# HOW SHOULD A COURT DEAL WITH A PRIMARY QUESTION THAT THE LEGISLATURE SEEKS TO AVOID? THE ISRAELI CONTROVERSY OVER WHO IS A JEW AS AN ILLUSTRATION

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Abstract:

Legislative avoidance of principled decisions on substantive questions, by transferring the decision making task to the executive branch, is a frequent scenario. The legislature does this by way of either express or hidden delegation, i.e. by using ambiguous wording that on the face of it only requires interpretation, but which in fact requires a substantive decision on the matter at stake. The Israeli legislature resorted to the hidden delegation tactic in order to avoid the adoption of a substantive decision in the dispute over the question of: "who is a Jew" - a dispute that has divided Israeli society and World Jewry (especially its American component) since the establishment of the State of Israel. This article presents a complex analysis of the Israeli Supreme Court's treatment of this hidden delegation. The aim of the article is to enhance the American reader's understanding of the various options available to the court while tackling the fundamental question of the Nondelegation Doctrine, and to offer a few new insights as to how this question should be resolved.

As is well known, during the last few decades, the American Supreme Court has avoided applying the Nondelegation doctrine, even though it has never been officially overruled. One of the stratagems employed by the American Supreme Court to avoid applying the doctrine is the strategy of denying the existence of delegation, in reliance on the "double test" established in the *Chevron* case. I will indicate the similarity between this evasion tactic and the tactics used by the majority justices of the Israeli Supreme Court in the matter of who is a Jew. I will then briefly review the arguments offered by the doctrine's opponents, and present a new, narrower version of the doctrine, which distinguishes between express delegation and hidden delegation, and only seeks to disqualify the latter. I will argue that this version of the doctrine -- which was employed in Israel by one minority Justice – could even be acceptable to those American justices and scholars who for various reasons oppose the doctrine in its complete form.

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## A. INTRODUCTION

American scholars of constitutional law have long been engaged in almost obsessive attempts to illuminate the justification for judicial review of legislative decisions and its legitimate limits. Prima facie, there is a fundamental tension between the conferral of the right of the "last word" to the court and the democratic principle, and hence the need to justify judicial review.[1]

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[1] See Alexander M. Bickel, THE LEAST DANGEROUS BRANCH, THE SUPREME COURT AT THE BAR OF POLITICS, 16-17 (1962). For a general survey see Paul W. Kahn, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992). To date, the vast majority of Western countries function within the framework

However, the tension between judicial activity and the democratic principle is not only expressed in cases in which courts interfere with the legislature's decisions. It also emerges in cases in which the court is required to resolve issues that the legislature intentionally avoided resolving. Indeed, quite frequently the legislature circumvents the resolution of substantive questions. Questions left undecided by the legislature thus find their way to the judicial branch, after having been decided by the executive branch.

This second category of cases can be divided into two scenarios: The express delegation of the power to decide to the executive branch, or the adoption of an ambiguous decision which fails to decide the question at issue, intending or at least anticipating its decision by the other branches of government. This article is devoted to a discussion of these two methods of avoidance, which we will refer to respectively as **express delegation** and **hidden delegation**, and with the possible methods of response available to the court when encountering such cases.

In the article I will present four modes of response the court can choose from when it is called upon to address a substantive question, one which the legislature avoided deciding, and which was decided by the executive branch. One method of response is to decide the question on its merits, using substantive claims. A second method is to maintain neutrality – in other words, to render a decision on the file, but to refrain from a decision on the fundamental dispute.[2] A third method is that of judicial restraint: Absent an explicit reason based in law, or public consensus militating against the decision of the executive branch, the court will refrain from interfering with its decision. The fourth mode is the adoption of tactics intended to compel the legislature, or at least to pressure it into arriving at a democratic decision on the matter. The article is devoted to a detailed discussion of the advantages and disadvantages attaching to each method, and an attempt to pinpoint the most appropriate method from a democratic perspective.

The options available to the court in the current context may be presented and discussed in the abstract, but the discussion could benefit from its development having resort to concrete examples. As a graduate of the Israeli legal system I have chosen to be assisted in the main by a classic case study in Israeli Law – the legal and public dispute over the question of: who is a Jew. Israeli immigration laws grant every Jew the right to immigrate to Israel and

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of the constitutional model, and in that framework, the court has the right of the last word. Even so, a number of countries have adopted intermediate models (between the model of the legislative supremacy and the model of judicial supremacy), which confers powers to the court in constitutional matters, and simultaneously maintain a dialogue between the judicial branch and the executive branch. This characterizes the models (which differ from each other) that were adopted in England and Canada. For a description of the models, and their characterization as intermediate models (or another appellation-Weak form Judicial Review), see e. g. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 Am. J. Comp . L. 707 (2001); Mark Tushnet: *Comparative Constitutionalism: State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 Chi. J. Int'l L. 435, 447-453 (2002).

[2] It might be asked: How can one decide a file without deciding the dispute? My response, which will be presented in greater detail below, is that indeed, this is impossible. Nonetheless, as I will exemplify, the Court may well attempt to claim that it did not decide.

automatically to be granted citizenship (= the status of an *oleh)*, but the Israeli legislature failed to furnish a precise definition of the term "Jew" for that purpose, despite its awareness of the controversy and the varying interpretations that can be given to the concept "Jew". The Legislature did not perform express delegation, inasmuch it did not expressly delegate the authority to decide to the executive branch. But, in its failure to provide an exact definition, despite its awareness of the controversy, it performed hidden delegation, when it transferred the undecided matter to the executive branch, with the knowledge and intention that it would be decided by the executive branch. The executive branch gave the term its own interpretation, and acted accordingly. A number of individuals and organizations, aggrieved by the interpretation, petitioned the Court, requesting it to reject the interpretation of the executive branch, and to adopt another in its place. The opinions given by the justices addressing the dispute over the years, whether as majority or minority opinions, may be classified into the four fundamental categories of response mentioned above. The description of these four methods in their concrete settings will assist in their evaluation and expose the advantages and disadvantages of each one.

The article is structured as follows: In Chapter B I will present the dispute over who is a Jew and describe its evolution through the decisions of the Supreme Court, focusing on five leading judgments, the first in 1970 and the last in 2005. Chapter C exemplifies the concrete expressions of the four methods for decision-making in the majority or minority opinions given in the judgments surveyed in Chapter B. In Chapter C1, I will describe and evaluate the first method – the substantive decision. My claim will be that this method is problematic from a democratic perspective. In chapter C-2, I will analyze the second method of making decisions. – The neutral decision. This method was utilized by the majority justices in some of the decisions surveyed in Chapter B, and it too is problematic. Firstly, it is doubtful whether a truly neutral decision is even possible. For even where the neutral presentation is made in good faith - its consequences cannot be neutral. Furthermore, on numerous occasions the pretence of neutrality is no more than a façade that conceals an unequivocal, value-based decision. Chapter C-3 will deal with the third method, that of judicial restraint, which is expressed by judicial respect and deferral to the position adopted by the executive branch. I will argue that this mode is preferable to its predecessors, but it too is flawed, by two weaknesses. Firstly, the decision not to intervene preserves the status quo ante, despite its being acceptable to only one of the parties. This means that wherever there is a dispute between an individual and the executive authority, a decision not to intervene will always be a decision in the authority's favor. Secondly, the institution of a policy of non-intervention in the executive authority's decisions may produce arbitrary results.

After describing, and rejecting the three first operative modes, in Chapter C4 I will proceed with a description and evaluation of the fourth method. In this mode of decision-making, the court utilizes tactics designed to compel the legislature, or at east pressure it into democratically deciding on the issue at hand. I will argue that this method is the most commendable one from a democratic perspective.

The fourth operative method indeed has an advantage over its three predecessors, but it too has certain weaknesses. The main drawback is a practical one: On many an occasion it seems that it is not a viable option. The court's powers are limited; it is powerless to **force** the legislature to resolve an issue that the legislature has chosen to circumvent, and it is doubtful whether it would even be possible or proper to confer such power. Even so, relying on a number of examples, I will claim that contrary to first impressions, the practical shortcoming is not a major one. The court holds certain cards, and intelligent use of those cards is likely to engender a resolution on the legislator's part.

The American reader will certainly be familiar with the question discussed in this article. Courts and scholars in the United States deal with similar concerns in the framework of the discourse on the Nondelegation doctrine. In chapter D, I will attempt to clarify how my position in the article fits into the American discourse in this field. In the first part of the chapter, I will show how the American doctrine of Nondelegation is consistent with the fourth method of response that I suggested. It is well known that during the last several decades, the American Supreme Court has avoided applying the doctrine, even though it has never been officially overruled. One of the stratagems employed by the American Supreme Court in order to avoid applying the doctrine is based on its denial of the existence of delegation, by relying on the double test established in the *Chevron* decision. I will point to the similarity between this evasion tactic and the tactics used by the justices of the Israeli Supreme Court in the matter of who is a Jew. In the second part of the chapter, I will attempt to make a modest contribution to the internal American discourse. I will briefly review the arguments offered by those opposing the doctrine's application, and attempt to present a new, narrower version of the doctrine, which distinguishes between express delegation and hidden delegation, and only seeks to disqualify the latter. I will argue that this version of the doctrine can, and should be acceptable even to those American justices and scholars who for various reasons oppose it in its complete form.

The American reader stands to gain a dual benefit from this article. On one level, the article presents a complex analysis of one of the central controversies that has divided Israeli society and World Jewry (especially its American component), since the establishment of the State of Israel and which is now about to be finally decided by the Court. However, this article also has a second dimension. The discussion of the Israeli controversy will provide the American reader, so I hope, with a better understanding of the fundamental question of Nondelegation and with a few new insights as to how this question may be resolved.

## B. BACKGROUND

### *1. Introduction*

Enacted in 1950,[3] the Law of Return grants every Jew the right to immigrate to Israel,[4] and in conjunction with the Citizenship Law,[5] which allows every *oleh* (immigrant under the Law of Return) to receive citizenship, it enables every Jew to become a citizen of the State, almost automatically.[6] The Population Registry Law,[7] (hereinafter: the Registry Law) establishes a duty to register certain particulars of every citizen in the State, among them, national affiliation and religion. Since the passing of the Law of Return and the Registry Law and until today, there has been an ongoing dispute over the question of who is a Jew for the purposes of these laws. On more than one occasion, the Israeli Supreme Court has been required to adjudicate the resolution of these disputes, and the question has yet to merit a complete and definitive answer.

The history of the controversy can be divided into two periods: until 1970, and thereafter. Until 1970, neither the Law of Return nor the Registry Law carried any definition of the term "Jew", thus leaving room for a broad spectrum of possible interpretations. In 1970, both of the laws were amended. In the framework of the amendment, the Law of Return defined "Jew" as one who was born to a Jewish mother or who had converted, and the Registry Law refers to the provision in the Law of Return.[8] From this point onwards, the question was no longer who is Jew - becoming instead - who is a convert, because the legislature failed to determine the nature of the conversion that was necessary in order to satisfy the requirements of the Law.[9] The absence of a statutory definition (until

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[3] Law of Return, 5710-1950, Sefer HaHukim [S.H.] 51, 5710 p. 159; 4 Laws of the State of Israel [L.S.I.] 114

[4] Israel's first Prime Minister, David Ben-Gurion, stated the following during a speech introducing the Law of Return to the Knesset: "This is not a Jewish state merely because Jews are the majority of its population. It is a state for Jews everywhere . . . . The Law of Return . . . embodies the central purpose of our state." Yoram Hazony, The JEWISH STATE: THE STRUGGLE FOR ISRAEL'S SOUL 56 (2000) (citing Prime Minister Ben-Gurion's July 3, 1950, speech, reprinted in Jerusalem Post, July 19, 1957).

[5] Nationality Law, 5712-1952, S. H. 95, 5712, p. 146; 6 L. S. I. 50

[6] While the Law of Return establishes the right of every Jew to immigrate to Israel (the "right of return"), another legislative act, the Citizenship Law, provides three other ways by which to acquire Israeli citizenship: residence, birth, and naturalization. See Citizenship Law, 1952, 6 L. S. I. 50, (1951-52)

[7] Population Registry Law, 5725-1965, S. H. 466, 5725, p. 270; 19 L. S. I 288, which replaced the Registration of Inhabitants Ordinance, 5709 -1949.

[8] Sec. 4B of the Law of Return reads: For the purposes of this Law, "Jew" means a person who was born to a Jewish mother or was converted to Judaism and who is not a member of another religion; Sec. 3A(b) of the Population Registry Law reads: For the purposes of this Law and any registration or document thereunder, "Jew" has the same meaning as in section 4B of the Law of Return,5710-1950.

[9] See Pinhas Shifman, *On Conversions Not In Accordance with Halakhah*, XI Jewish Law Association Studies, 65,69 (2000) ("There is a school of thought that emphasizes the fact that the Knesset rejected any definition which intended to specify that only an Orthodox conversion is valid, but this same school ignores the fact that the Knesset also rejected the opposite view that suggested that any conversions which "is accepted by one of the Jewish movements" should be

1970) or a precise definition (after 1970) was not an oversight. It reflected an attempt on the legislature's part to evade the need to decide a substantive question, over which the Israeli public was deeply divided.[10] Of course, the legislative inaction did not solve the problem; it just made it someone else's problem, initially of the executive branch (who was saddled with the deciding how to implement an ambiguous statute), and thereafter the Court when it was requested to intervene in the decision of the executive branch. For purposes of this article, a comprehensive and exhaustive history of the protracted and intricate debates is unnecessary.[11] We will content ourselves with a more focused examination, and in the next chapter, we will describe five main cases in which the Court addressed the controversy, and the chronological connection between the cases.

The *Shalit*[12] case was the first, and most prominent of the cases, in terms of its public profile, in terms of the political and legislative responses it evoked, and in terms of the breadth and depth of the proceedings devoted to its resolution by the justices of the Supreme Court. It belongs to the first period, preceding 1970 – and it was the Supreme Court's decision in *Shalit* that triggered the amendment of the Law of Return and the Registry Law. The other four cases –

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recognized as valid"); Asher Maoz, *Who is a Jew? – Much Ado About Nothing*, XI Jewish Law Association Studies (2000), 75, 77. See also Mark Altschul, *Note: Israel's Law of Return and the debate of altering, repealing or maintaining its present language,* 2002 U. Ill. L. Rev. 1345, 1357.

[10] There are those who claim that the abstention from a definition during the stages of legislation was not the product of a desire to evade the dispute, but rather of the assumption of the founders of the State that it was not necessary. This position was adopted by Supreme Court justice, Moshe Silberg, in his book, PERSONAL STATUS IN ISRAEL (1965) [Hebrew] where he writes: "Ultimately, the legal definition is not tremendously important, for at the end of the day, the Law of Return was not intended to resolve disputes. Its purpose was the return of the sons to their borders, and if a person who regards himself as Jewish wishes to immigrate to Israel, and the immigration authorities are satisfied on the basis of reasonable evidence, that he is indeed Jewish, they will certainly not close the country's gates on him, *id,* at 349. See also comments of the Minister of Justice, Shapira, in the Knesset deliberation prior to the amendment of the Law of Return in 1970 ("The members of the Provisional Council of State did not apparently imagine that the term "nation" would one day become the source of a complex legal dispute. It would appear that they did not consider the entire complex of problems associated with intermarriage" (D. K. 56 (1970) 723). At all events, when the Law of Return was amended in 1970, it was quite obvious that there was a need for a clear definition. The adoption of the ambiguous definition at the second stage was undoubtedly the result of the inability to reach a full agreement. The attempt to arrive at a clearer definition was the subject of the debate in the Knesset plenum during the first reading, preceding the amendment of the Law. See D. K. 56 (1970) 723-752.

[11] Over the years, an extensive literature has developed on the subject, in Hebrew and in English. Following is a partial list of the articles in English: Asher Maoz, *Who is a Convert*? 15 Justice (1997) 11; Asher Maoz, *Who is a Jew? Much Ado About Nothing,* 11 Jewish Law Association Studies (2000), 76; Menashe. Shawa, *Comments on the Law of Return* (Amendment No, 2): *Who is a Jew*, 3 University of Tel Aaviv Law Studies 143 (1997); Nancy Caren Richmond, *Israel's Law of Return: Analysis of Its Evolution and Present Application*, 12 Dick. J. Int'l. L. 95 (1993).

[12] H.C. 58/68 Shalit v. Minister of the Interior 23(2) Piskei Din [P.D.] 477, translated at Selected Judgments of The Supreme Court of Israel, Special Volume, 35 (1971).

*Pessaro,*[13] *Na'amat,*[14] *Toshbeim 1,*[15] and *Toshbeim 11,*[16] belong to second period, during which the dispute was confined to a dispute over who is a convert.

*2. The Shalit Case*

Benjamin Shalit was an officer in the Israeli Navy. While studying in Edinburgh, he married Anne, a non-Jewish, Scottish woman. In 1960, Anne joined her husband in Israel and received a resident certificate. In her registration documents, she declared herself a British national, with no religion. In 1964, a son was born to the couple, and in 1967, their daughter was born. Shalit attempted to register his children in accordance with the Registry Law: in the rubric for religion - as having no religion, and in the rubric of national affiliation - as Jews. However, the registration clerk refused his request regarding the national affiliation rubric. Shalit petitioned the Supreme Court.[17] He claimed that a distinction should be made between the questions of religion and of nationality, and that a person could belong to the Jewish nation without necessarily being a member of the Jewish religion. In his view, the proper criterion for assessing whether or not a person belongs to the Jewish nation was the criterion of identification with the Israeli-Jewish culture and values, and in his view, his children satisfied that criterion. According to Shalit, the test should comprise both subjective and objective components: subjective – in accordance with the subjective feelings and perceptions of the applicant, and objective – in accordance with the applicant's objective connection to the Jewish national group.

