the Israeli citizenship which expresses the common self-determination of all residents of Israel, uniting [members of] various nations who have gathered in the State of Israel. They … note that the separate classification of various groups within the Israeli population, as parts of separate nations, had existed before the establishment of the state, and has remained afterward. It has also been stressed that information on nationality appears only in the population registry, which is a statistical database, and [this] does not even constitute proof of [the information's] veracity. Therefore. according to the respondents, the appellants' request has no significance de-facto and it is entirely grounded in the symbolism they assign to it. Therefore, it has been argued, the appellants have failed to show that declaratory judicial support was required in this issue…

10. This [Israeli Supreme] Court rejected Tamarin's appeal ... It was ruled that it had not been proven that an Israeli nation has been formed in the State of Israel, separately from the Jewish nation … In addition, [the court] ruled that the principle of self-determination should, in its view, apply to peoples and not to "shreds of peoples" … Recognition of such nationality may bring about the national and social disintegration of the entire nation … A separatist trend of splitting the Jewish nations must not be accepted.

14. Thus, we see that the details of religion and nationality in the population registry are fertile grounds for tempestuous legal debates on the issues of "peoplehood and nationality, religion and state, and Halachic and non-Halachic conversion [to Judaism]". Following several decades of debating around the nationality detail, it seems that things have not changed.

18. The appellants argue, for example, that "It is impossible to define the entirety of Jews in the world as members of the 'Jewish nationality', since the Jews ... all belong to the nationality of the state in which they are citizens". We are dealing here with a sensitive and moot issue which has accompanied the Jewish people for many years and the Zionist movement from its inception, historically and value-wise. The concept of Zionism as a national denomination, not merely a religious one, is a pillar of Zionism. On the other hand, there has been the concept of Judaism as a religion only, entailing that the national affiliation of Jews be only with the state whose citizenship

they hold. The foundations of the latter concept are the emancipatory process which Jews went through in western European states, a time in which many Jews began to define themselves as Jews by religion only.

19. The implications of this discussion are immensely wide. This pertains to Israel's relations with diaspora Jews, and also to perceptions among the various groups within the State of Israel and the relations between them. The [Jerusalem District] Court pointed out the possible implications of a judicial resolution of the issue:

> "The desired declaration would violate the delicate balance between the state's national and cultural constituents, which are based on national and non-Jewish identities on the one hand, and the way in which the religious constituents are manifested on the other hand. And NB: One cannot belong to two nationalities. If an Israeli nationality is recognized, members of the Jewish nationality in Israel will have to choose between the two: Are they Israelis, in which case they would not be Jewish; or are they Jewish, in which case they would not be Israeli; the same would apply to members of minority groups [in Israel]."

Thus, a court declaration of the existence of an Israeli nationality, as an objective reality, may have implications for the nationality entry registration of all Israeli citizens, even if the latter are not interested in it. In this context, let us mention the position of scholars Amnon Rubinstein and Alexander Yakobson, who have addressed the significance of such a move with respect to the Arab public:

> "In the current situation of two distinct national identities among the citizenry, a formal, or even informal adoption, of the term 'The Israeli Nation', may not include the Arab minority nationally, but exclude it civically… Among the Arab public, many will refrain, or even explicitly refuse, to define themselves as Israelis due to the national 'non-neutrality' of this this name, or merely for political reasons"
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> *(Israel and the Family of Nations: The Jewish Nation-State and Human Rights - Israeli History, Politics and Society, 2003)*

21. And so we have seen that in order for the court to accept the appellants' request for a declaratory ruling according to which they belong to the Israeli nationality, they are required by previous judicial rulings to prove the existence of that nationality by objective criteria.

22. Having said that, I cannot accept in full the conclusion drawn by the District Court, about the issue being institutionally nonjusticiable. Firstly, as we have seen, this court has often been required to address issues pertaining to the content of the nationality and religion entry in the population registry, in spite of the public sensitivity involving these questions. Viewing these questions as institutionally nonjusticiable has remained a minority opinion.

…

25. ...Firstly, the appellants have hardly grappled with the court's decisions in the matter of Tamarin. [Their] key arguments had been examined and rejected by the court in [that] matter.

Secondly, the appellants have failed to address … deeply rooted perceptions among the Israeli public and in court rulings, as to the interpretation of the concept of "nationality" in Israeli law. ...[They] have not come forward with the sufficient factual groundwork to prove that the general public's perception of "nationality" has changed since the [1970] Tamarin ruling to the present…

Thirdly, the appellants have not addressed the distinction within the Registry Law, namely between the nationality entry (article 2(a)(5)) and the citizenship entry (article 2(a)(10)). Numerous excerpts to which the appellants refer to corroborate their arguments, regarding the existence of an Israeli nationality, pertain merely to Israeli citizenship. For example, the term "Israeli nationality" employed by the shipping ordinance, means nothing but citizenship; and the same holds for the term 'nationality' in the Israeli passport. The distinction between citizenship and nationality is not new. The substantial datum among the two is obviously the citizenship [which] creates a lasting legal linkage between the individual and her/his state … The appellants' wish to bring about the unification of these two terms is the ideological purpose underlying their request and their concept of nationality. However, when petitioning the court and demanding that it rule differently from prevalent past judicial rulings, the appellants have failed to address the existence of the aforementioned distinction.