In an unprecedented panel of nine justices,[18] the Supreme Court unanimously called upon the Government to delete the national affiliation rubric

[13] HCJ 1031/93 Alian Pessaro v. The Minister of the Interior, 49(4) P. D. 49, *abridged* in XI Jewish Law Association Studies, 141 (2000) and in 15 Justice pp. 43-48 (December 1997).
[14] H.C. 5070/95 Na'amat v. Minister of the Interior, 56(2) P. D. 721, *abridged* in 31 Justice pp. 37-42 (March 2002).
[15] H.C. 2597/99 Toshbeim v. Minister of the Interior, (yet unpublished) ruling given on 31.5.04
[16] H.C. 2597/99 Toshbeim v. Minister of the Interior, (yet unpublished) ruling given on 31.3.05
[17] Parallel to its function as an appellate court, (criminal and civil, both by right and with leave), section 15 of the Basic Law: Judicature grants the Israeli Supreme Court discretionary power, as a first (and final) instance to hear petitions against the various government agencies. In these cases the Supreme Court presides in the capacity of "The High Court of Justice". The decisions dealt with in this article belong to this category. For a description and evaluation of the work of the Supreme Court, sitting as the High Court of Justice, see,Yoav Dotan, *Judicial Review and Political Accountability: the Case of the High Court of Justice in Israel*, 32 Isr. L. Rev. 448 (1998); David Kretzmer, *Democracy in the Jurisprudence of the Supreme Court of Israel*, 26 Isr. Yearbook Hum. Rts. 267 (1996); Meir Shamgar, *Judicial Review of Knesset Decisions by the High Court of Justice*, 28 Isr. L. Rev. 43 (1994).
[18] Currently, fifteen justices serve in the Israeli Supreme Court. Unlike the American Supreme Court, where the entire bench presides over all cases, the Israeli Supreme Court usually sits as a bench of three. However, there is a possibility of expanding the panel. See sec. 26 of the Courts Law [Consolidated Version] 5744 -1984, 1123 S. H. 5744, p. 198; 38 L. S. I p. 278. The difference between the Israeli and the American courts with respect to the initial (default) size of the bench can be explained *inter alia* as a result of the fact that in the United States, the Supreme Court's exercise of its jurisdiction is primarily discretionary. See The Judges Bill Act, 1925, Act of February 13, 1925, c. 229, 43 stat. 936 in which the American Congress abrogated almost all

from the Population Registry, thus obviating the need to decide a question, which as stated by then President Agranat, was "one that does not admit of a judicial solution but lies entirely in the ideological sphere"[19]. The Government refrained from assenting to the request, and thus the Court had no choice but to rule on the matter, and by a majority of 5 against 4 it decided to grant the petition and instructed that the children be registered as belonging to the Jewish nation. [20]

The Court's decision triggered a public storm and a threat on the National Religious Party's part[21] to bolt the coalition, a move that would have precipitated the government's downfall.[22] The resultant pressures culminated in an amendment of the Law of Return and the Registry Law, and a new section was enacted, which for purposes of these particular laws defined a Jew as a person born to a Jewish mother, or who had converted, and did not belong to another religion.[23] From that time onwards the question ceased to be 'who is a Jew' and became 'who is a convert', because the Legislature failed to state which "conversion" was necessary in order to comply with the statutory requirements.[24]

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proceedings subject to the obligatory jurisdiction of the Supreme Court. For discussion, see Richard A. Posner, THE FEDERAL COURTS: CHALLENGE AND REFORM, (1996) 4-5. During the last few years the American court has made extensive use of its screening power, and hears no more than 100 cases a year. See Posner, Id. at 80-81; David M. O'Brien, *The Rehnquist Court's Shrinking Plenary Docket*, 81 Judicature 58 (1997). In Israel on the other hand, the Supreme Court presides as a court for appeals by right in civil and criminal matters, and as a first instance in most public matters. As a result, its caseload is unparalleled by any of the Supreme Courts in other countries. In view of the immense caseload, a hearing before a full bench or even an expanded panel is almost impossible. Despite this, between the years 1948 – 1990 there were a number of occasions in which the Israeli Supreme Court presided as an expanded panel. In most of the cases it sufficed with five justices. There were only two cases in which the court sat as a panel larger than five justices. Once it sat as a panel of seven (H. C. 51/80 Cohen v. Rabbinical High Court of Appeals, 35 (2) P. D. 8) and on one occasion only, in the case of *Shalit*, it sat as a panel of nine. In this context it bears mention that Chief Justice Agranat attended law school at the University of Chicago. Pnina Lahav argues that when Agranat chose the court to sit as a panel of nine in deciding the Shalit case, it demonstrated a "striking reminder of his attachment to his native culture." Pnina Lahav, JUDGMENT IN JERUSALEM: CHIEF JUSTICE SIMON AGRANAT AND THE ZIONIST CENTURY, 200 (1997).

[19] *shalit, supra* n. 12, p. 149 (translation)

[20] For a discussion of the judgment and the related circumstances, see Lawrence S. Nesis, *Who is a Jew?*,4 Manitoba Law Journal (1970), 53; Noah Baer, *Who is a Jew? A Determination of Ethnic Status for Purposes of the Israeli Population Registery*,10 Colum. J. Transnat'l L. 133 (1971); Lahav, *ibid,* pp. 196-200; Altschul, *supra,* n. 9 at 1353-1356

[21] The National Religious Party (N.R.P.) is regarded as the representative of the modern orthodox stream in Israel. Regarding the N. R. P., see Gary Schiff, TRADITION AND POLITICS; THE RELIGIOUS PARTIES OF ISRAEL (1977). See also Web site at: http://www. mafdal. biography. ms

[22] Regarding the N.R.P's threats to quit the coalition in the event of the registration not being amended by way legislation, see in the press: "N.P.R. Walkout Threat", Jerusalem Post, Jan. 25, 1970.

[23] Following the amendment of the Law of Return the Court rejected an additional petition filed by Shalit in which he requested to have his third child, who was born after the decision in the first petition, registered as a Jew (See H. C. 18/72 *Shalit v. Minister of the Interior*, 23 (1) P. D. 334.

[24] Notably, together with the restriction of the right of return within the framework of the new definition of "Jew", the Knesset added another section to the Law of Return, which greatly expanded the right of return by granting this right to any family member of an entitled person (i.

*3. The Pessaro Case*

Eliana Pessaro, a Christian, born in Brazil, arrived in Israel as a tourist. In Israel, she met and married a Jew, named Goldstein. Before her marriage, Pessaro underwent a conversion ceremony in the *Beit Din* (Rabbinical Court) of the Council of Progressive Rabbis in Israel. She then applied for an immigration certificate (*Teudat Oleh),* and to be registered as a Jewess. Her application was refused, and she petitioned the Supreme Court. On the face of it, there was already an explicit Supreme Court precedent in a previous petition (hereinafter: the *Shas* case), which supported Ms. Pessaro. In the *Shas* case, the Court adjudicated the question of the standing of Reform conversion for purposes of the Registry Law.[25] The Court ruled that: "a declaration supported by a document that is proof that a conversion has taken place in a Jewish community abroad, is sufficient to compel the authorities to register that person as Jewish. It makes no difference whether that community was Orthodox, Conservative, or Reform."[26] However, the Minister of the Interior attempted to distinguish the petitioner's case from the issue adjudicated in the previous case, claiming that the previous ruling was confined to conversions conducted abroad. Conversions in Israel, on the other hand, are regulated by the provisions of the Religious Community (Change) Ordinance, which makes the validity of the conversion contingent upon the certification of the Chief Rabbi.[27] The Court rejected this argument by a majority of 6 against 1, explaining that the Change Ordinance was not relevant for purposes of the Registry Law.

In view of this holding, the result ought to have been the granting of the petitioner's application, in other words, ordering that she be registered as Jewish, and granting her an *oleh* certificate. However, the Court avoided this path. In the words of Supreme Court President, Aharon Barak: "Our decision today is of a limited scope. We have only ruled that the Religious Community (Change) Ordinance is not applicable in the context of recognition of conversion for purposes of the Law of Return and the Population Registry Law […]. Hence we have not ordered the respondents to recognize the petitioner as Jewish under the Law of Return, and we have not instructed that she be registered as Jewish in the Registry. "[28]

The Court's ruling is puzzling. Ms.Pessaro applied to the Ministry of the Interior, requesting its recognition of her conversion, and the Ministry refused

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e., a "Jew" by the above-mentioned definition), up to a third generation and regardless of the family members' religious affiliation. Section 4A of the 1970 Amendment vests in "a child and a grandchild of a Jew, the spouse of a Jew, the spouse of a child and a grandchild of a Jew" all the rights of an *oleh* to Israel.

[25] HCJ 264/87 *Shas Movement v, Minister of the Interior*, P. D. 43(2), 723, *abridged* in XI Jewish Law Association Studies, 133 (2000).

[26] *Id,* at p. 134 (translation) For a discussion of the decision, see Ayelet Shachar,,*Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 Geo. Immigr. L. J., 233, 246-47 (1999)

[27] Section 2(1) of the Religious Community (Change) Ordinance, The Laws of Palestine, Vol. 2, p. 1294, provides that: "A person who has changed his religion and wishes his conversion to be legally validated will receive from the head of the religious community which he has joined …a certificate that proves that the person has been accepted into that religious community"

[28] See Pessaro-Goldstein*, supra*. n. 13 at p. 747-748 (Hebrew).

her application, arguing that the conversion did not comply with the provisions of the Change Ordinance. Having rejected the arguments of the Ministry, the Court ought to have allowed her request by granting the remedy she requested. Indeed, in clarifying the reasons for its surprising decision the Court declared that its abstention from an operative ruling actually stemmed from its desire to give the legislature the opportunity of establishing the proper standard for the recognition of conversions for purposes of the Law of Return. A number of commentators regarded this argument as a rare manifestation of judicial restraint on the Court's part.[29] Even so, the Court stressed that its abstention from a decision was temporary, and contingent upon the matter being definitively resolved by the legislature. According to Justice Barak, "We are not ruling on "what is" (the substantive content of the conversions in Israel). As we noted, "what is" may be determined in detail and explicitly by the legislature. However, as long as the legislature has not done so, it cannot be said that there is a lacuna. A solution to the problem of "what is" lies in the Law of Return, which defines who is a Jew. Should the legislature refrain from adding to the law, there will no escaping a judicial resolution based on the existing definition.[30]

In the wake of the judgment, and under the pressure of the Court's ultimatum, a public committee was appointed to discuss the matter and to formulate recommendations. The committee consisted of representatives from the Orthodox stream, as well as representatives of the "liberal" streams: the Conservative and Reform. It reached a compromise formula, which proposed the established of an institution designated for the preparation for conversion and the conversion itself. According to the proposal the three streams would all be involved in the preparatory process, but only Orthodox Rabbis would conduct the conversion ceremony itself.[31] Towards the end of its deliberations, the representatives of the liberal streams conditioned their consent to sign the Committee's conclusions upon a public declaration of support for the Committee's conclusions, on the part of the Chief Rabbis. The Rabbis refused to make such a declaration, and in response, the representatives of the liberal streams refused to sign upon the Committee's conclusions.[32] Under these circumstances, the political elements that orchestrated the attempts at dialogue

[29] Maoz, *Who is a Convert*?, supra note 11 at 15. Over the last few decades the Israeli Supreme Court has been characterized by its judicial activism, expressed *inter alia* by its willingness to establish substantive policy without leaving it to the other branches of government. For such interpretation of 'judicial activism', see e. g. Bradley C. Canon, *A Framework for the Analysis of Judicial Activism*, in S. C. Halperin and C. W. Lamb, SUPREME COURT ACTIVISM AND RESTRAINT 385 (1982). For discussion of judicial activism in its Israeli context, see Shimon Shetreet, *Resolving the Controversy over the Form and Legitimacy of Constitutional Adjudication in Israel: A Blueprint for Redefining the Role of the Supreme Court and the Knesset*, 77 Tul. L. Rev (2003), 659; Aharon Barak, *Foreword: A Judge on Judging: the Role of a Supreme Court in a Democracy*, 116 Harv. L. Rev. 16 (2002).

[30] See Pessaro-Goldstein*, supra*. n. 13 at p. 747-748 (Hebrew).

[31] The Committee Report is presented in full in Michael Korinaldi's book, THE ENIGMA OF JEWISH IDENTITY (2001) [Hebrew] 203; See also Herb Keinon, "The Panel's Recommendations", Jerusalem Post, Jan. 25, 1998 at p. 1.

[32] See Haim Shapiro "Rabbinical Council Spurns Compromise with Non-Orthodox" Jerusalem Post, Feb. 10, 1998 at p. 1.

and compromise found it difficult to muster the Knesset majority required to anchor the recommendations of the Neeman Committee in legislation. Members of the liberal movements no longer regarded themselves as being bound to the mediation procedure outside the courtroom, and hence they resumed their attempts at attaining their goals through legal channels.

*4. The Na'amat Case*

The *Na'amat* case was a partial continuation of the adjudication discontinued in the *Pessaro* case. This time the Court panel consisted of 11 justices, and five files were considered. Two of them concerned applications for recognition as a Jew both for purposes of the Law of Return and for purposes of the Registry Law; the other three dealt exclusively with recognition for purposes of the Registry Law. Following repeated deferrals, the Court decided to split the adjudication into two stages: Firstly, it would decide the three files concerning merely the Registry, and only at the second stage would it consider the two files which involve also the question of who is Jew for purposes of the Law of Return. The three files concerned conversions conducted in Israel by Rabbis from the Conservative or the Reform movement, or conversions conducted abroad, where the candidates for conversion were not members of the communities in which the conversion took place. Regarding the conversions conducted in Israel, the State reiterated its position in *Pessaro* (even though this position had already been rejected), to the effect that the certification of the Chief Rabbis was a condition for the validity of the conversion. Regarding the conversions conducted abroad, the State attempted to distinguish these conversions and the conversions that formed the basis of the *Shas* ruling. The *Shas* ruling, it argued, applied exclusively to conversions conducted abroad in which the candidate for conversion had joined the community performing the conversion. As such, it was not applicable to residents of Israel who had traveled abroad and undergone the conversion procedure without any desire to join the Jewish community that conducted the conversion. By a majority of 10 against 1, the Court rejected the State's claim, and ordered that the petitioners be registered as Jews. As mentioned, the Court confined its decision to the Registry Law and left the question of who is a Jew for purposes of the Law of Return, pending a future decision

*5. The Toshbeim I Case*

The *Toshbeim I* case was the next stage of an ongoing saga, but as we will immediately see, it was not the final station. The Court was called upon to address the two files that had been left undecided in *Na'amat*. In these cases, it will be recalled, the question of who is a convert arose not only for purposes of the Registration Law, but also for purposes of the Law of Return. The moment of truth – for the deciding of the most significant question – was approaching.

On the face of it, the controversy focused on the question of the status of Conservative and Reform conversions for purposes of the Law of Return. Nonetheless, before the hearings on the two petitions, attorney for the State presented a new fundamental position, which attempted to deflect the focus of

the hearing away from the question of the validity of non-Orthodox conversions, and to premise it on altogether different grounds. The petitioners had undergone conversion proceedings after having resided in Israel as non-Jews. The State claimed that their prior residence in Israel precluded their entitlement to the standing of an *oleh* under the Law of Return, irrespective of the question of the validity of the conversion. The argument was that the Law of Return only applies to Jews living abroad who desire to immigrate to Israel, or to Jews who came to Israel and are resident therein as Jews. It does not apply to any person who came to Israel, and while living there, undergoes a conversion ceremony (either inside or outside of Israel). The essence of Law of Return lies in its being a law for the restoration of exiles and the sons returning to their country. It is not an immigration law designed to regulate the status of non-Jews residing in Israel. Attorney for the State further pointed out that Israel had become a significant target for non-Jewish immigration. Based on this he claimed that nationalization based on conversion of persons who had arrived in Israel as non-Jews would lead to the inundation of the State with migrants whose sole intention was to obtain Israeli citizenship. This intention was entirely extraneous to the purpose of the Law of Return and inimical to the public interest and public order. According to the logic of the State's position, the nature of the conversion was irrelevant, and indeed, attorney for the State conceded that were her position to be accepted, then the Law of Return would not even apply to an Orthodox conversion, if conducted in Israel.

In a majority of 7 against 4, the Court refused to accept the State's position. The majority opinion was written by President Barak, who explained that:

> "*Aliya*- [=immigration; Lit: coming up (to Israel)], means the settling of a Jew in Israel. For that purpose the question of when the person who settled, actually became Jewish – before or after settling in Israel – is irrelevant. It would be illegal discrimination if one person were to be recognized as an "*oleh*" because he converted and subsequently settled in Israel while the same recognition is denied to another person desiring to settle in Israel, purely because he converted *after* having come to settle in Israel. Both of the converts joined the Jewish people and came to settle in Israel; both of them are sons returning to their homeland. The difference between the two conversions in terms of the "time sequence" of conversion and immigration is not germane to the goal of the Law of Return, and the Law of Return cannot be interpreted in a manner that leads to this type of illegal discrimination. [33]

On the face of it, having rejected the State's argument for negating the petitioner's entitlement to an *oleh* certificate under the Law of Return, it should have been clear sailing for the Court to hand down a substantive ruling. However, once again, as in *Pessaro*, the Court avoided deciding, and again turned to the State, requesting it to formulate a substantive position regarding the nature of the conversion that was required as a condition for a person to become

[33] Toshbeim I, *supra.* n. 15, par. 19.

Jewish, in order to entitle him to the status of *oleh* under the Law of Return. The larger question was left pending, though the time of decision was drawing closer.

*6. The Toshbeim II Case*

Of the four cases surveyed so far, the Court gave a substantial decision in two of them, and in the other two, it rejected the State's pleadings without delivering a final decision on the petition. Moreover, even in the two cases in which the Court gave a principled decision, it confined the scope of its decision to the question of who is a Jew or who is a convert for purposes of the Population Registry. The question of the Registry is not peripheral, but there can be no doubt that who is a Jew or a convert for the purposes of the Law of Return is a much more important question. Yet, it was in this second matter that the Court consistently refused to rule. *Toshbeim II,* is the first time the Court gave its decision on the question of who is a convert for the purposes of the Law of Return. Surprisingly, its task was relatively easy. Before the hearing, the State presented the following position:

> The State of Israel confers equal recognition to all conversions conducted abroad by a recognized stream of Judaism (Orthodox, Conservative, Reform), provided that it [the conversion] was conducted within the framework of a recognized Jewish community abroad, by the competent organs of that community. This recognition is based on the principle of respecting an act of a recognized Jewish community abroad. "[34]

Even so, the State attempted to qualify this recognition in two ways. Firstly, a conversion conducted abroad would only be recognized if the convert actually joined the community in which he converted, as a means of ensuring that the conversion was genuine. Secondly, the pluralistic approach was only applicable abroad. In Israel on the other hand, conversions would only be recognized if conducted in the framework of, and under the supervision of the national institution established in accordance with the format proposed by the Neeman Committee.

In contrast with the previous occasions, where the Court rejected the State's position, this time the Court was quick to endorse its position, which conformed to the position of the petitioners. One of the justices declared that this position was also consonant with the legislative history.[35] Another judge stated that it was a "conception that recognized doctrinal and value-based pluralism, being commensurate with the fundamental constitutional conceptions of man's freedom of religion and spirit."[36] Still, the Court rejected the State's qualifications, by a majority of 7 against 4. While acknowledging the importance of ensuring that the conversion was genuine, in view of its far-reaching legal ramifications, the majority justices nonetheless held that in order to assure the seriousness of the conversion it was not necessary to compel the convert to join the converting community. It is sufficient "that the conversion took place in a

[34] Toshbeim II, *supra.* n. 16, Barak, par. 12.
[35] Barak, *id.*
[36] Proccaccia, par. 5

recognized Jewish community abroad, was followed by the *aliyah* to Israel, and was conducted according to the guidelines accepted in that community for someone desiring to join the community. For that purpose it is sufficient if those responsible on behalf of that community give notice that the person was converted in a recognized Jewish community according to the regular standards accepted therein, which are applied to all cases of conversion in that community, both for those wishing to join the community and for those who do not wish to join it.[37] Regarding the second qualification proposed by the State, pertaining to conversions conducted in Israel, the Court refused to rule on the matter, claiming that it was not necessary, in so far as all of the conversions dealt with in the petition were conducted abroad. Even so, from various obiter dictums of the Court President, one can infer with a high degree of certainty that this facet of the struggle over who is a convert is also about to be resolved in favor of the liberal streams.

### C. FOUR METHODS OF DECISION-MAKING

As stated, our purpose in this article is not to deal on a substantive level with the dispute over who is a Jew for purposes of the Law of Return, nor to support any of the suggested approaches, or to suggest a position of our own.[38] Rather, we will focus our attention on the question of the Court's proper role and function in its resolution of this particular dispute, as an illustration of the more general scenario in which the political system fails to decide on a primary question, and passes it on to the executive domain. In the following chapter, we will analyze the principled positions taken by the various justices who presided over the cases just described. The analysis will consist of an initial presentation of the various positions, after which we will evaluate the advantages and shortcomings of each position.

Scores of justices have addressed this issue of the years, but they can be classified into four categories, each defined by a particular institutional conception. One group of justices attempted to resolve the question according to the best of its understanding. The second group characterized its decision as being neutral. The third group avoided intervening in the interpretation given by the executive branch (not because it agreed with its interpretation, but because it did not regard itself as entitled to intervene), and the fourth group espoused an approach intended to ensure that the matter would be returned to the legislature

[37] Barak, par. 19.

[38] For the variety of opinions on the issue, see e. g. Eliezer Ben Rafael, THE MEANING OF JEWISHNESS: FIFTY SCHOLARS REPLY TO BEN-GURION (2001) [Hebrew]. This book comprises the replies sent by about fifty Jewish scholars to Ben-Gurion, in answer to the question he sent to them. For the background to Ben-Gurion's question to the scholars, see Baruch Litvin & Sidney Hoenig, JEWISH IDENTITIY: MODERN RESPONSA AND OPINIONS ON REGISTRATION ON CHLIDREN OF MIXED MARRIAGE (1965). Another substantive issue, which we shall not deal with here, is the legitimacy in principle of an immigration policy that gives preference to Jews, irrespective of their definition, over others. For a discussion of this subject, see Chaim Gans, THE LIMITATIONS OF NATIONALITY pp. 124-128, 141-144 (2003); Ruth Gavison, *The Jews' Right To Statehood: A Defense*, 15 Azure 70 (2003); Shachar, *supra* note 26; Asa Kasher, *Justice and Affirmative Action: Naturalization and Law of Return*, 15 Isr. Yearbook Hum. Rts. 10 (1985).

for it to decide upon. I shall argue that of these four approaches, the forth is the most appropriate.

*1. Substantive-Ideological Decision*

The first method is the decision on the question itself, involving an inquiry into the most appropriate interpretation of the term "Jew". The justices espousing this approach stressed the question's ideological aspect. Accordingly, they were not content with a narrow interpretative analysis, and examined the question from various broad perspectives: scientific, historical, sociological, psychological, national, religious, and Zionist. In their consideration of the substantive question, the justices generally presented it as turning on a fundamental dichotomy between the subjective approach: that the definition of nationality should be determined in accordance with a person's own wishes, and the approach based on an objective definition. The objective definition does not necessarily dictate the endorsement of the halakhic criterion, but most of the justices who supported the objective approach ultimately chose the orthodox criterion.

A clarification is required. A review of the decisions of all the justices who presided over the various cases indicates that a significant number of the decisions *included* a substantive – ideological examination of the question of who is a Jew,[39] but the justices that actually *based* their decisions on substantive-ideological considerations constitute a far more restricted group. In the final analysis, most of the justices preferred to avoid premising their decision on a substantive analysis of the question of who is a Jew, and at all events, they endeavored to avoid creating that impression. In this chapter we will focus exclusively on members of the limited group of justices who not only considered the substantive aspect but also relied upon it in their decision, for it is only these justices who can be regarded as having utilized the first method of decision-making.[40]

From among the members of this group, we chose to concentrate on the opinion of Justice Silberg, in the *Shalit* case. Our choice of Justice Silberg as the representative of the first group stems from three considerations: Firstly, chronologically, Silberg was the first member of the group.[41] Secondly, of all the

[39] See especially in Justice Berenzon's opinion in *Shalit*, *supra.* n. 12.

[40] This limited group consists of Justices Silberg and Kister in their opinions in *Shalit*, Justice Tal in *Pessaro*, and Justice Englard in *Na'amat.*

[41] Actually, the first time that Silberg entered the fray was in a previous case, in H. C. 72/62 Rufeisen v. Minister of the Interior, translated in Selected Judgments of the Supreme Court of Israel – Special Volume (1971) 1, also known as the "Brother Daniel" case. The case concerned Oswald Rufeisen, a Polish Jew who had converted to Christianity at the beginning of the Second World War. Rufeisen requested to be registered as a Jew and to receive Israeli citizenship under the Law of Return. In his judgment, Justice Silberg conducted a comprehensive analysis of the question of who is a Jew, and concluded that a person, who had voluntarily converted to Christianity, could not be viewed as a Jew for the purpose of the Law of Return. For a review of the judgment, see Ralph Slovenko, "*Brother Daniel and Jewish Identity*, 9 ST. LOUIS U. L. J, 1 (1964). For a critical analysis of Silberg's position, see Moshe Halbertal, *Who is a Jew*, in JEWISH CULTURE IN THE EYE OF THE STORM (Avi Sagi and Nacham Ilan eds. 2002) 233, 240-244 [Hebrew].

members of this group, Silberg was the most extreme. While the other members of the group also discuss the who is a Jew question on its merits, they combine it with other lines of argument, such as statutory wording, legislative history, government policy, etc. Silberg is the only member of this group willing to rely on substantive arguments only. Finally, from among the members of the group Silberg displays the broadest and deepest awareness of price and the implications of the path he chose as well as of the other stratagems that were available to him, but which he rejected.

Silberg prefaces his judgment by emphasizing the magnitude of the question confronting the Court and stressing its ideological components:

> The question which we have to consider here surpasses in import and significance anything this court has dealt with since it first became an Israeli court. Although in the instant case the question is a personal one, inconsiderable and limited in scope, our examination thereof and its ideological constituents call for the most profound and penetrating self-scrutiny of our existence as a people, our essence as a nation and our Zionist-political task in the renaissance of this country.[42]

Silberg further points out that in his view the Court is not the appropriate tribunal for deciding the issue.[43] The tribunal which he believes should resolve the question is "the entire Jewish people, and only a world-wide representative all Jewish body"[44] (which does not exist). Still, Silberg felt - the question having been asked – that the Court was not "at liberty to disengage itself"[45]. Consequently, he embarked upon an examination of the question in an attempt to ascertain "the Jewish attitude to the problem arising in the present cause"[46].

Before entering the thick of the fray, Silberg makes it clear that conceivably, he could have "buried" the problem beneath the mound of formalistic procedural provisions of the Registry Law, and indeed, this was the path chosen by the majority justices in their respective judgments.[47] However, Silberg refrained from taking that course, "even though it is the easy course, since our main concern in this case is not the solution of the problem of the Shalit family"[48], but rather the "question is a weighty one for us" and "must be answered fully"[49]. The question is whether "there is some test, other than the

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[42] H. C. *Shalit*, *supra* n. 12, p. 48 (of the official translation)

[43] "I am not ashamed to admit that had I originally been asked, before the petition was entered whether the problem it encompasses might be exhaustively treated by our court, I would most certainly have answered in the negative." *id. p. 48* (of the official translation)

[44] *id.* p. 49 (of the official translation)

[45] *id. p. 49* (of the official translation)

[46] *id. p. 49* (of the official translation)

[47] This is the second of the four decision-making methods, which we have termed 'the neutral decision'.

[48] H.C. *Shalit, supra n. 12. p. 49 (of the official translation)*

[49] *id*. (of the official translation)

*halakhic* test, for determining the national identity of a Jew."[50] His answer, after a long discussion, is that "The search for a new test of our national identity constitutes in fact a complete denial of the continued existence of the Jewish People"[51] and as such must be rejected out of hand.

As stated, we do not intend to engage in a substantive discussion of the question itself, and this obviates the need for an in-depth analysis of the reasons furnished by Silberg in support of his position: that the question of who is a Jew must be resolved in accordance with the *halakhic* criterion. Our concern is solely with his utilization of the decision-making mode based on making a fundamental decision, guided by patently ideological considerations. This being the case, we will focus our attention on two statements appearing at the beginning of his opinion, justifying his choice of the principled decision. Firstly, that despite the Court being an unsuitable forum for deciding the matter, it was forced to do so. Secondly, that despite the option of circumventing a principled adjudication of the matter, he chose not to evade the issue, but rather to "take the bull by its horns". In our opinion there is an internal tension between these two claims, in so far as the second one contradicts the first.

We already mentioned that at the beginning of his opinion, Silberg averred that it would have been preferable had the Court not addressed the issue, given that it lacked the moral authority to decide a question of this nature. Silberg therefore explains that his only reason for adjudicating the matter was that in his capacity as a justice he was unable to ignore a request that had been filed. However, if this was the case, it is unclear why Silberg failed to take the middle-path, of deciding the case without addressing the fundamental issue, if indeed he had that option, as he himself claims. Conceivably, as Silberg asserts, the question of who is a Jew is indeed "a weighty one for us" and perhaps "it must be answered fully." Nevertheless, if Silberg felt that the Court was not the appropriate body to furnish a substantive solution to the question, then the intensity and urgency of that question cannot justify a choice on Silberg's part, to deal with the question on its merits, when he has the option of circumventing a substantive decision. If Silberg failed to take the path of 'deciding without deciding' then presumably it is because he does not really regard himself as ill equipped to render a decision on the issue. Silberg's second claim therefore contradicts the two foundations of his first claim, for it transpires that contrary to his first claim, Silberg was not forced to resolve the issue, but rather - he chose to do so, and it further transpires that he did not really think that the Court was not the appropriate body to decide the matter.

So far, we have demonstrated that Silberg's first claim, regarding the impossibility of avoiding a decision on the matter, contradicts his second claim regarding the possibility of giving a decision without addressing the substantive aspects of the matter (which, as we will immediately observe, was the path taken by the majority-justices). Actually, in addition to the escape route indicated by Silberg, he also had at his disposal another elegant outlet, which he could similarly have chosen: the possibility of rejecting the petition out of hand. The

[50] *id. (of the official translation)*
[51] *id, p. 62 (of the official translation)*

*Shalit* case was heard by the Supreme Court presiding as the High Court of Justice. The High Court of Justice deals primarily with relations between the individual and government. The power conferred to the Court in its capacity as the High Court is broad in scope, but together with that power, it was also granted the keys to exempt itself from its duty to exercise that power. One of the doctrines that Justice Silberg could have used to reject the petition out of hand is the doctrine of injusticiability.[52] His failure to utilize this doctrine in order to reject the petition further weakens his claim that the decision was forced on him.

From our remarks so far it emerges that Silberg's resort to the method of a principled-ideological decision was not forced upon him, but was rather the result of a choice. The question I now wish to clarify is the justification he gives for choosing this method. My use of the term "justification" implies that there is something problematic in the method of a substantive decision, for otherwise, it would not require justification. Further on in this article we will clarify our reservations regarding this method. For current purposes, it suffices to indicate the accepted intuition, which perceives the judicial role as being confined to the application of existing norms, that were democratically accepted by the governmental agencies charged with their creation, and not to author new norms, based on the justice's own world-view. Parenthetically it must be stressed: A sharp distinction between the creation of norms and their application is, obviously, artificial. It is clear that any judicial decision, and particularly on substantive issues, cannot be entirely discretion-free, and will inevitably involve a certain degree of value-based subjectivity.[53] However, Justice Silberg's

[52] On the use of this doctrine in Israeli law, see Ariel Bendor, *The Administration of Justice in the High Court of Justice*, 17 Mishpatim 592 (1988) [Hebrew]; Ariel Bendor, *Are There Any Limits to Justiciability*? 7 Ind. Int'l & Comp. L. Rev 311 (1997). Over the last decades, the use of this doctrine has almost completely disappeared from Israeli Law, and it would seem that the turning point was the judgment in H. C. 910/86 *Ressler v. Minister of Defense*, 42(2) P.D. 441, translation available at http://elyon1. court. gov. il/eng/verdict/frameset/Srch. html. During the last few years, the doctrine has been partially revived, the process being spearheaded by Justice Yitzchak Zamir. See e. g. Zamir's statements in H.C. 8666/99 *Temple Mount Faithful v. Attorney General*, 54(1) P.D. and H.C. 5167/00 *Weiss v. Prime Minister*, 55(2) P.D. 455. Silberg himself addressed the issue of injusticiability in H.C. 295/65 *Oppenheimer v. Ministers of the Interior and Health*, 20(1) P.D. 309, 332-333. Silberg claims that the injusticiability doctrine is abstract and lacks a clear definition, but he still expresses willingness to resort to it in matters relating to policy (foreign policy, internal affairs, and economics). For a discussion of the threshold tests generally, and specifically in relation to the injusticiability doctrine in its Israeli context, see Aharon Barak, *supra* n. 29, at pp. 97ff.

[53] For a while it appeared as though the question of whether a justice presiding over constitutional proceeding can abstain from the exercise of value-based discretion was dependent on the dispute between competing interpretative schools: Originalism and Non-Originalism. One of the central arguments raised by supporters of the Originalist school was that its adoption reduces the interpretative scope available to justices, while subjecting them to objective interpretation. See e.g. Antonin Scalia, *Originalism: The Lesser Evil*, U. Chi. L. Rev. 849, 869 (1989). ("[O]riginalism "establishes a historical criterion that is conceptually quite separate from the preferences of the judge himself,"). However, as the academic discourse on the subject progressed it became increasingly apparent that even the Originalist approach cannot obviate the need for creative interpretation in the process of constitutional decision-making. See e. g. Michael J. Perry, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS? (1994). Perry devotes chapters 4 and 5 of his book to explaining why "Originalism Does Not Entail

decision in the *Shalit* case is a pure and unadulterated value judgment, one that prima facie exceeds the boundaries of what is considered acceptable even according to the toned down description of the judicial process just presented, which acknowledges the limited involvement of subjective-value based considerations in the decision-making process. The value judgment involved in Silberg's decision similarly characterizes the manner of its presentation as well. In contrast to other cases in which the judge can present his decision (which involves the exercise of discretion) as reflecting the appropriate interpretation of the language of the law, or of the constitution, Silberg himself admits that in this particular case there is no legislative "hanger" to peg the decision upon. The question therefore is, why did Silberg chose this particular path, and not one of the other two paths that were at his disposal: burying the ideological tension inhering in the matter under layers of technical interpretation of the Registry Law (the option chosen by the majority justices, which will be surveyed below in the framework of the 'neutral decision'), or rejecting the petition out of hand on the grounds of injusticiability?

A possible answer to this question, from Silberg's perspective, may be inferred from the inner recesses of Silberg's own argumentation regarding the considerations militating against a judicial resolution of the issue. Close examination of Silberg's comments in this context reveals that his aversion to a judicial resolution does not stem from the conception that the **Court** is not an appropriate decision making forum. From his perspective, neither the Israeli legislature, nor even the entire Israeli public by way of a direct democratic decision, is the proper forum to decide the question of who is a Jew for purposes of the Law of Return and the Registry Law. According to Silberg the authentic respondent to the petitioners was none other than 'the Community of Israel', given that this was a question of defining a collective, the boundaries of which extended beyond those of the State. Paradoxically, this train of thought may also explain Silberg's readiness to decide the dispute. For if the decision should be adopted by a body that represents 'the Community of Israel' and such a body is not to be found, then importance no longer attaches to the identity of the default option. In other words: The decision of the legislature has no primacy over the decision of the Court.

If the explanation presented above lies at the basis of Silberg's choice, then conceivably he does not fundamentally dispute the claim of illegitimacy of judicial resolutions that are premised on ideological-value based foundations. His readiness to have the Court enter the fray in the dispute over who is a Jew is an exception, based on the exclusive assumption that there is no other body whose decision would be more legitimate. However, this assumption cannot be taken for granted. It is one thing to assert that the decision ought to be made by a body

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Minimalism." Perry himself is one of the few who actually changed camps over the years, from Non-Originalism to Originalism. In the aforementioned book, he takes the Originalist position, after having been a prominent representative of the Non-Originalist camp for about 15 years. On his Non-Originalist position, see Michael J. Perry, THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS (1982). For a discussion of the possible reasons for his change of position see Richard B. Saphire, *Originalism and the Importance of Constitutional Aspirations*, 24 Hastings Const. LQ 599 (1997)

that represents the entire Community of Israel; it is quite another to claim that absent such a body, the legislature's decision has no primacy over a judicial decision. Even if the legislature is not the optimal representative of the public vested with the right of decision, there may still be a host of reasons for choosing the legislature over the Court as a default option, both by virtue of the fact that the legislature represents at least part of the public that is entitled to decide the matter, and because there are weighty considerations militating precisely against judicial intervention in an ideological battle. Hence, the questions raised regarding Silberg's position remain unsolved.

Before proceeding to a description of the other methods utilized by the Court in the various cases, we wish to point out an interesting point, relating to the common factor that characterizes all the justices belonging to the 'substantive decision' group. The members of this group belong primarily to the Orthodox stream. This aspect may explain their decision in favor of the *halakhic* criterion, but at the same time is also somewhat surprising. Over the last few years the Court has been the target of scathing criticism originating from different sectors of Israeli society, focused on the value-laden, ideological component of its decisions. One of the Court's most prominent and vocal detractors is the Haredi-Orthodox sector.[54] Thus, it is interesting to note that it is precisely the "representatives" of this group who allow themselves to openly rely on subjective, value-based considerations when deciding controversial questions.[55]

[54] A few years ago, the Ultra-Orthodox held a demonstration against the Supreme Court, participated in by about a quarter of a million people. See Shahar Ilan, Relly Sa'ar & Mazal Mualem, "Haredim threaten 'war' if court keeps on 'meddling'", Ha'aretz English Edition, Feb. 15, 1999.

[55] During most of the years of the Supreme Court's existence, religiously observant justices have been amongst its numbers. In his book of memoirs, Justice Yitzckak Olshan, the second president of the Supreme Court and a member since its establishment, severely criticized the fact that when the Court was established the religious parties demanded that its five justices include at least one who was religious. According to Olshan, this demand was accepted without opposition by the Provisional Government (Yitzckak Olshan, LAW AND WORDS – MEMOIRS, 247 (1978) [Hebrew]. Another justice, Haim Cohn gave an entirely different description of the circumstances and the reasons for the appointment of a religiously observant justice. According to Cohen, when he was serving as Attorney-General he insisted that Supreme Court include one expert in Jewish Law (*Mishpat Ivri*), and therefore took pains to convince Ben-Gurion and the first Minister of Justice, Pinchas Rozen, to agree to the appointment of Rabbi Simcha Assaf to the elevated position. Rabbi Assaf had been Cohn's university professor (Haim H.Cohn, SUPREME COURT JUDGE – TALKS WITH M.SHESHAR, 115 (1989) [Hebrew]. With Assaf's death in 1953, he was not replaced by a religious justice in the Supreme Court. Even so, Justice Silberg, though he did not wear a skullcap, apparently led an Orthodox life style, and was regarded (and rightfully so as attested to by his position in Shalit) as a loyal representative of this sector. Since then, over the last thirty-five years, the Court has always had a religious justice. Since the appointment of Justice Kister, and until today, whenever the position of the religious justice becomes vacant, another one is immediately appointed in his place. In another forum, I examined the manner in which the Supreme Court justices treated matters of religion and state. I attempted to show that in cases in which questions arose pertaining to the standing of religion and the scope of the principle of religious freedom, the positions taken by the justices tended to divide along the lines of their personal worldviews: the religious on one hand and the secular on the other. See Gidon Sapir, *Law or Politics: Israeli Constitutional Adjudication as a Case Study*, 6 UCLA J. Int'l L. & Foreign Aff. 169 (2001). For a discussion of the phenomenon of special seats in the American

As we will presently observe, the invoking of value-based subjective considerations is by no means the exclusive legacy of religious justices, and a large number of the secular justices invoke considerations of that kind. The difference is, however, that the secular justice at least attempts to downplay the value-laden dimension of his decision, whereas the religious judge externalizes this dimension, some of them more, and others less. Naturally, the question is which is the more appropriate of the two approaches: an ideological decision that conceals its ideological underpinnings, or the same decision - with its ideological foundations publicly exposed? Either way, the fact that the representatives of the Orthodox public, who decry the value based dimension of the decisions of the Court's secular justices, enlist the same kind of considerations themselves, justifiably exposed this group to the retort: "Adorn yourself first and then adorn others. "[56]

### *2. A Neutral Decision*

a. Introduction

As stated, though Silberg chose to decide the question on a value-based, ideological basis, he also mentioned another option – for the Court to decide the issue without addressing the substantive question. This was precisely the option chosen by the majority justices in *Shalit,* and in their footsteps – the majority justices in *Na'amat.* These justices claimed that the cases under adjudication could be given a local, technical solution, based on the laws of the Population Registry, without deciding the primary, substantive question of 'who is a Jew'. In our discussion of this option we will explain why its description as neutral - as one that refrains from a substantive decision on the question of who is a Jew - is rather problematic, both from a consequential perspective, and from a perspective that analyzes the motivations of the justices themselves.