…

26. Having said that, and perhaps even more importantly,... the current law does provide the appellants with a course of action to bring about their desired outcome, albeit partially, without having to overturn the Tamarin ruling and declare the objective existence of an Israeli nationality...[This can be achieved] by registering them as Israeli citizens only in the population registry...Similarly to a recent ruling by the Tel Aviv-Jaffa District Court in the matter of [author Yoram] Kaniuk, in which the court agreed to provide declaratory support which would allow the undoing of his registration as "Jewish" in the religion entry … The appellants, some of whom are registered as Jews in the nationality entry and some as members of other nationalities, do not wish to express their discontent with legal restrictions on a person's registration as "Jewish" in the nationality entry, but merely wish for a genuine expression of their subjective self determination. Even if the appellants are not granted their full wish, it seems that following [this] course could serve their case to some extent. On the one hand, they would not be "labelled" as members of a nationality to which they do not wish to belong, by their own statement (be it "Jewish", "Hebrew", "Arabic" or other). On the other hand, they would be able to keep defining themselves - in private and in public - as Israelis through their Israeli citizenship, which will still be registered in the population registry. If the appellants wish for the registry to reflect their view that citizenship is the appropriate characteristic to be included in the definition of one's identity, then deleting the content of the nationality entry in the pertaining registry, while leaving the citizenship entry intact, may serve this view well.

Judge H Meltzer :

1. I concur with my friend, Judge U Vogelman's, comprehensive and meticulous ruling.

I do not accept the appellants' key legal proposition, which states: "There is no 'sovereign Jewish entity in Eretz Israel', but only a sovereign entity named 'Israel' and its decisions are being made by the Israeli nation - its entire citizenship with no difference of race, religion or gender..."

…

(a) This proposition ignores the "constitutional datum", according to which Israel is defined on the constitutional level - at least since 1992 - as a "Jewish and democratic state", following the stipulations of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation.

(b) The proposition attests to a certain conceptual confusion among the appellants. Israel is defined, internationally (since the UN "partition" resolution) and internally (at least following the aforementioned basic laws) ... as the Jewish people's nation state. The fact that it is also the [civic] nation state of its Israeli citizens - whoever they may be - does not negate its identity as the Jewish people's [ethnic] nation state.

(c) The proposition involves a new reading of the Declaration of Independence, according to which the "Israeli" nationality was constituted by the declaration, and that this nationality comprises members of "the independent Hebrew people in their land" and members of "the Arab nation who are Israeli citizens". This was already rejected in the matter of Tamarin, [by] judge Agranat who stated:

> "The declaration decrees that 'The state of Israel will be open for Jewish immigration and for the Ingathering of the Exiles'...the great occasion of the establishment of the State of Israel...did not come about only [to culminate in] division among the [Jewish] people... Jewish on the one hand and 'Israeli" on the other."

The recognition of the legitimacy of Israel's existence as a Jewish state is grounded … in three central elements:

> (1) the 29.11.1947 UN resolution on the establishment of a Jewish state in Eretz Israel
>
> (2) The moral recognition of the Jewish people's right to self determination within a national framework.
>
> (3) The practice among nation states, common in other democracies - rejects the argument that the democratic system necessitates a nationally "neutral state".

7. ...The appellants have also not been precise on the legal level. One of the characteristics of Israel as a Jewish state is its “responsibility for the fate of the entire Jewish people, since it was founded as a manifestation of all-Jewish solidarity. In the face of such responsibility, it has the right and duty to to employ tools of collective state action to defend Jews being harmed “for being Jewish”.
(Prof. Moshe Halbertal, Haaretz 27.4.13)

9. I cannot concur with my friend, Judge U vogelman in section 26 of his ruling … Unlike citizenship and religion, which may be “renounced”, or changed, usually through an institution or a “ceremony”... It is usually very difficult to renounce one’s national affiliation

12 (a) Regarding members the various nationalities living in Israel - at this point there is no justification for the “unification” of the separate nationalities and their legal merging into a new general “Israeli nationality”, since this would run contrary to Israel’s Jewish nature as well as its democratic nature (the latter regarding all nationalities in our land, including the Jewish nationality).

(c) The State of Israel exists as a Jewish and democratic state, as a solution for the jewish people, who have suffered harsh persecution throughout the ages and a fatal blow in the Holocaust, and this is also one of the reasons for its definition - constitutionally - as such. Therefore, there are no legal grounds for the appellants’ wish to cancel the state’s “Jewishness” and turn all its citizens into members of an “Israeli nationality”.

President A. Grunis

I agree with my friends, Judge Vogelman and Judge Meltzer, about the Tamarin ruling still applying to the subject of the appeal. Therefore, I see no need to address the question of whether the District Court was right in rejecting the appellants' request on the grounds of the issue being institutionally nonjusticiable. And a further comment about what my friend Judge U Vogelman proposes … Since this possibility has not even been raised by the appellants, I have clearly refrained from addressing it.

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