From a consequential perspective, our argument is that the technical-statistical approach to the Registry is disingenuous because the fact is that the Registry has numerous ramifications: symbolic and practical. This being so, in terms of its result, one is hard put to append the label of neutrality to a judgment

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context, see Barbara. A. Perry, A "REPRESENTATIVE" SUPREME COURT? – THE IMPACT OF RACE, RELIGION, AND GENDER ON APPOINTMENTS (1991).

[56] This is particularly apposite with regard to Justice Englard. In his rulings, he consistently decries what he regards as the exercise of strong subjective discretion on the part of the Court. See e. g. his remarks in C. A. 6024/97 *Fredrika Shavit v. Rishon Lezion Jewish Burial Soc*, 53(3) P. D. 600, translation available at: http://elyon1. court. gov. il/eng/verdict/framesetSrch. html. One is similarly astonished when reading Silberg's judgment, albeit from a different perspective. Silberg's opinion in *Shalit* is painted in bold and adamant colors, abounding with vitriolic pronouncements such as "Whoever divorces Jewish nationality from its religious foundations assaults at the very same moment the core of our political claim to the land of Israel; and so to do is like committing an act of real treason." *shalit, supra* n. 12 p. 56. (translation) It is interesting to discover that despite the emphatic, blistering nature of his remarks here, in other judgments, Silberg actually displays an extensive understanding of the complexity of the question, and of the absence of any clear-cut answers. Silberg's style is discussed in Michal Alberstein's article, *From Ringer to Barda: A Study of Evolving Genres of Interpretation in Supreme Court Decisions* 19 Bar Ilan Law Studies, 633 (2003) [Hebrew].

enabling a person to be registered as being Jewish, when according to the Halakhah that person is not Jewish. From the perspective of judicial motivation, our claim is that contrary to the justices' pretence of neutrality, i.e. – that they were not espousing any position regarding the value based dispute between the parties, some of the justices interspersed their decisions with various indicators that more than hinted at substantive direction of their own personal leanings, and which constituted the basis of their decision - the direction that preferred the subjective definition of who is a Jew over the objective definition, based on a liberal world view.

In the wake of the discussion of the neutralist position, we will examine an additional argument alluded to by the justices - that even if we agree that their decision on the question of who is a Jew is substantive and not technical, and even if we agree that it was premised on their liberal world view, their decision still merits the title of neutrality, because liberalism itself is premised on the foundations of neutrality. In other words, their decision is based on the refusal in principle to espouse any position regarding competing definitions of the good. We will reject this claim, invoking (and somewhat refining) the standard argument against liberalism's pretension to neutrality.

b. "Registry Based" Neutrality: The Attempt to Distinguish between the Registry Law and the Substantive Law

Over the years since *Shalit,* the Court has consistently accepted the position of those petitioners who desired to be registered as Jews for purposes of the Registry Law. At the first stage, the majority justices accepted the petition of the Shalit children to be registered as Jewish nationals even though their mother was not Jewish and they do not consider themselves Jewish in their religion. At the second stage, following the addition of a statutory definition of a Jew consisting of two categories: Jewish mother or conversion, a petition was accepted to register as Jewish converts who had not undergone an Orthodox conversion. In both cases however, the majority justices asserted that in their decision they were not adopting a position on the substantive dispute surrounding the question of who is a Jew, and attempted to present their decisions as neutral. The argumentation of the majority justices relied on a rationale, developed in another case, dealing with a dispute over another particular in the Population Registry, namely the one relating to "personal status". For an understanding of the rationale of the majority judges in the 'who is a Jew' line of cases, we will briefly describe the structure of the Court's contention regarding the question of the registration of personal status.

In the State of Israel, religious marriages have statutory exclusivity, and the option of civil marriage is non-existent.[57] In the *Funk Shlesinger* case,[58] Ms Funk – a Christian resident of Israel (by virtue of a visa for permanent residency) – married Mr.Shlesinger, a Jewish citizen of Israel, by way of a civil ceremony

[57] See Pinhas Shifman, *Civil Marriage in Israel – The Case for Reform*, XIII Jewish Law Association Studies 9 (2002).

[58] H. C. Funk Shlezinger v. Minister of the Interior, 17 P. D. 225 (hereinafter – *Funk Shlezinger*). For a discussion of the judgment see Asher Maoz, *supra* n. 9 pp. 105-110.

conducted in Cyprus. Equipped with her marriage certificate from Cyprus, she applied for registration in the Population Registry as a married woman. The Ministry of the Interior refused her request, claiming that civil marriage is not an available option for an Israeli citizen. She filed a petition against the refusal in the High Court of Justice, and the High Court accepted her petition.

Justice Suzzman analyzed the provisions of the Inhabitants Registry Ordinance, 5709-1949, which preceded the Registry Law. He held that "The function of the registration clerk, under the said Ordinance, is only to gather statistical information for the purpose of managing the Inhabitants Registry; he has not been granted any judicial powers."[59] Regarding the status of the Registry as set forth in the Registry Ordinance, Justice Suzzman wrote, "the Ordinance did not grant the Registry he force of evidence or proof of anything. The purpose of the Ordinance was to collect statistical information, which could either be true or false. No one guaranteed its truth."[60] Justice Suzzman further wrote that "In entering the personal status of the resident, it is not the function of the registration clerk to give his opinion about the validity of the marriage. It must be presumed that the legislature did not impose a duty upon a public authority that it cannot fulfill. It is sufficient if the registration clerk, in fulfilling his function and entering the personal status, has been given evidence that the resident performed a wedding ceremony. The question of the effect which must be given to the ceremony occasionally involves different aspects, and examining their validity exceeds the scope of the Inhabitants Registry"[61]

A close examination of Suzzman's argumentation indicates that he actually relies on two arguments. Firstly, that the registration relating to the marriage does not constitute prima facie evidence of the truth of the particulars included therein. Secondly, that the clerk was not granted any authority to rule on the matter. The two arguments complement one another. If the matter was one with significant practical ramifications, it would not have been possible to "dispose" of the problem with such facility by claiming that the clerk has no authority to decide. If the clerk is not authorized to decide, then the Court should have decided the matter by way of statutory interpretation. The Court could only avoid deciding the case by describing the issue as a marginal one.

In both *Shalit* and *Na'amat,* the majority justices used exactly the same reasoning, i.e. the attempt to downplay the importance of the Population Registry – this time relating to the rubric of ethnic affiliation. Their assumption is that the ethnic affiliation rubric is of no importance, as far as its contents do not even constitute a prima facie proof of their truth. The upshot of this assumption is that a decision in the petitioner's favor as to the status of the Registry can therefore not be regarded as a principled decision on the question of who is a Jew, and accordingly, it does not exceed the parameters of neutrality. These justices contended that both their motivation and the result they reached satisfied the requirements of neutrality. In our view, on the other hand, the claim to neutrality

[59] *Id.* p. 244.
[60] *Id.* p. 249
[61] *Id.* p. 252.

is incongruous, both in terms of the result and the motivation. We will begin with the question of the result, and conclude with the question of motivation.

c. The Failure of the Result Test

As stated, the pretension to neutrality of the majority justices in *Shalit* relies on their attempt to diminish the importance of the Inhabitants Registry. However, in our view the attempt to bisect the Registry laws and the substantive law, by presenting the Registry as inconsequential, is defective on a number of fundamental grounds, two of which we will mention:

1. The Inhabitants Registry is a state symbol, and hence the very act of entry therein is an act of significance.
2. Even if the Registry itself is not important, the definition adopted by the Court is liable to "filter" into additional definitions, with substantive ramifications.

1. The Registry as a Symbol

The majority justices in the cases of *Shalit*, *Pessaro*, and *Na'amat* asserted that the Registry itself is of no importance. Nonetheless, already in the *Shalit* case the minority justices rejected this assertion. Hence for example, Justice Landau wrote: "[I]f all this is of so little importance, why is the petitioner so determined in insisting on his petition, and why does the petition arouse such general interest among the public in all its various circles and in Jewry abroad".[62] President Agranat expressed himself in a similar vein, stating that "[S]uch registration, if pronounced valid, will not only be of technical value, but will possess importance also from the political-social point of view, as is attested to by the lengthy debate of members of the Knesset. . . as well as the great interest which the present case has evoked in the public at large. "[63]

Thirty years later, in *Na'amat*, Justice Englard echoed the queries of Landau and Agranat. Englard writes:

> "The majority in… *Shalit*…did not tire of stressing that the registration in the Population Registry was nothing more than a statistical matter, lacking in substantial importance, and that the decision concerning it was not a substantive decision on the ideological question of who is a Jew. However, not only did some of the justices on the panel refuse to accept this conception; the public at large too rejected it. In the wake of the *Shalit* decision a political storm erupted, precipitating a swift amendment of the law and the repeal of the rule that had just been adopted by a narrow majority… in fact, if the issue was merely one of inconsequential statistics, why then has there been an ongoing battle regarding registration? Why have there been so many judgments, spanning hundreds of pages, comprising the conflicting opinions of the justices. The truth is, naturally, that the symbol is the substance and that in the

[62] H.C. *Shalit,* supra note 12, at p. 89 (of the official translation)
[63] *Id.* p. 178 (of the official translation)

absence of a particular world-view there would be no decision on the registration question, and no statistics. [64]

We agree with the minority view of justices Landau, Agranat and Englard, that the registration question is not a marginal one, due to overarching symbolic significance attributed to it, both by the petitioners and the respondents.[65]

**2.** The Manipulative Nature of the Distinction Between the Registry Law and the Substantive Law

As we explained above, during the first period, which terminated in 1970, the Law of Return and the Registry Law lacked a definition of the term 'Jew', thereby leaving room for a broad range of possibilities for interpretation. In the absence of a definition, in principle, the term could be interpreted differently in each of the laws. In 1970, the Law of Return and the Registry Law were amended. In the framework of the amendment a definition of the term 'Jew' was added to the Law of Return, with the Registry Law referring to the provisions of the Law of Return. As such, from 1970 onwards the term had the same meaning in both laws. If the Court orders the registration as Jewish of a convert under a Conservative, or Reform conversion, then prima facie, this dictates an identical conclusion with respect to the convert's request to receive the status of '*Oleh*' under the Law of Return. As mentioned above, the endorsers of the neutral position argue – and we disputed their argument above – that the registration *per se* does not have any substantive meaning. However, all are agreed that entitlement to 'return' has just such substantive ramifications, for the person meriting it is granted automatic citizenship of the State of Israel. It could therefore have been presumed that following the amendment of the Law of the Return and the Registry Law, the neutral approach would no longer be relied upon as a justification for accepting a petition regarding the Registry. This however, was not the case, and in *Na'amat,* the Court again reverted to the very same rationale.

As mentioned above, a number of files confronted the panel that decided *Na'amat,* some of which raised questions regarding both the Law of Return and the Registry Law. The Court decided to split its adjudication of the two questions, and accordingly it postponed its decision on the "double" files, which

[64] *Na'amat, supra* n.14 , at p. 756 (Hebrew); abridged in 31 Justice p. 42.

[65] On the symbolic role of legal norms, see, Joseph R. Gusfield, *Moral Passage: The Symbolic Process in Public Designations of Deviance*, 15 SOC. PROB. 175, 176-178 (1967) ("The fact of affirmation through acts of law and government expresses the public worth of one set of norms, of one sub-culture vis-à-vis those of others. It demonstrates which cultures have legitimacy and public domination, and which do not" *Id*. at 178). It bears mention that in *Shalit*, minority justice Landau argued that the importance of the Registry does not consist only in its symbolic meaning. In his opinion, Landau was not impressed by the technical claim that the Registry Law itself states that the registration of national affiliation does not even constitute *prima facie* evidence of the truth of its contents. In his view, "The entries in the register, including those of religion and national affiliation, are in the nature of "public documents" within the meaning of the Evidence Ordinance, and it seems to be that although they may not be prima facie evidence, they are still some sort of evidence". H.C. *shalit, supra n. 12 p. 89* (of the official translation)

also included the subject of return. It was this artificial split that enabled the Court to persist in its adherence to the neutralist claim, according to which the dispute over the Registry question did not necessarily raise the substantive question of who is a Jew. In the words of President Barak, "Registration under the Registry Law is one thing, and status under the Law of Return is another".

In our view, the Court's position is far from convincing. The assumptions are that (a) the rights and obligations conferred by the Law of Return are substantial; (b) that these rights and obligations stem from the fact that a person is defined as being Jewish, and (c) that the definition serving the clerk in assessing the applicant requesting to be registered as a Jew in the Population Register is precisely the same definition that should serve the clerk in assessing the applicant requesting a *teudat oleh* (immigration certificate granted under the Law of Return). In view all of the above [none of which are disputed], it is unclear how the clerk is permitted (and in view of the Court's decision – obligated) to register a person as Jewish, in total disregard of the fact that the definition in both laws is identical, taking a casual attitude to the registration. On the face of it, from the moment that the legislature linked the two statutes for the purposes of the definition of 'Jew', the question became a substantive one in both of the statutes, and it can no longer be argued that the definition for the purposes of the Registry is inconsequential. Furthermore, neither the assertion, nor the tactic that it justifies, are clear in terms of their purpose. Ultimately, the Court will be forced to rule on the question of who is a Jew for purposes of the Law of Return, and its decision will be immediately applicable to the question of who is a convert for the purposes of the Registry Law. If a Conservative conversion is valid for purposes of the Law of Return then it is equally valid for purposes of the Registry Law. Conversely, if it is not valid for purposes of the Law of Return, then the registration clerk will be unable to register the Conservative convert as a Jew (unless the Court formulates a method for persisting in its differentiation between the two statutes, and despite the fact the Legislature expressly linked them – a method of which we have no knowledge.) What then was the purpose of the court's perfunctory deferral of the decision?

Possibly, the answer to this question lies in President Agranat's opinion in the *Shalit* case. In that case, Agranat challenged the assertion that the decision on the question of Registry was devoid of substantive significance. His claim was that validating the registry in defiance of the halakhic position was an act of social and political importance. Agranat observed that: "[T]here is room for thinking that the validation of such a registration, may in the course of time be interpreted as a crucial turning point, having repercussions on the content of the term "Jew" in other spheres of life, so that the halakhic rule …… will gradually be pushed into a corner"[66]. In other words, according to Agranat, an act that is currently presented as an ostensibly trivial issue of registration, lacking any evidentiary force, may in the course of time become a catalyst for the endorsement of the petitioner's worldview in matters of substance too. Having become embedded in conventional modes of thought and opinion, it may ultimately attain the status of an unassailable social convention. Was this the

[66] *id. pp. 178-179 (*of the official translation*).*

Court's intention in *Na'amat* when it drove a wedge between the connected statutes, giving a provisional ruling in the petitioners' favor, and confining it to the question of the Registry. If so, it belies the Court's pretension to neutrality, not only in terms of the result, but also in terms of the motivation. We will expand on this point in the following chapter.

d. The Failure of the Motivation Test

1. Introduction

Until now, we have clarified why the pretension of neutrality espoused by the majority justices in *Shalit*, fails the test of the result. We raised the suspicion that this defect have been anticipated, and perhaps even planned from the outset – that is to say: it was not motivated by neutrality. In this chapter we will attempt to adduce additional evidence, more overt, to substantiate our claim that the seeds of this failure were already sewn in the motivation stage. Exposing the inner secrets of the heart is a formidable task, but we have at our disposal the explicit statements of the justices themselves, and some of their comments evince (almost without the need for interpretation) a clear identification with the non-Orthodox position.

Justice Witkon's position in *Shalit* serves as an example. Witkon prefaces his opinion by concurring with the approach adopted by his colleague, Justice Suzzman, according to whom **"**the question, who is a Jew does not require decision"[67] because this kind of ideological question "has no room in the context of this simple, technical Law"[68], the entire object of which is "registration and statistical requirements"[69]. Nonetheless, further on in the judgment, Witkon bares his claws. Firstly, he makes it clear that neutrality in relation to an ideological question entails granting equal status to the religious position, which "supports the objective test" and the secular position, which "supports the subjective test"[70]. In his view, "[I]f we wish to act with neutrality between the religious and the freethinking camps, we must not raise any presumption in favor of the former and place the burden of proof upon the latter. Neutrality demands of us to give equal status to both competing approaches."[71] Yet, at this point, Witkon summarily abandons the neutral approach, and proceeds to describe what he perceives to be the fundamental dispute. In his view, "[T]he real conflict that may lead to a split" and which is manifested in this dispute, is not between the religious and the secularists, but between "those who seek to impose their views on others and those (including religious and secularists) who put the freedom of the individual at the forefront and oppose any tendency to conformism"[72]. In this regard, Witkon makes it clear that he has no intention of remaining neutral, and

[67] *Id. p. 96 (*of the official translation*).*
[68] *Id. p. 98 (*of the official translation*)*
[69] *id. (*of the official translation*).*
[70] *Id. p. 101 (*of the official translation*).*
[71] *Id.* (official translation).
[72] *Id.* pp. 101-102 (of the official translation).

that his lot is "with the latter,"[73] a position that aligns, so says Witkon, to the Supreme Court's regular and consistent position in favor of this camp – the liberal stream. The result is that what Witkon initially describes as a neutral decision, free of ideological considerations, is in fact based on the unequivocal preference for a particular ideology – the liberal ideology.

At this point, Witkon and his faction could make the following claim of defense. Even if we concede that their decision on the question of who is Jew, endorsing the subjective test, is indeed a substantive decision, based on a liberal world-view,[74] it can nonetheless be described as neutral. This is because the essence of neutrality entails the preference of individual freedom over society's conception of the good. In other words, the claim is that adoption of the liberal stance does not constitute a deviation from neutrality, because liberalism itself is neutral by definition. In what follows we will describe the salient features of this position, and seek to refute it. We will then explain why the reliance on the liberal mode of thought constitutes a value-based decision that cannot be regarded as neutral.

2. Is "Liberalism" a Neutral Ideology

A significant portion of the liberal writing since the beginning of the seventies has been devoted to the rejection of the perfectionist approach. According to the latter: (1) Certain lifestyles are superior to others, and (2) In its formulation of the law and of the governmental-political system, the legislature is permitted, and even duty bound to base its decisions on its conceptions regarding the characteristics of the "good" lifestyle. A major trend in liberal philosophy, known as "political liberalism" challenges (at least) the second of the perfectionist claims. For example, John Rawls, a proponent of the anti-perfectionist conception, claims that his theory does not purport "to evaluate the relative merits of the different conceptions of the good", and that in a state premised on the foundations of justice "everyone is assured an equal liberty to pursue whatever plan of life he pleases as long as it does not violate what justice demands".[75] Hence, over the last few decades, "neutrality" has become one of the catch phrases of liberal philosophy.

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[73] *Id.* p. 102 (of the official translation).

[74] In another context, I attempted to prove that the liberal position does not entail the endorsement of the subjective position on the question of who is a Jew. See Shachar Lifshits & Gidon Sapir, Who Shall decide Who Is a Jew? On the Proper Role of the Judiciary in a Democratic State (forthcoming, Spring 2006 *Bar-Ilan Law Studies*) [Hebrew]. For purposes of the discussion, here it is sufficient to note that the liberal position is not a neutral one.

[75] John Rawls, A THEORY OF JUSTICE 94 (1971); Rawls, POLITICAL LIBERALISM 190-195 (1993) For a similar opinion see also Charles E. Larmore, PATTERNS OF MORAL COMPLEXITY,43 (1987) ("The ideal of neutrality can best be understood as a response to the variety of interpretations of the good life. "); Bruce Ackerman, SOCIAL JUSTICE IN THE LIBERAL STATE, 11(1980). Rawls and other thinkers sharing his views made it clear that their emphasis on neutrality on the question of the good life, is in fact a generalization on the idea that underlies freedom of religion. See, Rawls, *id*. at 206, n. 220; Bruce Ackerman, RECONSTRUCTING AMERICAN LAW**,** 99 (1984); Charles E. Larmore, THE MORALS OF MODERNITY, 144 (1996)..

In time however, the weaknesses of the idea of neutrality began to surface. One of the central criticisms against the idea is that it lacks coherency. The argument is that any political system must of necessity base itself upon a disputed system of values.[76] Another powerful claim that was raised against political liberalism is that the liberal state is by no means neutral. Supporters of this view argue that liberalism failed in its attempt to rise above the sectorial disputes, and that in effect it espoused a viewpoint that actively competes with other viewpoints in respect of which it claims to be neutral.[77] These two counter-arguments do not focus on neutrality's essential justification. They are prepared to accept the basic assumptions that guided political liberalism in its attempt to crystallize a political system founded upon the neutral values of justice, but they challenge the possibility of its implementation (the first counter claim), or at the very least – the degree of success in its implementation on the part of political liberalism (the second counter claim). A third line of critique refutes the justifications given by political liberalism for the need to establish neutral principles of justice (the third counterclaim). The upshot of the critique in both of its dimensions (practical and conceptual) is that for the most part, the neutrality idea has been abandoned in recent years, and only a scant few persist in the attempt to justify it. In an article published a few years ago, Thomas Hurka wrote: ". . it is hard not to believe that the period of neutralist liberalism is now over". [78]

Against the background of the powerful critique of political liberalism, there is evidence of the contemporary revival of a competing liberal conception, known as "perfectionist liberalism."[79] This conception concedes part of the argument raised by the second group of critics mentioned above - that liberalism is indeed based on a specific conception of the good. In fact, it willingly expounds the basic premises of this conception of the good. According to perfectionist liberals, the principle of free choice has always been the chief priority of liberalism. Nonetheless, despite having conceded this much, the perfectionist liberals refuse to accept, in its entirety, the sweeping contention that liberalism is not neutral. Their argument is that the liberal position with regard to the value of autonomy is a second order claim, which enables, and even compels neutrality with respect to disputes over first order conceptions of good. It **enables** neutrality because from a liberal perspective, no fault can attach to a person's choice of a lifestyle premised on obedience to authority, if he voluntarily chose that lifestyle. Hence, all that is "required" or preached under the autonomy assumption is that a person autonomously choose the lifestyle that he deems to be of value. It even **compels** first order neutrality because a

[76] See e.g. William A. Galstone, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE, pp.92-94 (1991).
[77] Larry Alexander, *Liberalism, Religion, and the Unity of Epistemology*, 30 San Diego L. Rev. (1993) 763 (Liberalism is "just a sectarian view on the same level as . . . other views that it purports to be neutral about. " id. at 764).
[78] Thomas Hurka, *Book Review: Sher, Beyond Neutrality*, 109 Ethics 190 (1998) .
[79] The writers belonging to this stream include *inter alia* Galston, *supra,* n. 76 and Joseph Raz, THE MORALITY OF FREEDOM (1986).

deviation from the principle of neutrality, induces a person to choose one path over another, thereby violating the value of autonomy.

At a first glance, it would seem that perfectionist liberalism successfully overcomes the obstacle to the squaring of perfectionism and neutrality, but upon further examination, new anomalies arise. The alignment of the two values is based on a differentiation between two levels of treatment, of the first and second order. Nevertheless, this differentiation is somewhat artificial. As stated liberal perfectionism argues that positing freedom as the highest value is only a second-order proposition, in the sense that it is indifferent to the first order disputes over the question of the good. The only condition it posits is that the State refrain from preferring any option, thereby ensuring the autonomous nature of the choice.[80] But this presentation of matters is somewhat contrived. The elevation of the value of freedom, *per se* is in itself a clear and definitive statement, directly affecting the value ascribed by its proponents to the particular choices people make. He who ascribes supreme importance to autonomous choices (as a second-order claim) will always ascribe greater value to a choice (as a first order claim) of a non-authoritarian life-style over a choice (first order) of an authoritarian life-style, even if the authoritarian lifestyle was chosen and not forced (for example - the decision to live in accordance with the precepts of a religion bearing paternalistic, authoritative characteristics).

The Perfectionist Liberalism's assertion that perfectionism is a second order claim is incoherent. At the very moment that a State decides to premise its policy of neutrality on the value of freedom, it deviates from the neutralist position, because its very decision indicates that some first order options are of greater value than others. The result is that not just neutralist liberalism, but also perfectionist liberalism, makes a false pretension to neutrality, while in effect they promote a message and value that are just one of the many contenders in the market place of ideas and lifestyles. Justice Witkon based himself on the liberal viewpoint, but this endeavor fails to square his operative position with his pretension to neutrality and ameliorate the tension between them.

E. Conclusion

Our claim in this chapter was that the "neutral" stand adopted by the majority justices in the matter of who is Jew did not produce a neutral result. Symbols have their own intrinsic value, and any decision in a dispute involving them, necessarily involves a deviation from neutrality. Furthermore, in addition to their independent value, symbols also play a guiding role in the molding of views that ultimately influence the crystallization of numerous substantive arrangements. We expressed our suspicion that even the justices who endorse the neutral position do not genuinely believe in its neutrality, and that its utilization

[80] See, e.g., Stephen A. Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 Stan. L. Rev. 385 (1996) ("So long as there is meaningful exercise of choice, liberalism based on second-order autonomy is essentially indifferent to what one chooses (i.e., the object of choice): whether to enter politics, a monastery, or a commune. Thus, this account of liberalism is not at all hostile to traditional, customary, or authorized ways of life; it is hostile only to such ways of life (or any others) being adopted on the basis of tradition, custom, or authority rather than choice." Id. at 395).

is therefore tendentious, the aim being to realize the patently non-neutral goal of recognition of Reform and Conservative conversions for purposes of the Law of Return. Finally, we pointed out that the claim regarding the absence of neutrality with regard to motivation and result is substantiated by the fact that justices professing neutrality rely on a liberal world-view, and the liberal worldview – in both of its competing versions, political and perfectionist – has failed in its neutralist pretension.

The second decision-making method is therefore defective on the same grounds as the first, for in both cases the judge decides in accordance with a certain substantive worldview, be it Silberg's Orthodox view, or Witkon and Suzzman's liberal view. In a certain sense, the second method is even worse than the first. In the first decision-making method, where the Court openly and unabashedly decides a value-laden dispute that has yet to be decided by the public, it exceeds its judicial mandate in a democratic society. Nonetheless, the actual adoption of a substantive value-based decision on the part of the Court increases the chances that the public will reopen the subject for discussion and this time reach a democratic decision. On the other hand, the second mode of decision, a value-based decision under a pretense of neutrality, may benumb the democratic decision-making system, by rendering the public unaware of the value based nature of its decision due to its "neutral presentation, or at least fail to stimulate it to challenge the justices' value based decision.

### *3. Judicial Restraint*

The third approach, advocating what some refer to as 'judicial restraint' is represented in *Shalit* case by President Agranat and Justice Landau. We will intersperse our description with statements made by both of them.

Justice Landau, who also later served as the President of the Israeli Supreme Court, is known for his judicial and academic adherence to judicial restraint. For example, when still at the bench, Landau opposed the broadening of the Courts' intervention in quasi-judicial decisions of the Knesset.[81] Similarly, he directed scathing criticism at the broadening of the ground of unreasonability as a tool for evaluating acts of the executive.[82] He also voiced a decisive position against the adoption of the American constitutional model, i. e. the entrenchment of human rights in a constitution and conferring power to the Court to invalidate legislation that violates these rights.[83] A central rationale that connects all of these positions, is Landau's perception that in each of these scenarios judicial intervention is necessarily based on the judge's personal world-view.[84] From

[81] See his minority opinion in H. C. 306/81 Platto Sharon v. Knesset Committee, 35 (4) 118, and the comments in his article: *Trends in the Decisions of the Supreme Court*, 8 Tel Aviv University Law Review 500, 504 (1980-1981) [Hebrew]. See also *'I Do Not Believe in Judicial Activism" conversation with Justice M. Landau* 16 Justice 3 (March 1998) .

[82] See detailed debate on the subject between Landau and Barak in H. C. 389/90 Dapei Zahav Ltd v. Broadcasting Authority, 35(1) P. D. 421.

[83] See e. g. Moshe Landau, *Constitution as the Supreme Law of the State of Israel*, 27 Hapraklit 30 (1971) [Hebrew].

[84] Landau's position on this issue was extremely similar to position of Learned Hand. See Learned Hand, THE BILL OF RIGHTS (1958). Like Hand, Landau does not oppose

Landau's perspective, invoking the justice's own values as a basis for a decision is illegitimate. In a number of places Landau stresses additional considerations for his support of judicial minimalism, among them, the damage to the Court as a result of its intervention in value-based disputes, the inherent logic of the practice of restraint, and an attitude of reciprocal deference and mutual respect between the various branches of governmental authority, without the Court being converted into the dominating, ruling branch.

Landau's approach in *Shalit* is an authentic expression of his fundamental approach. Firstly, he summarily rejects the contention of his colleagues, Suzzman and Witkon, according to whom the matter of registration is of no importance. "If all this is of so little importance" Landau asks, ". . why is the petitioner so determined in insisting upon his petition and why does this petition arouse such general interest among the public in all its various circles, both in this country and in Jewry abroad"[85]. Landau was unmoved by the technical argument, that the Registry Law itself provides that the registry of national affiliation does not constitute prima facie evidence of the truth of its contents. In his view, "The entries in the register, including those of religion and national affiliation, are in the nature of 'public documents' within the meaning of the Evidence Ordinance, and it seems to me that although they may not be prima facie evidence, they are still some sort of evidence"[86]

From here, Landau proceeds to the contention of his colleagues, the majority judges, that the implementation of the halakhic criterion "prejudices the right of every citizen that his and his children's national affiliation should be registered in accordance with his subjective outlook." The majority justices regarded this position as being a dictated by the adoption of a liberal world-view. However, Landau disagrees with his colleagues, and argues that liberalism cannot provide a basis for the claim. He explains that the basic position, i. e. "The very point of departure…. that affiliation to the Jewish people is a matter for self-determination" is in issue, given that a significant part of the Jewish public in Israel, both orthodox and non-observant, adhere to the halakhic criterion as the exclusive test for determining a person's Judaism. Under these circumstances, he explains, the point of departure of his colleagues involves "a circular argument based upon an assumption which in itself is far from being generally accepted."[87]

According to Landau, it would have preferable had the decision of the issue been avoided altogether, by deleting the rubric of national affiliation from the Registry. As mentioned above, this was also the position of President Agranat, who drafted the Court's appeal to the Government, at the end of the deliberations, requesting it to amend the Registry Law accordingly.[88] Nevertheless, in view of the Government's refusal to follow the Court's recommendation, both Agranat and Landau, at the end of the day, were forced to

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constitutional entrenchment and judicial review in order to fortify the principle of separation of powers, and the division of powers among the different branches.

[85] H.C. *Shalit, supra* n. 12 p. 89 (of the official translation)

[86] *id. (*official translation*).*

[87] *Id.* p. 91 (of the official translation).

[88] See *supra* text adjacent to n. #

decide how they would act. They both chose the path of non-intervention. To our understanding however, their decisions are substantially different, and the difference is particularly significant for our purposes. We will begin with a description of Agranat's argumentation, and then proceed to that of Landau.

The *Shalit* case was adjudicated in the framework of the High Court of Justice. As explained above, the High Court of Justice deals primarily with relations between the individual and government, and the standard petitions addressed to the High Court of Justice are filed in the framework of giving instructions to other governmental agencies. The authority conferred to the Court in its capacity as the High Court is broad in scope, but together alongside the power given to Court, it was also granted the keys enabling it to refrain from exercising its powers. This was the escape route used by President Agranat in *Shalit*.[89] Agranat mentions "the premise, based on a line of decisions, that the High Court has a discretion when application is made to it by the citizen for relief against the act or decision of a public authority, and the court will not interfere in the matter if justice does not require it".[90] According to Agranat, in the *Shalit* case "justice does not require us to take up any position on the aforementioned ideological problem, since it is clear that no consensus of opinion exists in respect thereof amongst the enlightened section of the public, and that any position which we adopt would rest solely upon our own private views and personal predilections".[91]

Agranat's approach is not free of difficulties. His exhortation for judicial restraint in the question of who is a Jew links up to a comprehensive view that advocates a minimal degree of judicial intervention in ideological questions which lack a clear legal answer. The logic of the position is sound, but exposed to two fundamental criticisms. The first criticism emphasizes the fact that even non-intervention on the Court's part does not and cannot lead to a neutral result. The decision not to intervene preserves the status quo ante, despite it being acceptable to one party only. The other criticism focuses on the fact that the application of a policy of non-intervention may lead to arbitrary outcomes. We will describe the arguments in brief, and explain how they affect the case under discussion.

The first critique of "non-intervention" approach stems from the fear that in many cases, what is initially perceived as non-intervention, will ultimately produce a result, which far from being neutral, is in fact a decision in favor of one of the disputant parties.[92] This kind of argument is frequently cited in the

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[89] It is interesting to note that both Agranat and Landau avoid making use of the screening tool we referred to above, namely the doctrine of justiciability. Explaining his avoidance of the justiciability argument, Landau states that "the subject of the nature of the Jewish nation is not in itself injusticiable, …That abstention from adjudicating which is our duty in this petition does not stem from the lack of justiciability of the subject, but from our inability to draw a judicial answer to the problem from any of the legal sources from which we normally obtain our inspiration." (*Shalit, supra* n. 6 p. 94)

[90] *Id*. at p. 180-181 (of the official translation)

[91] *Id*. at p. 181 (of the official translation)

[92] This point is emphasized by Ariel Bendor, *The Life of Law is Logic, and Accordingly everything is Justiciable – On legal formalism*, see 6 MISHPAT UMIMSHAL 591 (2003) [Hebrew] ("When the court dismisses a petition by reason of injusticiability, its decision does not

field of family law.[93] One of the recognized doctrines in this field is the doctrine of Non Intervenes in the Family.[94] This doctrine was regnant in the Anglo-American Law of the late 19th and the beginning of the 20th century, and has roots in modern thought. Under this doctrine, the State eschews intervention in family life, at least where it concerns a functional family. This doctrine was a quasi umbrella doctrine underpinning a system of special rules that regulated the interaction between family relations and a number of different branches of the law, such as contracts,[95] torts,[96]criminal,[97] procedure,[98] evidence,[99] and parent-

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create a legal vacuum. Rather it creates a judicial permit for the governmental authority against whom the petition was filed to continue taking the actions concerned". p. 602)

[93] I learnt about the analogy from the area of family law from my colleague, Shachar Lipshitz.

[94] On the fundamentality of this idea in American thinking, and its traditional connection with the idea of the family as private and autonomous unit, see Carl E. Schneider, *Moral Discourse and The transformation of American Family Law,* 83 Mich. L. Rev. 1803, 1835-1839 (1985); Ann L. Estin, *Family Governance in the Age of Divorce* , Utah L. Rev. 211, 213-216 (1998); Lee E. Teitelbaum, *Family History and Family Law,* 1985 Wis L. Rev 1135.

[95] This is the standard interpretation given to famous English judgment in the matter of *Balfour.* In Balfour, the court refused to enforce a contract between spouses, under which the husband undertook to allocate his wife a sum of money in his absence. It justified this refusal *inter alia*, by the desire to preserve the family domain as one to which the kings' emissaries have no access. See Balfour v. Balfour [1919] 2 K.B. 571, 570; Regarding a similar policy adopted in the United States see, Banks Mcdowell, *Contracts in the Family* 45 B. U. L. Rev. 43 (1965)

[96] The non-intervention policy receives expression in the immunity in torts claims filed between a husband and his wife. Originally, the immunity rule was connected to the doctrine of a "merger" between husband and wife as a result of the marriage. The immunity rule survived in the 'traditional' laws of spousal relations in the Common Law countries, even after the repeal of the merger doctrine. For a discussion on the laws of torts in the context of family law, see, Salvatore Patti *Intra- Family Torts* in Ch. 9 in "PERSONS AND THE FAMILY" INTERNATIONAL ENCYCLPEDIA OF COMPARATIVE LAW (Mary Ann Glendon ed., Vol. IV, 1998). For a discussion on the immunity rule in the Common Law countries, see *ibid. ,* pp. 7-11l. The immunity rule in torts survived in the U.S.A. until the 70's of twentieth century. See, Jana B. Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev, 1443, 1446; Kristyn J. Krohse "No Longer Following the Rule of Thumb - What to Do With Domestic Tort and Divorce Claims" 1997 U. Ill . L. Rev. 923, 925-926. In Israel, the immunity rule was anchored in section 18 of the Torts (New Version) Ordinance, until 1969.

[97] Under Common Law, there is almost absolute immunity from criminal liability for offences of violence between spouses, including the rape of the woman. Most of these rules survived the changes made in the 19th century, and they continued to accompany family law in the twentieth century. In the context of the U. S see: Singer, *ibid,* at p. 1463; Estin, *supra* n. 94, at n. 18 & n. 2795. Regarding the position in other Western states see, Patti, *ibid. ,* at pp. 9 – 10.

[98] For a discussion of the general aversion in the Common Law states to the possibility of intra-spousal litigation, see Notes, *Litigation Between Husband and Wife*, 70 Har L. Rev. 1650 (1966).

[99] For example, the prohibition on testimony of spouses against each other, is based on the ruling of the U.S.Supreme Court from the 1950's of the twentieth century. See *Singer supra* note 94 at p.1463. A similar rule exists in Israel due to the influence of English Law, see, Evidence Ordinance (New Version) 5731-1971, sec 3: "In a criminal case a spouse shall not be competent to give evidence against the other spouse or compellable to give evidence against a person accused jointly with the other spouse in the same indictment".

child relationships,[100] and it prevented the operation of the regular legal rules between members of a family.[101]

At a first glance, one might have thought that this was a neutralist approach in the sense that it enabled the abstention from external legal intervention in the relations of family members. However, a deeper examination indicates that this approach inevitably involves a clear decision in favor of one of the parties. For example, as far as allegations of family violence are concerned, adoption of the doctrine inevitably means the preference of the aggressor over the victim by granting criminal and civil immunity to the violent party. In the context of violence, this characterization of the preference is actually even more pointed. On the face of it, the rule of non-intervention in intra-family relations operates symmetrically with regard to all members of the family irrespective of their gender. Even so, in a reality in which men are generally the aggressor party, it materializes as a doctrine that overtly favors men over women,[102] enabling them to beat women with impunity, in the absence of a legal response. The claim of covert preference, under the guise of neutrality, is not just relevant to the subject of violence; it extends to family relations in general. A social reality in which the men assume the role of the breadwinner, having access to the family's financial resources is one in which the failure to intervene in family disputes endows the man with an inbuilt advantage over the woman.[103]

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[100] The doctrine of family privacy is connected to the parent's right to raise their children without any interference. See the two famous judgments of the American Supreme Court at the beginning of the twentieth century: Pierce v. Society of Sisters 268 U. S. 510 (1925)**;** Meyer v. Nebraska 262 U. S. 390 (1923); See also Bruce C. Hafen, *The Family as an Entity,* 22 U. C. Davis L. Rev. 865 (1989) at pp. 874-875. Furthermore, in certain cases, the doctrine is "broadened" and the Court will also refuse to intervene in disputes between parents and their children. See e.g. People ex rel. Sisson v. Sisson 271 N. Y. 285 ; 2 N. E. 2d 660 (1936); Christine B. Kilgrow v. Jack M. Kilgrow 107 So. 2d 885 (1958).

[101] Ironically, the principle of non-intervention even prevents the enforcement of obligations deriving from family law. For example, in one of the most significant cases in this context, the Court in the United States held that despite the existence of a fundamental obligation to support the spouse, the Court would not enforce this obligation for as long as the spouses continued to live under the same roof See McGuire v.McGuire 59 N.W.2d 336 (1953). For a comprehensive discussion of the McGuire case, see, Hendrik Hartog, MAN AND WIFE IN AMERICA – A HISTORY (Cambridge, 2000)

[102] See, Frances E. Olsen, *The Myth of State Intervention in The Family,* 18 U. Mich J. L. Reform 835 (1985); Ruth Gavison, *Feminism and the Private/Public Distinction*, 45 Stan. L. Rev. 1 (1992).

[103] The critique of the non-intervention doctrine can be presented in two ways: Firstly, that the non-intervention rule has a rationale, but the practical result of non-intervention is harm caused to the weaker parties. Secondly – in view of the fact that the law establishes the basic rules that form the foundation of family life, there is no rationale for the non-intervention doctrine. For example, a rule providing that the State does not intervene in the economic relations between parties belonging to the same family. This rule assumes that in the absence of family rules, the salary of each spouse belongs to the spouse who earned it. However, this rule itself is by no means a natural rule, but rather a legal decision. Had there been another rule, providing that the property rights in the salary belong to both spouses, it would have obviated the need for women to apply to court and demand maintenance, and accordingly, they would not have required the court's legal intervention. Regarding these matters see also in Frances Olsen, *id.*

The other category of claims against the policy of non-intervention underscores the arbitrary nature of such a policy. Here too, examples from the area of family law are illuminating. In the famous *Nahmani*[104] case the Israeli Supreme Court was required to decide the fate of the fertilized eggs of the estranged spouses. The woman, Ruth, had filed an action that requested to enable her to make use of the fertilized eggs. In justifying her dismissal of the woman's action, Justice Strassbourg-Cohen attempted inter alia to rely upon the doctrine of non-intervention in family matters. Justice Strassbourg-Cohen argued that recognition of the limitations of the law in the realm of family relations, and in intimate matters of the type debated in the Nahmani case, necessitated a policy of non-intervention, which in the case at stake meant the dismissal of Ruth's action.[105] Strassbourg-Cohen's ruling in *Nahmani* is an admirable illustration of the dimension of decision that is inherent in the non-intervention approach. In addition, it also demonstrates the dimension of arbitrariness involved in this kind of policy. As aptly stated by Daphne Barak-Erez:

> The claim of judicial neutrality also receives occasional expression in the principle of allowing the damage to remain wherever it falls. In other words: Ruth Nachman necessarily finds herself in an inferior position, because she was the one who called for external intervention in the family unit – by her application to the Court in request of a remedy (to receive possession of the fertilized eggs). Further examination of the subject exposes the extent to which the call for judicial non-intervention is not a solution, but rather an illusory panacea that solves nothing. For argument's sake, let us assume that the hospital …in possession of the eggs, had assented to Ruth Nachmani's request to receive the eggs. In that case, it would have been Danny Nahmani who would have turned to the Court and demanded the discontinuation of the surrogacy process. Should the final [judicial] result be the product of the chance unfolding of events in each case, so that the hospital replaces the Court as the deciding mechanism in cases of dispute? [106]

The fundamental claims against the non-interventionist approach are also germane to the subject of who is a Jew. Firstly, in *Shalit* as well, the non-intervention method effectively meant deciding in favor of one of the disputant parties. In our description above of the approach adopted by Witkon and his colleagues in the 'neutral camp' we quoted the claim that ". . if we wish to act with neutrality between the religious and freethinking camps, we must not raise any presumption in favor of the former and place the burden of proof upon the latter. Neutrality demands of us to give equal status to both competing approaches". As we demonstrated, and as indicated by Justices Agranat and Landau, the ruling of Witkon as well is not neutral, neither in terms of its result,

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[104] C.A. 5587/93 Daniel Nahmani v.Ruth Nahmani 49(1) P.D. 485. Translated in Israel Law Reports [IsrLR ] [1995-6], 1; CFH. 2401/95 Ruth Nahmani v.Daniel Nahmani, 50(1) P.D. 661. Translated in IsrLR [1995-6) 320.

[105] See par. 7 of judgment of Justice Strassbourg Cohen in Civil Appeal, *id.*

[106] Daphna Barak-Erez, *Symmetry and Neutrality in the wake of the Nahmani Case,* 20 Tel Aviv University Law Review, 197, 204-205 (1996) [Hebrew]

nor, apparently, in terms of its motivation. Nevertheless, he was correct on one matter. Refusal to address the petition, in reliance on "the discretionary character of the power granted by law to the High Court of Justice", does not and cannot lead to a neutral result. In our case, the petitioners – the Shalit family – petitioned the Court against an act or the refusal to act on the part of other sovereign agencies. When the Court refuses to intervene in a matter, it grants the stamp of finality to the sovereign's decision, without recourse for appeal. In other words, when the Court abstained from intervention it was tantamount to a decision against the petitioner, and against the fundamental approach (the subjective approach), which the petitioner proposed. Moreover, similar to the discussion in the family context, here too the decision is one that systematically favors the stronger party (the sovereign) over the weaker party (the citizen). The subject at hand also provides an instructive example of the second grounds of critique. Daphne Barak-Erez's admonition regarding the dimension of arbitrariness inherent in the non-intervention approach is applicable in our context as well, given that endorsement of the non-intervention approach may similarly lead to an arbitrary, chance result. The question of the petitioner's status when requesting to be registered as Jews will be determined by the personal identity and the political affiliation of the Minister charged with the implementation of the Law at the time the application was filed. [107]

Thus far, I have described two weak-points marring the approach of judicial restraint. A close reading of Landau's opinion indicates that Landau, contrary to Agranat, was cognizant of these weaknesses, and even proposed a way of overcoming them. Landau explained that from the moment that the Knesset rejected the Court's proposal to delete the national affiliation rubric, the dye was cast and the question had to be resolved. However, "the decision must rest with the Knesset which represents the people, and so long as the Knesset has not decided otherwise, with the Government which is entrusted with matters of policy and depends upon the confidence of the Knesset."[108] The implication is that according to Landau, as of the date the ruling was delivered, the Knesset had already ruled on the question, perhaps not optimally, but a decision nonetheless. An optimal decision would have been achieved had there been an act of express legislation, with a precise definition of 'Jew' for purposes of the Law. Nevertheless, even in the absence of a legislative resolution, "the expression of the will of the majority of the Knesset was clear from what it did and refrained from doing in connection with the directives given at various times by the Ministry of the Interior regarding the very problem before us."[109] This point is of cardinal importance in Landau's opinion, and is an essential component in the defense of his position in the confrontation with Witkon's position. If we assume the veracity of Landau's claim - that there has already been a democratic decision on the question, then it controverts Witkon's claim. Because in that case, when

[107] In view of the fact that the Israeli Supreme Court sits in panels, its decisions too may be arbitrary in the sense that they are determined according to the identity of the justices sitting in the panel that hears the petition. The legislature's decision is not arbitrary insofar as it reflects the majority position.

[108] H.C *Shalit, supra* n. 12 p. 94 (of the official translation).

[109] *Id*. p. 84 (of the official translation).

the Court decided to refrain from interfering with a governmental decision, it was not using the tool of abstention as a means of taking a position in a fundamental issue, but was rather deferring to and respecting a legitimate decision of the legislature, albeit a decision adopted by way of inaction. [110]

So far we have described and analyzed three approaches: The 'substantive decision' approach, per Silberg and his colleagues; the 'neutral' approach of Suzzman, Witkon, and their faction; and the approach of judicial restraint, as espoused by Agranat and Landau. In our view, the third approach is the most commendable. The first two decide the dispute, whether overtly (the first approach) or covertly (the second approach). The third approach on the other hand, per Landau's interpretation, accepted the legislature's decision by inaction.

The third approach is the best of the three, but not an ideal one. It does not represent the ideal decision-making method, because under a proper conception of democracy, substantive, value-laden issues ought to be submitted for deep and considered deliberation by the people and its representatives, and they should be decided in a clear and unequivocal manner. According to the third approach, what the Court accepted and deferred to was not that kind of decision, but rather a decision based on the legislature's inaction. Had there been a format enabling the Court to induce the legislature to decide by way of commission as opposed to omission, then prima facie, it should have been utilized. But does such a possibility exist? Can the court operate as a catalyst for decision-making? In our view, the answer is in the affirmative. The next chapter is devoted to a description of this approach.

### *4. The Court as an Agent for the Principle of a Democratic Decision*

a. The right of the last word and the right (and perhaps obligation) of the first word

In Israeli and foreign academic writing, it is customary to distinguish and contrast between formal and substantive democracy. The first is described as a principle for resolving disputes which gives preference to the majority position; the second is presented as imposing a limitation on the majoritarian principle by conditioning its legitimacy upon the degree to which the majority view upholds [and gives expression] to a whole series of values, and chief among them human rights.[111] The proponents of substantive democracy frequently invoke this

[110] One could argue that at all events the third approach is preferable to the first two for an additional reason. According to the first two methods, it is the Court that makes the decision. According to the third, the decision is made by the executive branch. It could be argued that from a democratic perspective, the decision of the executive branch is preferable to the decision of the Court. For the Court, as opposed to the executive branch, is not accountable to the public. For a similar approach see, Douglas Krniec, *Judicial Deference to Executive Agencies*, 2 Admin L.J. 269, 277-78 (1988). Incidentally, this is also one of the possible rationales for the decision of the American Supreme Court in *Chevron v. U.S.A. National Resources Defense Council Inc.* 467 U.S. (1984) 837. ("While agencies are not directly accountable to the people, the chief executive is. *Id.* at 865).

[111] For a discussion of possible meanings for this conception, see e.g. Ruth Gavison, ISRAEL AS A JEWISH AND DEMOCRATIC STATE: TENSIONS AND PROSPECTS (1999) pp.37-46 [Hebrew]; Barak, *supra* n. 29.

definition in the refutation of claims raised against Israel's transition from the model of a parliamentary democracy, by which Israel operated until recently, to the model of a constitutional democracy – a transition which has been promoted by the Supreme Court over the last few years.[112] As stated at the beginning of the article, one of the fundamental claims [generally referred to as the counter-majoritarian argument] made in academic writing against the adoption of the constitutional model, both in Israel and abroad, is that the adoption of this model contravenes with the majoritarian principle. Supporters of the constitutional democracy, foremost among them the President of the Israeli Supreme Court, counter this claim by stating that everything depends upon which definition of democracy is adopted. If the full scope of democracy is confined to the majoritarian principle, then it conflicts with the constitutional model. If, on the other hand, a condition for the democratic nature of a regime is its upholding of the human rights of the minority, even at the price of invalidating certain majority decisions, then the constitutional model does not conflict with democracy, but is one of its necessary derivations.

Elsewhere, we attempted to clarify why this argument is unsuccessful in refuting the criticism of the transition to constitutionalism.[113] We argued that the central problem does not lie in the constitution's limitations on majority decisions, but rather in granting the Court exclusive power to resolve substantive constitutional disputes, for which no answer can be found in the constitutional text. We claimed that from a democratic perspective, the core of the problem lies not in the entrenchment of certain values but rather in the central position given to the Court as the creator (through interpretation) of norms, and not just as the protector of existing norms. However, for the sake of our current discussion, the question of the particular rule of power that ought to control in the resolution of constitutional disputes is immaterial. The Counter-Majoritarian concern is preoccupied with the question of who ought to be given the right of the last word. The essence of the question raised by cases such as who is a Jew, with respect to the necessary implications of a democratic conception, is entirely different. Here, one needs to determine which body ought to have the right and obligation of the first word. As we understand it, democracy requires first and foremost that significant questions, the answer to which is disputed, must be seriously

95 For a description and discussion of the constitutional changes that have occurred in the State of Israel over the last few years, see, Menachem Hofnung, "*The Unintended Consequences of Unintended Constitutional Reform: Politics in Israel*, 44 Am. J. Comp. L. 485 (1996); Baruch Bracha, *Constitutional Upgrading of Human Rights in Israel: The Impact on Administrative Law*, 3 U. Pa. J. Const. L. 581 (2001); Daphna Barak Erez, *From unwritten to a written constitution: the Israeli challenge in American Perspective*, 26 Colum. Hum. Rts. L. Rev. 309 (1995); Aharon Barak, *Constitionalization of the Israeli legal system as a result of the basic laws and its effect on procedural and substantive criminal law* ,31 Isr. L. Rev. 3 (1997); Ruth Gavison, *A constitutional revolution*, in TOWARDS A NEW EUROPEAN IUS COMMUNE (1999), 517; Ran Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 Am. J. Comp. L. 427 (1998) ; Michael Mandel, *Democracy and the new constitutionalism in Israel*, 33 Isr. L. Rev. 259 (1999).

113 Gidon Sapir, "The Constitutional Judicial Proceeding as a Political Proceeding, 19 Bar Ilan Law Studies 461 (2003) [Hebrew]

deliberated over and (initially) decided upon, in a definitive manner by the people and its representatives. A democratic conception that cherishes delb erations by the people, and people's resolution of fundamental issues, not only entails the people's entitlement to discuss and decide these questions, but also imposes, at the very least, a moral obligation to actually exercise its right. This conception of democracy is certainly consistent with the republican world-view, which as is well known, regarded the participation of every individual in the collective decision making process as an intrinsic value.[114] In my view, it is also an imperative of the liberal standpoint, which focuses on the value of autonomy, and thus, entails the preference for personal (and collective) decision over the attempt to avoid it.[115]

Statements in a similar vein were made by the President of the Israeli Supreme Court, Aharon Barak, in one of his decisions.

> The people's elected representatives must adopt substantive decisions regarding State policies. This body is elected by the nation to pass its laws, and therefore enjoys social legitimacy when discharging this function. […] Hence, one of the tenets of democracy is that decisions fundamental to citizens' lives must be adopted by the legislative body, elected by the people to make these decisions.[116]

b. How can we influence the legislature to assume responsibility

One of the fascinating and unfortunate phenomena, already noted by others, is the attempt made by so many people to free themselves from that right – the escape from freedom.[117] The legislature is no exception. The legislature has two methods for shirking its obligation to decide substantive questions: Occasionally it avoids deciding by delegating regulatory power to the executive branch.[118] Alternatively – for example in the case of who is a Jew – it

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[114] See, e.g. Michael J. Sandel, DEMOCRACY DISCONTENT 5-6 (1996) .

[115] This description of the implications of the value of freedom can be based on Isaiah Berlin's distinction between positive and negative liberty. The participatory component is consistent with the idea of positive liberty. See Isaiah Berlin, *Two Concepts of Liberty*, in *Four Essays on Liberty* (1969) pp.118-172. For a similar approach, which places the decision of the people at the center of the democratic idea, see David Schoenbrod, *Delegation and Democracy: A Reply to My Critics,* 20 Cardozo L .Rev. 731 (1999) (lawmaking "by the people is the essential feature of a democratic government" *id.* at 756-7).

[116] See H.C. 3267/97 Rubinstein v. Minister of Defense, 52(5) P.D. 481, translation available at http://elyon1.court.gov.il/eng/verdict/framesetSrch.html

[117] Regarding this phenomenon in a broad psychological context, see Erich Fromm, ESCAPE FROM FREEDOM (1941).

[118] In A PLATFORM TO A NEW SOCIAL COVENANT BETWEEN RELIGIOUSLY OBSERVANT AND SECULAR JEWS IN ISRAEL (temp.edition, 2003) written by Prof. Ruth Gavison and Rabbi Yaakov Medan, the authors take a similar approach to the question of entitlement to return. According to their proposal, entitlement to return would be determined in a Basic Law, and would include the child of a father or mother who was Jewish under the Halakhah, or a person who joined the Jewish people and lives a Jewish life or was persecuted by reason of his being Jewish. The authors leave it for the Minister charged with implementation to determine the particulars regarding the recognized paths for joining the Jewish people, by way of secondary legislation (*id.* 125). Gavison explains this distinction, claiming that the procedures for joining should be "detailed, flexible, and individual, and thus, are not suited for Knesset legislation" (*id.*142). In our view, the

intentionally adopts an ambiguous arrangement, the clarification of which will necessitate an additional decision, whether by the executive branch or by the Court.[119] In our view, under circumstances in which a political agency attempts to avoid deciding substantive questions by shifting the responsibility to another governmental agency, it is incumbent upon the Court to do its best to thwart that intention. Many democratic systems rely on an established constitutional principle that prevents the legislature from evading its duty to decide substantive questions; namely, the principle that primary arrangements must be decided by the legislature. In Israel, the principle is not entrenched in the constitution, but nonetheless, in a series of decisions the Israeli Court ruled that it has certain constitutional status, creating an interpretative presumption under which, absent unequivocal evidence of the legislature's intention to act in defiance of that principle, all of its laws should be interpreted in accordance to it. Recently the Court used this interpretative presumption in the sensitive issue of the drafting of Yeshiva students, as we will now explain.

The Law in the State of Israel imposes the duty of army service upon every Israeli citizen, who reaches a certain age. Nonetheless, over the years the Minister of Defense made a practice of granting a blanket exemption to Yeshiva students from the duty of military service. This exemption arrangement was never anchored in primary legislation. In the law that established the draft, there was a section granting discretion to the Minister of Defense to exempt candidates for enlistment from I. D. F. service, for special reasons and "for other reasons".[120] The Minister of Defense argued that the alternative of "other reasons" vested him with discretion to exempt the Yeshiva students from the duty of military service. In a recently delivered decision the Court rejected the position taken by the Minister of Defense and ruled that a reading of the law in light of the interpretive presumption (of nondelegation) compelled the conclusion that the Law empowered the Minister to grant individual exemptions, but not to make a blanket decision applicable to all Yeshiva students.[121]

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Gavison-Medan proposal is another inappropriate attempt to evade a decision on a substantive question.

[119] When the legislator delegates power expressly, there can be no question that his intention is to avoid a decision. When he resorts to ambiguous wording, his intention is not necessarily to evade the question, because occasionally he simply uses awkward phrasing, or is unaware of the ambiguity. As such, there is need for external evidence to prove that the ambiguity is intentional. In the matter of who is a Jew, the issue is incontrovertible, in view of the controversy and the disputant parties' attempts to propose clear alternative wordings, which would decide the controversy in favor of either one of the parties.

[120] s. 36 of the Defense Service Law (Consolidated Version), 5746-1986 reads: "The Minister of Defense may, if he sees fit to do so for reasons related to the size of the regular forces or reserve service forces of the Israel Defense Forces or for reasons related to the requirements of education, security settlement or the national economy or for family **or other reasons** (emphasis added g. s. ) do the following, by order:(1) exempt a person of military age from regular service duties or reduce the period of his service."

[121] It may be argued that the Court's application of the interpretative presumption was not motivated by its fealty to the principle of a democratic decision but rather by its **substantive opposition** to the exemption arrangement for Yeshiva students. This contention finds support in the decision itself, a significant part of which is devoted to the Court's criticism of the

As stated, a proper conception of democracy requires that the people, through its representatives, adopt the decisions on substantive matters. A decision to exempt an entire sector from the duty of military service is unquestionably a substantive matter, but as stated, the Israeli Legislature had never actually decided the matter. Without going into a detailed history of the enlistment of Yeshiva students, it suffices to mention that the exemption arrangement began with an ad-hoc decision of the Prime Minister David Ben-Gurion, adopted in the early days of the State, to exempt 400 Yeshiva students from military service. Beginning as a provisional arrangement of limited scope and duration, it survived by force of inertia, without ever having been seriously evaluated on its merits by the body charged with the adoption of democratic decisions – the Knesset.[122] The Court's decision to invalidate the policy of the Minister of Defense on the grounds of his lack of power to establish such a primary arrangement ensured that the matter would be returned for the legislature's decision without dictating the precise decision that the legislature should make.

The first path of abstention, namely the express delegation of legislative power to the executive branch, can be blocked by the establishment of a constitutional prohibition on such delegation. The barring of the second path of abstention, namely hidden delegation, poses a far more formidable challenge. In this case the prohibition on the delegation of power cannot be easily enforced because the legislature did not explicitly delegate the power of decision; all it did was adopt an ambiguous arrangement, the implementation of which would necessitate a decision on the part of the executive branch. Yet, in our view, this path too can and should be blocked. Indeed, this was the path taken by the Israeli court in the various stages of the legal saga of who is a Jew. As explained above, in *Pessaro* the Court failed, surprisingly, to go the last mile and obligate the Ministry of the Interior to register the petitioner as a Jewess in the Population Registry. It will be recalled that Pessaro's petition was based on a previous ruling. The Minister of the Interior claimed that the previous ruling was confined to conversions conducted abroad. Conversions conducted in Israel, on the other hand, were subject to the provisions of the Religious Community (Conversion) Ordinance, which required the confirmation of the Chief Rabbi to give effect to the conversion. The Court rejected the claim, explaining that the Ordinance was exclusively applicable to matters of personal status. Having so decided, prima

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arrangement from a substantive-value based perspective, even though ultimately, the Court invalidated the arrangement due to the technical defect of the Minister's lack of power. This contention is further strengthened when considering the nature of the Supreme Court's activities over the past decades, characterized by broad judicial involvement in discretionary realms. See Barak, supra note #, pp.138-149; Dotan, supra, note 17; Shamgar, supra note 17. Under this interpretation of the judgment, the Court's decision to premise its annulment of the arrangement on purely technical grounds was tactically motivated, in other words: by its desire to avoid a dangerous, head on confrontation with the Ultra-Orthodox Israeli population, whose relations with the Court are already tenuous in the extreme.

[122] For the history of the arrangement, see the Report of the Committee for the Formulation of an Appropriate Arrangement the Enlistment of Yeshiva Students (2000) [Hebrew]; H.C. 3267/97, Rubinstein, *supra,* n. 116 par. 1-10, per Barak J.

facie the result ought to have been to grant the petitioner's request, in other words, ordering her registration as a Jewess, and the granting of an immigration certificate. The Court however acted otherwise, making it clear that the Knesset should be allowed to determine the appropriate standard for recognition of conversions for purposes of the Law of Return. There is certainly room for conjecture regarding the Court's hidden agenda,[123] but irrespective of its covert, concealed motivations, the express reasoning furnished by the Court for its decision, reflects, in our view, an appropriate policy not only regarding the question of who is a Jew, but also in relation to any controversy concerning a substantive issue. It is commensurate with the preferred role of the Court in situations in which substantive primary questions are not clearly resolved by the legislature. In these cases, as stated, it is the Court's duty to induce the legislature to fulfill its role and reach a democratic decision. In abstaining from decision, and explicitly calling upon the legislature to decide the matter, the Court discharged its judicial function in a commendable manner.

The common element in the two disputes – regarding the enlistment of Yeshiva students, and regarding who is a Jew – is that in neither of them had there been any clear democratic substantive decision before the rulings of the Supreme Court. We adumbrated the history of Yeshiva student enlistment above, pointing out how the arrangement survived by force of inertia in the absence of a democratic decision. The question of who is a Jew suffers from a similar syndrome. The ambiguity that characterized the question of who is a Jew for two decades was replaced by the ambiguity over the question of who is a convert. In both cases, the Knesset abstained from deciding by transferring the decision on to other branches of government. In both cases, in our view, the Court operated in a commendable manner, at least at a particular point in time. Leaving the question of who is a convert pending in the *Pessaro* was intended to prod the Knesset into making a democratic decision on the matter. A similar purpose was served by the Court's decision to invalidate the Defense Minister's policy concerning the draft exemption of Yeshiva students, without dictating its version of the appropriate policy from a value-based perspective.

c. How to Confront a Stubborn Legislature

Now here, naturally, a problem arises, for the Court can bring the horse to the water but it cannot make him drink. If, despite the Court's exhortations to the legislature, the legislature persists in its avoidance of an unambiguous decision, what avenues are still open to the Court? The Court's persuasion tactics were effective in the case of the Yeshiva students, leading to the enactment of a detailed law on the matter.[124] In contrast, its attempt to orchestrate a clear legislative arrangement regarding the question of who is a Jew failed. Is there any means of compelling a recalcitrant legislature to resolve an issue, if the

[123] See our remarks in note # above.

[124] Deferral of Service for Full Time Yeshiva Students Law, 5762-2002. S.H. 1862, 5762, p.521. For survey see Gideon Alon, "Tal Law: Deferring Draft for Yeshiva Students passes 51-41", Ha'aretz English Edition, July 24, 2002.: Dan Izenberg, "Supreme Court leaves Haredi conscription up to Knesset", Jerusalem Post, Feb. 21, 2002, p.4.

legislature is determined not to resolve it? In my view, it is possible, if the Court is genuinely committed to the task, as I will now explain.

It will be recalled that the legislature can adopt one of two tactics when evading a decision by way of transferring it to other branches of government: express delegation, and hidden delegation - ambiguous legislation which does not decide the issue, and necessitates a decision by way of interpretation. Our claim above was that blocking the first method of abstention is easier than blocking the second. All that is required is the enactment of a rigid prohibition on delegation and its strict enforcement by the Court. The second evasion tactic poses a more formidable challenge, given that the delegation is concealed and not explicit. Prima facie, the role imposed on the executive branch or the Court is not to decide, but rather to interpret decisions adopted by the legislature; legislative interpretation is a legitimate activity that both these branches of government are called upon to perform on a regular basis. This presentation however is only prima facie. In reality, as distinct from other cases in which interpretation is required, here the need for additional interpretation was anticipated and planned by the legislature, which intentionally avoided making a decision on the central question. Is there any way of blocking this abstention tactic?

If the relevant legal system includes a prohibition on delegation, then the blocking of hidden delegation is certainly possible. In fact, it does not differ substantially from the barring of express delegation. The Court is only required to indicate that despite the pretense of a decision, there is in fact a covert act of delegation, which in essence is no different than an open act of delegation, and is therefore a candidate for invalidation. A determined Court, armed with a constitutional prohibition on delegation would thus be capable of preventing covert delegation as well. The problem arises in system like the Israeli system, in which the prohibition on delegation is not rigid, and serves only as an interpretative tool. However, here, I believe, paradoxically, it is precisely the express delegation that raises more problems than those raised by hidden delegation in the form of ambiguous legislation. In elucidating this point I will again have reference to the two Israeli examples: the dispute over the enlistment of Yeshiva students and the dispute concerning who is Jew.

It will be recalled that in the enlistment matter, the Israeli legislature expressly and publicly delegated the power for granting draft exemptions to the Minister of Defense. The Court returned the matter to the legislature by exercising the interpretative presumption against the delegation of power to determine primary arrangements. It gave the Minister's power a narrow construction, as intended for individual exemptions, and not for a fundamental decision by force of which an entire sector would be exempted from military service. As we explained, this time the legislature took its cue and decided. However, the legislature also had the option of amending the law, unequivocally empowering the Minister to adopt substantive decisions on the question of the exemption. Had it done so, in the absence of a rigid constitutional prohibition on delegation of power to regulate primary matters, the Court's hands would have been tied, and it would have been unable to invalidate the delegation. These remarks however are only relevant with respect to an express delegation. On the

other hand, in the case of covert delegation by way of ambiguous legislation, the Court can block the legislature's path, even in the absence of a rigid constitutional prohibition on delegation. All that is required is for the Court to rule that the legislature failed to decide on a particular matter, and that the Court cannot do so in its place

The majority justices in *Pessaro* took a different path. Indeed, the Court refused to decide on the substantive issue, and appealed to the legislature, requesting that it decide. However, together with this request, the Court also made it clear that in the event of the legislature abstaining from a decision on the matter, the Court would decide. In the words of Justice Barak:

> Our decision today is of purely negative nature. We determine what "is not" (the non-application of the Communities Ordinance (Conversion). We do not determine what "is" (the precise nature of the conversion procedure in Israel). As we stated, the "is" may be determined explicitly and precisely by the Legislature. However, as long as the legislature has not done so, it cannot be said that there is a lacuna. A solution to the problem of "is" lies in the Law of Return, which defines who is a Jew. Should the legislature refrain from adding to that definition there will no escaping a judicial decision based on the existing definition. "[125]

As stated, following the judgment a committee was established and it formulated a compromise proposal that was almost accepted. The reason that the proposal was ultimately rejected stemmed, in my view, precisely from the Court's refusal to characterize the question as one that had never been decided, and its contention that even in its current format, the statute contained an answer to the question. A balance of fear between the parties is a necessary condition for reaching a compromise, that is to say: a situation in which each party has something to lose from a refusal to compromise. Regarding the question under discussion, this was never the case. Ever since *Shalit*, the Court's rulings have broadcasted a subtle but clear message against the Orthodox position. It did this when it rejected the Orthodox position on the question of registry, while presenting its own position as "neutral" and it did this when it consistently rejected the legal constructions presented by the Orthodox stream (by way of the State) in its demand for exclusivity. Against this background, it was more than reasonable to expect that at the end of the day the Court would also reject the Orthodox position on the substantive question of who is a Jew for purposes of the Law of Return. Under these circumstances, it was only logical for the representative of the Conservative and Reform streams in the Neeman Committee to attempt to torpedo a compromise agreement, in the hope that their patience would pay off, and if they persisted in it for just a bit longer, the Court would ultimately decide in their favor. The Court's ruling in *Toshbeim II* proved that the gamble paid off.

At the end of the day, no democratic decision was adopted on the question of who is a convert for the purposes of the Law of Return. However, the failure to decide did not stem from the Court's lack of tools to prevent the

[125] *pessaro, supra* n. 13 pp. 747-748 (Hebrew)

legislature from avoiding a decision by passing the buck to the executive and the judicial authorities. Rather, it resulted from the fact that the Court itself lacked a genuine commitment to the task.

There was however at least one justice on the Supreme Court who was prepared to "go the whole way" in his commitment to the principle of a democratic decision. It was Justice Yaakov Tirkel, in his minority judgment in the *Na'amat* case. In his judgment, Justice Tirkel challenges the position of the majority justices, who adopted the second of the four methods - the position that a decision favoring the registration as Jews of converts who had been converted in a liberal conversion is in fact a neutral decision. Simultaneously he also opposes Justice Englard who adopted the first approach and decided in favor of the Orthodox position, invoking substantive justifications. He also refused to take the third approach of deferring to the position of the executive branch. Instead, Justice Tirkel proposed a new path, which is consistent with the fourth approach presented above. Tirkel wrote:

> "In my opinion, the result of the rejection of the *Funk Shlezinger* ruling was the creation of a "legislative vacuum" in the Registry Law, which the legislature is obligated to fill, either by a new definition of the term "was converted", or by an explicit directive to the registration clerk. Absent such legislation, the term "was converted" appearing in section 4B of the Law of Return is devoid of any legal import, as though never written. By extension, no importance attaches to the notification and the certificate received by the registration clerk for the purposes of the initial registration, nor do they have any ramifications for the declaratory judgment intended to amend the registration. Consequently, after the ruling was rejected, the registration clerk is not authorized to make any entry in the registration particulars concerning national affiliation and religion. [126]

Putting it quite simply, Tirkel urged his fellow justices to refrain from any registration of the convert's particulars, regardless of the nature of the conversion, for as long as the legislature had not clarified the meaning of an intentionally ambiguous statute. However, had Tirkel's proposal been accepted, its ramifications would have been far more radical. The suggestion to instruct the registration clerk to refrain from entering any kind of registration for purposes of the Registry Law, for as long there was no definition of the nature of the conversion required, would have entailed the identical result in relation to the Law of Return. In other words, according to Tirkel not only the right to be registered as Jewish would be denied to a person claiming to be Jewish by force of conversion; the right of return would also be denied. If no meaning attaches to the term "was converted" in section 4B of the Law of Return then it is impossible to grant the status of *oleh* (and automatic citizenship as a result) to any convert, including those who underwent Orthodox conversions. An instruction to avoid any manner of registration in the Population (Inhabitants) Registry is certainly a matter of consequence, at least for the applicant who desires a symbolic

[126] See Na'amat, *supra,* n. 8 p. 656. p. 42 of the abridgment.

authorization of his conversion. However, it is doubtful whether its dimensions could have sufficed to exert the public pressure necessary to force the legislature to decide on the matter. Entitlement to return on the other hand carries far greater weight. Let us assume that Tirkel's view had been accepted, and the executive branch had refrained from granting rights as an *oleh* and automatic citizenship to every covert, including those who underwent an Orthodox conversion, for as long as the legislature had not clarified who is a convert. Would not the decision of the Supreme Court have exerted heavy pressure on the Israeli political system to adopt a clear decision on the question?

d. Can a judicial decision be viewed as a catalyst for democratic decision-making

Our detractors might argue that the thesis proposed here is fundamentally flawed. Their claim would be that a judicial decision can and should be viewed, not as a step that enables the legislature to avoid deciding, but precisely as a catalyst for democratic decision-making. In accordance with our description above, it was precisely the Court's decision in *Shalit*, against the Government's position, that finally led to the democratic decision in the Knesset. Indeed, this decision was insufficient, because while solving the problem of who is a Jew it created the new problem of who is a convert instead. Nonetheless, in terms of the democratic process it was great step forward when contrasted with the situation that preceded its enactment. The question then is why shouldn't we allow the Court, on a permanent basis, to decide primary questions left undecided by the political system. On the face of it, such decisions would promote the democratic process: In the event of the legislature being unsatisfied with the content of the decision, it always has the option of changing it by way of legislation. In the event of the legislature failing to overturn the Court's decision, its silence or inaction would be deemed as acknowledgment on the public's part of the justness of the court's position.

This claim is defective for a number of reasons. As stated above, its underlying assumption is that the legislature's failure to respond to Court decisions attests to its acceptance of the substantive position adopted by the Court. Nevertheless, this assumption is unfounded, for it fails to consider the institutional significance ascribed by the public to judicial decisions. This claim should be familiar to supporters of the liberal conception. Liberal discourse has devoted extensive attention to the question of the paths of action that should be avoided by the State. It is axiomatic that there can certainly be no justification for coercion in its narrow sense.[127] The accepted position also opposes the creation of either negative or positive incentives for the adoption of specific alternatives.[128] Many liberal writers even opposed any State-based expression of a position within the framework of purely symbolic acts too. This stand derives

[127] See e.g. Will Kymlicka, *Rawls on Theology and Deontology*, 17 Philosophy & Public Affairs 186 (1988); but c.f. George Sher, BEYOND NEUTRALITY (1997)
(adoption of the liberal stand that recognizes the value of autonomy, does not compel the negation of coercion).

[128] See e.g. Jeremy Waldron, *Autonomy and Perfectionism in Raz's Morality of Freedom,* 62 S. Cal. L. Rev.1147 (1989) ("The trouble with a perfectionist tax is that it provides a reason for refraining from an activity that is not one of what I have called 'the merits' of the case).

from the assumption that any State indication that a particular first order system of values is of greater merit than competing systems is liable to persuade individuals to endorse the recommended view, out of respect for the sovereign authority, and in contravention of the principle of freedom. A similar, even sharper fear[129] should also arise with regard to the results of a decision made by the **Court**. There is room for concern that a substantive decision of the Court, rather than stimulate democratic public debate on the issue would actually stifle it. A big portion of the public regard a decision of the Court as "the Word of the Living God". As a result, the court's decision would oppressively hover over deliberative forums, preventing the development of a genuinely democratic dialogue, a dialogue which should as far as possible be unencumbered by prior leanings. The decision of the Court is thus liable to operate not as a catalyst, but rather as a factor which delays a decision.[130]

Another reason for not interpreting legislative inaction as acquiescence to the decision of the executive branch or the Court is based on the nature of the political system. According to the naïve conception of the legislative process, each member of the legislative body votes exclusively in accordance with his own genuine convictions. It would seem however that the parliamentary process is somewhat more complex, and quite often involves political deals in the framework of which party A agrees to support the position of party B on a particular issue, despite the fact that party B's position differs from its own position. In return, party B will support party A's position in another issue. These deals are costly and their crystallization is a drain on both the budgetary and the time resources of the legislature. They also necessitate an apparatus for enforcement (because without an enforcement apparatus, party A will have no way of relying on party B to abide by its undertaking) and enforcement apparatuses too are costly.[131] For our purposes, the legislature's response to the Court's decision necessitates a decision, and this in turn may entail deals, enforcement mechanisms and the ensuing costs. The result is that the legislature's failure to respond to the Court's decision does not necessarily attest to its concurrence with the contents of that decision. It may ensue from the legislature's unwillingness or inability to bear the transaction costs involved in an alteration of its current position.

Finally, even if silence is tantamount to admission, this does not mean that decision by way of inaction or omission possesses the same standing as a positive decision. Were the two forms of decision deemed equivalent, judicial intervention would be unnecessary. After all, the request for the Court's intervention in cases of the kind being discussed stems from the petitioners' dissatisfaction with the path **chosen by the executive branch**. If the legislature's

[129] It is sharper because unlike those holding the reigns of government, the Court's pretension, which also accords with its image in the eyes of large parts of the public, is that it does not rule on the basis of its own personal proclivities, but rather in accordance with the dictates of the principles of justice, and as such its decision has greater influence than a governmental decision.

[130] On the other hand, endorsement of a position by the Court, after the conduct of a democratic debate, may actually enrich the public dialogue.

[131] For a similar "market" based description of the parliamentary reality, see William Riker, THE THEORY OF POLITICAL COALITIONS, (1962). I wish to thank Omri Yadlin for this insight.

silence attests to its concurrence with the decision of the Court, there is no reason for not placing the same interpretation on its failure to actively oppose the government's policy. As noted above, this indeed was the underlying assumption of Justice Landau's opinion in *Shalit.* Since the government's decision invariably predates the Court's decision, on the face of it there is no reason for not being content with the earlier decision. Furthermore, in view of the two scenarios for decision by virtue of inaction, failure to respond to a government decision seems preferable to the failure to respond to the position taken by the Court. This is true not only due to its chronological precedence, but also from a democratic perspective, because, in parliamentary systems (of the sort Israel maintains), the government, as distinct from the Court, serves by virtue of the confidence of the constituencies (directly, in presidential systems, or indirectly, in parliamentary systems).[132]

Summing up, under circumstances in which the democratic network abstains from systematic discussion and decision on a central question - by the adoption of an ambiguous decision that transfers the question to the executive - it is the Court's primary, or at least initial task to serve as the catalyst for deliberation and decision-making. The court would fulfill its task by returning the question to the legislature, making it clear that it is the legislature's exclusive prerogative and duty to decide (or more precisely to make the first decision) on the matter.

## D. Our Thesis from the Perspective of American Law

### *1. Introduction*

The question discussed in this article is not alien to the American reader. It is dealt with by American scholars and courts within the framework of the Nondelegation doctrine. In this chapter I will attempt to explain how the position I have presented so far fits into the American discourse in this field. The chapter is divided into two parts. In the first part, I will briefly review the American doctrine, focusing primarily on the famous Chevron ruling. I will underscore its relevance to the Israeli dispute in the question of who is a Jew/convert and I will examine which of the four approaches presented above would have been available to the Israeli Court had it adopted the Chevron doctrine. If I was an American, I would probably have joined the camp of those supporting the revival of the doctrine, which was comatose for the last seventy years, even though it was never expressly rejected. In the second part of the chapter, I will briefly review the arguments offered by opponents of the doctrine's application, and I will attempt to present a new, and narrower version of the doctrine, which distinguishes between express delegation and hidden delegation, and only enjoins the latter. I will argue that this version of the doctrine can and should be acceptable even to those who for a variety of reasons are opposed to the doctrine's application in its fullest sense.

[132] See our remarks at n. # above.

*2. Who is a Jew and the Chevron Doctrine*

Article I, Section 1 of the United States Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.[133] The American Supreme Court has understood these words to limit the extent to which, or the conditions under which, Congress may delegate its lawmaking powers to executive or administrative officials.[134]

In two cases decided in 1935, the Supreme Court applied the Non Delegation doctrine for the first time to invalidate provisions of a statute, which impermissibly delegated legislative authority to an administrative agency. That statute was the National Industrial Recovery Act, which gave the President broad authority to revitalize the economy in the wake of the Depression. In *Panama Refining Co. v. Ryan*,[135] the Court invalidated section 9(c) of NIRA, which authorized the President to restrict interstate transportation of oil produced in violation of state law. In *A. L. A. Schechter Poultry Corp. v. United States*,[136] the Court invalidated section 3 of NIRA, which authorized the President to approve "codes of fair competition" proposed by private industry groups. Neither section contained standards to guide the President's discretion.[137]

*Panama Refining* and *Schechter Poultry* have come to represent the high-water mark for the nondelegation doctrine. Although the Court has not overruled them, it has not since applied them or the nondelegation doctrine to invalidate a piece of legislation. In each case, the Court has upheld the delegation, which was based on vague statutory standards.[138] These cases plainly demonstrate the Court's unwillingness to enforce the nondelegation doctrine.

The Court's readiness to validate the Congressional delegation of legislative authority to the executive branch received additional support in the famous *Chevron* case.[139] In that case, the Court instructed federal courts to defer to reasonable agency interpretations of ambiguous statutory terms. The Court devised a two-step process for determining when deference is appropriate.[140] The

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[133] U. S. Const. art. I, 1.

[134] There are those who dispute the Court's interpretation, and claim that a correct reading of the American Constitution should lead to the conclusion that it does not contain any such doctrine. See Eric A. Posner & Adrian Vermeule*, Interring the Nondelegation Doctrine,* 69 U. Chi. L. Rev. 1721 (2002) (Courts shouldn't enforce a nondelegation doctrine for the simple reason that there is no constitutional warrant for that doctrine. Id. at 1723)

[135] 293 U. S. 388 (1935)

[136] 295 U. S. 495 (1935).

[137] See *id*. at 538-39; Panama Refining Co. , 293 U. S. at 418, 430.

[138] See, e. g. ,Loving v. United States, 517 U. S. 748, 768-69 (1996) (upholding a delegation to the President to define the "aggravating factors" that permit imposition of the death penalty in a court martial); Touby v. United States, 500 U. S. 160 (1991) (upholding a delegation to the Attorney General to add certain drugs to those listed in the statute, the possession or sale of which would constitute a crime, on the basis of standards that require the Attorney General to consider the levels of use of a particular drug and its impact on public health); Mistretta v. United States, 488 U. S. 361, 371-72 (1989) (upholding a delegation to the Sentencing Commission to "promulgate sentencing guidelines for every federal criminal offense").

[139] Chevron, U.S.A. v NRDC, 467 U.S. 837 (1984)

[140] Id. , at 842

first inquiry (Step I) is whether the statutory provision at issue is ambiguous - that is, whether Congress has spoken to the precise issue or has left a gap for the agency to fill. If the meaning of a statutory command is clear, then that meaning controls. If, however, the command is ambiguous, the second inquiry (Step II) is whether the agency's interpretation is permissible or reasonable. *Chevron* purports to give agencies great discretion in interpreting ambiguous statutory provisions.

It will be recalled that in this article I distinguish between two forms of delegation of power: express delegation and hidden delegation, i.e. the adoption of a vague decision which does not answer the question at hand, with the intention, or at least in the awareness that the question will be decided by other government agencies. The *Chevron* case deals with hidden delegation. The case concerned ambiguous legislation that left broad discretion for those charged with the implementation of the statute. In this article I presented four methods for the Courts to choose from when confronted with hidden delegation: the substantive decision, the neutral (prima facie) decision, abstention from intervention in the decision of the executive branch, or returning the matter to be decided by the legislature. It would appear that from the four methods presented, the American Supreme Court in *Chevron* chose the third, namely – that not only was the Supreme Court unable to invalidate the delegation to the executive branch, it was also obligated to avoid any interference with its decision. The definition of Jew in the Law of Return and the Registry Law, prima facie, is analogous to the circumstances of *Chevron*. This was a case of an ambiguous decision, which intentionally left scope for interpretation. Had the Israeli Court adopted the *Chevron* doctrine it would have been forced to take the approach of judicial restraint and defer to the interpretation of the Minister of the Interior.

The majority justices in the Israeli Supreme Court did not rule in the spirit of *Chevron.* They refused to accept the recommendation of Justices Landau and Agranat, and to defer to the decision of the executive authority. Even so, it could be argued that at least formally, the Israeli Supreme Court did not deviate from the *Chevron* ruling. The *Chevron* ruling established a two-step model; the prohibition of judicial intervention in the decision of the executive authority is contingent upon a prior conclusion – that the legislature did in fact delegate legislative power to the executive branch (by its adoption of a vague definition open to a number of interpretations). As I mentioned above, the Israeli Supreme Court emphasized on a number of occasions that its understanding was that the Law of Return, even in its current wording, provided a clear answer to the question of who is a convert. Translating these remarks of the Israeli Supreme Court into the *Chevron* terminology means that we have not progressed beyond Step I of Chevron to Step II, and hence, there is no call for judicial restraint or deference to the interpretation given by the executive authority, in the event of it conflicting with the statutory meaning.

The tactic employed by the Israeli Court is not foreign to the American legal system. Like the Israeli Supreme Court on the question of who is a convert, the American Supreme Court too, has frequently applied the two-step test proposed in Chevron as a tool for intervening in the decisions of the executive branch. In such cases it too ruled, albeit somewhat artificially, that the statutory

language is sufficiently clear, and there is therefore no grounds for progressing from Step I of Chevron, to Step II.[141]

How should we relate to this strategy of the Court? There are those who say that it revives the nondelegation doctrine. For example, Lisa Schultz Bressman argues that:

> The Court's efforts to find clarity where none exists, while perhaps not faithful applications of *Chevron*, are nonetheless understandable as a form of nondelegation review. By denying agencies the discretion to interpret ambiguous terms as they see fit, the Court effectively may block the delegation of policymaking authority.[142]

My view of the matter is different. The purpose of the nondelegation doctrine is to ensure that substantive decisions remain the domain of the legislative branch. Resorting to interpretative techniques for illumination of statutory language where the legislature was intentionally vague, without rendering a genuine decision on the substantive question at stake, does not achieve the goal returning the matter for a democratic decision by the legislature. It simply transfers the decision to the Court. One could perhaps understand the Court's desire to avoid granting overly broad discretionary power to the executive branch. The tactics employed however, produce a result no less grave than the one it attempted to prevent. Because the decision under these circumstances is nothing more a judicial decision based on the justices' own personal values – in other words, one that buttresses the standing of the Court at the expense of the other two branches.

The problematic character of this approach - utilized by the American Supreme Court in numerous cases and by the Israeli Supreme Court in the matter of who is a Jew – becomes even clearer when viewed from the perspective of the aforementioned gradation between the first and the second approaches. It will be recalled that our claim was that both of the two approaches should be rejected because they both entail a substantive judicial decision. Even so, the second approach, presenting itself as neutral, was the more problematic of the two because it camouflages the decision in a manner that prevents, or at least delays

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[141] An outstanding example of this approach is provided by Justice Scalia, who has admitted to successfully avoiding Chevron deference in a variety of cases. See, e. g. ,Babbitt v. Sweet Home Chapter, 515 U. S. 687, 736 (1995) (Scalia, J. , dissenting) ("There is neither textual support for, nor even evidence of congressional consideration of, the radically different disposition contained in the regulation that the Court sustains. "); Maislin Indus. V. Primary Steel, 497 U. S. 116, 136-38 (1990) (Scalia, J. , concurring) (refusing to accord deference to the Interstate Commerce Commission's interpretation of "reasonable" as used in the Interstate Commerce Act, stating that "under no sensible construction of that term could it consist of failing to do what the statute explicitly prohibits doing - viz. , charging or receiving a rate different from the rate specified in a tariff. " (citation omitted)); INS v. Cardozo-Fonseca, 480 U. S. 421, 452-55 (1987) (Scalia, J. , concurring) ("Since the Court quite rightly concludes that the INS's interpretation is clearly inconsistent with the plain meaning of that phrase and the structure of the Act. . . there is simply no need and thus no justification for a discussion of whether the interpretation is entitled to deference. ").

[142] Lisa Schultz Bressman, Schechter, *Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L. J. 1399, 1411-12 (2000)

the public criticism of the Court's position. The attempts made by the Israeli and American Supreme Courts to find clarity where none exists is highly reminiscent of this second approach. While the Court does not claim neutrality in terms of the result, it does conceal the existence of discretion in the strong sense in its judgment, and as a result, it delays the public debate regarding the legitimacy of its decision.

*3. Proposal for an Intermediate Approach to the Question of Delegation*

The American Supreme Court's circumvention of the enforcement of the nondelegation doctrine triggered conflicting reactions. Numerous writers criticized the Court's approach, arguing that it contradicted fundamental democratic principles.[143] Others expressed support for the Court's policy, arguing that the delegation of legislative power to the executive branch actually strengthens democracy.[144] However, the policy of the American Supreme Court does not necessarily express consent to delegation. Some commentators suggest that the Court's reluctance to use the nondelegation doctrine seems to be rooted, in part, in the institutional concern that courts would be unable to draw sensible lines between permitted and prohibited delegations.[145] This interpretation is supported by explicit remarks of Justice Scalia, in this vein.[146]

Justice Scalia's position is consistent with his general, minimalist conception of the judicial role in the constitutional context. However, even if one appreciates Scalia's concern that exercise of the nondelegation doctrine leaves the Court with overly powerful discretionary powers (due to the ambiguity of the doctrine), this does not justify a total abandonment of the doctrine and a permit for unsupervised delegation. In the following paragraphs, I will outline an additional course of action available to the Court, one that could be adopted by even a minimalist like Justice Scalia. As I will immediately explain, in my view

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[143] See e.g. Theodore J. Lowi, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY 125-26 (1969); John Hart Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 133-34 (1980); David Schoenbrod, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10 (1993); see also Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 Cardozo L. Rev. 807, 821 (1999) (noting that delegation to agencies avoids the national scrutiny that Congress receives); David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, supra note 115, at 740.

[144] Dan M. Kahan, *Democracy Schmemocracy*, 20 Cardozo L. Rev. 795 (1999); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775 (1999); Jerry L. Mashaw, GREED, CHAOS, AND GOVERNANCE 132-36 (1997).

[145] Cass R. Sunstein and Adrian Vermeule, *Interpretation and Institutions* 101 Mich. L. Rev. 885, 887 (2003)

[146] Scalia says that the Court has recognized that once some delegation is permitted, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree." Mistretta v. United States, 488 U. S. 361, 415 (1989) (Scalia, J., dissenting). Furthermore, "the limits of delegation must be fixed according to common sense and the inherent necessities of [government]." Id., at 416. Because this determination requires consideration of factors "both multifarious and (in the nonpartisan sense) highly political," the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."

this option should even be acceptable to those who in principle support delegation.

It will be recalled that the legislature can delegate power in two ways: express delegation, and hidden delegation. My position in this article thus far places me clearly in the camp of those who oppose the delegation of legislative powers, be it through express or hidden delegation. Even so, I believe that one can distinguish between the two types of delegation in terms of the intensity of their problematics. Hidden delegation is more problematic than express delegation. Where a delegation is express, the identity of the person making the decision is clear. The executive agency is the one empowered to decide, and accordingly it will also be publicly accountable for the decision. Where the delegation is hidden, on the other hand, it is altogether unclear who exactly made the decision, and the additional result is the absence of any person to pay the public price for a controversial decision. The legislature can cower behind the ambiguous wording and the executive branch can claim that it does not decide, but only interprets the legislature's decision.

On the face of it, my position regarding the problematic nature of hidden delegation should be concurred with not only by the opponents of delegation, but also by its supporters in principle. Those supporting the delegation of legislative power to executive agencies to decide primary questions, do so inter alia, because they think that for various reasons agency decision making is more responsive to public interest than is congressional legislation.[147] This contention may be challenged, but it appears that even its supporters would concede that its truth is at least partially dependent on public awareness of the fact that the executive agency is actually making the decision.

If hidden delegation is excessively problematic (even according to the proponents of delegation in principle), there may be a middle road between the blanket prohibition of delegation and its unqualified validation, a possibility of distinguishing between hidden and express delegation, prohibiting only the former. According to this proposal, should the legislature wish to delegate power to the executive branch, it is permitted to do so, provided that it explicitly declares its intention to delegate legislative power. The use of ambiguous wording as a delegation tactic would be invalidated by the Court, and the matter would be returned to the legislature's door, who would be required to do one of the following: to make its own decision, or to expressly delegate his decision-making power to the executive branch.

This intermediate possibility is consistent with Justice Tirkel's approach in *Na'amat*. Tirkel did not contend that the legislature is not permitted to delegate its power to the executive branch, nor was capable of making such an assertion inasmuch as in Israel the prohibition on delegation has no express constitutional anchorage. Nonetheless, he insisted that the issue involved a hidden delegation and thus refused to concur with the majority justices who denied the fact of delegation by claiming that even in its current wording the statute contained a decision on the specific dispute.

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[147] See Schuck, *supra* n. 144 at 782.

This intermediate possibility could also be acceptable to Scalia. As mentioned, Scalia was wary of adopting an amorphous constitutional principle that would leave the Court with overly broad discretion in deciding what was permissible legislative delegation and what was not. Acceptance of the intermediate possibility allows an almost complete solution to the problem. According to the proposal, even if the Court is left with broad discretion on the question of whether the matters delegated are of a primary-legislative nature character, the Court is not permitted to invalidate the delegation of legislative power altogether. It is only permitted to require that such delegation be explicit.

## E. SUMMARY AND CONCLUSIONS

1. It happens quite often that the legislature avoids the adoption of decisions on substantive questions by transferring the decision making task to the executive or the judiciary. It does this either by way of express or hidden delegation, i.e. by using ambiguous wording that on the face of it only requires interpretation, but in fact requires a substantive decision on the matter at stake. The history of who is a Jew controversy exemplifies the second kind of circumvention, namely, the legislature's intentional choice of ambiguous wording, which concealed the dispute without deciding it.
2. When the judicial branch is required to address a decision made by the executive branch while resolving delegated issues, it can choose one of four methods of response. In the issue of who is a Jew, various justices in the Israeli Supreme Court represented each of the four methods.
3. One of the methods of response is to decide the dispute by having resort to substantive arguments. This method is problematic from a democratic perspective. The judge's role is not to create norms based on his own worldview, but rather to apply existing norms that were democratically adopted by the sovereign authorities responsible for their creation. Admittedly, a sharp distinction between the application of norms and their creation is somewhat artificial, and clearly, a judicial decision cannot be entirely free of discretion involving a measure of value-based subjectivity. Nonetheless, a substantive decision in controversies of the kind at issue, which the legislature itself has not decided on, necessarily entails a pure and unadulterated act of a value-based judicial decision, which on the face of it exceeds even what is acceptable in the moderated characterization of the judicial role.
4. The premising of the judicial decision on subjective value-based considerations is particularly severe in cases of the kind at issue, in which the Court is not requested to examine a value judgment that was democratically adopted but rather to rule on a question that the democratic system has yet to decide on. The principle requirement of democracy is that significant questions, the answer to which are disputed, should be seriously discussed and clearly decided by the people and its representatives. This is not only the people's right – it is its duty. When the Court rules on questions that have <u>yet</u> to be decided on by the legislature it is blatantly and unjustifiably intervening in the democratic process.

5. A second method of response is to decide in favor of a particular approach while presenting the decision as a technical-neutral decision, that does not rule on the substantive dispute and does not rely on a value-based subjective position. This method was used by most of the justices who addressed the question of who is a Jew, and it too should be rejected. Even if the pretense of neutrality was in good faith, the technical decision is usually a substantive one as well, or at least one that in the future may lead to a substantive decision. Furthermore, in most of the cases the pretense of neutrality is nothing more than a spurious façade, intended to camouflage a clear value based decision.
6. Like the previous method, this method of response too is problematic due to the Court's arrogation of a role properly belonging to the legislature. In a certain sense, this second method is even more problematic than its predecessor because of its pretension to neutrality which (on the levels of result and of motivation) prevents or at least delays the public criticism of the value based decision chosen by the Court.
7. The third method of response expresses judicial restraint. In the absence of an express legal source or public consensus against the decision of the executive authority, the Court will refrain from intervening in its decision.
8. This form of response exacts a considerable price. Firstly, the decision not to intervene leaves the status quo ante intact, despite it being acceptable to only one of the parties. In other words, it does not and cannot lead to a neutral result. Secondly, the implementation of the non–intervention policy is liable to lead to arbitrary results.
9. Despite the problematic aspect of the third response, it has an advantage over the two previous ones. As stated, in a democratic system, the legislative branch should adopt the decision expressly. However, the legislature can also express its opinion by avoiding any intervention in the decision of the executive branch. A decision by way of avoidance is not an optimal decision, but it is a decision nonetheless. The approach of judicial restraint can therefore be characterized as a decision not to intervene in the decision of the executive, which was ratified by the silent consent of the legislative branch.
10. The fourth method of response, which is also the most correct from a democratic perspective, is the adoption of a tactic geared to compel the legislature, or at least to pressure it into reaching a democratic decision on the matter at hand.
11. This was also the approach taken by the Israeli Court for a brief period when it adjudicated the issue of who is a Jew, however, even during that period of time, it failed to make optimal use of the approach. Furthermore, unfortunately, in the long term, the Court was unable to resist the temptation and ultimately its justices chose to consistently use the method of the neutral presentation, which is the most lamentable of the four possible methods.
12. The American doctrine of Nondelegation is consistent with the fourth method of response. However, during the last few decades the American

Supreme Court has refrained from invoking it, even though it has never been formally overruled. One of the methods for circumventing this doctrine is to deny the existence of the delegation, in reliance on the double test established in *Chevron.*

13. Even if one can understand the concern of the American Court regarding the doctrine's effect, it is possible to consider it in a restricted sense, which would distinguish between express delegation and hidden delegation, and would only permit the former. In this way, the identity of the specific branch that adopts the concrete decision is clear, and it is accountable to the public for the contents of the decision.