The Israel Supreme Court Ruling on Non-Orthodox Conversions: What It Is and What It Isn't

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The progressive Jewish world rejoiced at the news that on March 1, 2021, the Supreme Court of Israel ruled that conversions to Judaism performed in Israel under the auspices of the non-Orthodox movements are sufficient to establish Jewish identity under the Law of Return. (Read about it in English or Hebrew.) Not surprisingly, the Orthodox Jewish world was, shall we say, less enthusiastic. All sides agree that this "bombshell" decision, a 37-page opinion delivered by Chief Justice Esther Hayut, has expanded the scope of the Law of Return, for good or for ill.

Obviously, as progressives, we think it's for good. But we want to take this opportunity to consider the decision carefully, in order to help clarify just what it is and what it isn't, what it says and what it doesn't say. The ruling is a blow for equality in the state of Israel, but we shouldn't forget that, in the battle for equal rights, we have not yet arrived in, er, the promised land. This is especially true when it comes to *halakhah*, the particular concern of this blog.

The Decision.

The issue revolves around the proper interpretation of Israel's 1950 Law of Return (חוק השבות, *ḥok hash'vut*), which Chief Justice Hayut calls "the cornerstone of the constitutional identity of the State of Israel as the state of the Jewish people as well as a democratic polity" (paragraph 12 of the opinion). The legislation begins with the famous words: כל יהודי זכאי לעלות ארצה, "every Jew is entitled to citizenship" in the Jewish state." [1] The act famously did not offer a detailed definition of the term *y'hudi*, "Jew," and this lacuna raised some difficult questions. Is a Jew who has converted to another religion eligible for automatic citizenship upon making *aliyah*? What about the child of a Jewish father and a non-Jewish mother, who does not enjoy Jewish status under traditional *halakhah*? These questions provoked serious political controversies in Israel during the first two decades of the state's existence. In response, the Knesset in 1970 added the following paragraph (4.b.) to the Law of Return:

לענין חוק זה, "יהודי" – מי שנולד לאם יהודיה או שנתגייר, והוא אינו בן דת אחרת.

> For the purposes of this statute, the word "Jew" refers to one born of a Jewish mother or who has converted to Judaism and who is not a member of another religious community.

That amendment does not qualify the meaning of the word שנתגייר, "one who has converted to Judaism." The question naturally arises: given the halakhic controversies between the various Jewish groups over this issue, how shall the government of Israel process requests for citizenship under the Law of Return? Should legally valid conversion (גיור, *giyur*) be restricted to conversions administered under the auspices of the Orthodox rabbinate, or does that term include conversions supervised by non-Orthodox rabbis as well?

The plaintiffs in this case are individuals who converted to Judaism in Israel under the supervision of the Reform (Progressive) or Conservative (Masorti) movements and thereupon sought Israeli citizenship under the Law of Return. The Interior Ministry (the defendant in the case) rejected their application on the grounds that non-Orthodox conversions do not qualify as *giyur*, valid conversion, under the law's terms. The plaintiffs appealed to the Supreme Court in 2005 and 2006. The Court has avoided ruling on these appeals for fifteen years, so as to allow time for the government and Israel to arrive at a legislative solution. Given Israel's constitutional structure, under which the legislature is the supreme governing institution, that would be the preferred solution. But in paragraph 1 of the decision Chief Justice Hayut suggests that the Court's patience is at an end:

הזמן הרב שחלף מאז הגשתן... ותיאור ההליכים שהתקיימו בהן לאורך השנים, ממחיש היטב את המאמץ הרב, החוזר ונשנה, מצד בית המשפט לעודד מציאת פתרונות מחוץ לכתליו שייתרו את הצורך בהכרעה שיפוטית, אך ללא הועיל.

> The extended period of time that has elapsed since these appeals were presented… along with the description of the proceedings that have taken place over those years, highlight in bold relief the Court's strenuous and repeated efforts to encourage other agencies to come up with solutions that would obviate the need for a judicial decision. These, however, have been to no avail.

Given the lack of progress toward such a solution for the past decade and a half, she declares, the litigants, should not be made to wait *ad infinitum* for an answer (paragraph 15). [2]

The Interior Ministry bases its position – namely, that only Orthodox conversions should be recognized under the Law of Return –on the grounds that conversion is a religious ritual, the act of joining "the Jewish religious community" (העדה היהודית, *ha'edah hay'hudit*), recognized by the law of the state as a unified bloc headed by the Chief Rabbinate. Thus, conversion should be governed exclusively by the rules of that institution (paragraph 18). But this theory was firmly rejected by the Israel Supreme Court in the 2002 case *Naamat v. Minister of Interior*, in an opinion authored by then-Chief Justice Aharon Barak. He wrote:

אמת, בחקיקתה של מדינת ישראל מופיע הדיבור "עדה דתית". סימן 2 לדבר המלך במועצה על ארץ-ישראל, 1922 – כפי שתוקן ב- 1939... תפיסתם של היהודים כ"עדה דתית" בדבר המלך במועצה על ארץ-ישראל היא גישה מנדטורית-קולוניאלית. אין לה מקום במדינת ישראל. ישראל אינה מדינתה של "עדה יהודית". ישראל היא מדינתו של העם היהודי, והיא הביטוי של "זכות העם היהודי לתקומה לאומית בארצו" (הכרזת העצמאות).

> The term "religious community" indeed appears in the legislation of the State of Israel, namely in the King's Order in Council of 1922, as amended in 1939… The conception of the Jews as a "religious community" in that act reflects a Mandatory-colonial approach. It has no place in the State of Israel. Israel is not the state of "the Jewish religious community" (*edah y'hudit*). Israel is the state of the Jewish people (*ha'am hay'hudi*), the expression of "the right of the Jewish people to the reestablishment of its national existence in its land" (Israel Declaration of Independence).

The Jewish *people* – as opposed to the Jewish *"edah"* – is most definitely not characterized by a unified approach to religion. As Chief Justice Barak continued:

ביהדות ישנם זרמים שונים הפועלים בישראל ומחוצה לה. כל זרם פועל על-פי השקפותיו שלו. לכל יהודי ויהודי בישראל - כמו גם לכל אדם ואדם שאינו יהוד - חופש דת, מצפון והתארגנות. תפיסות היסוד שלנו מעניקות לכל פרט ופרט את החירות להחליט באשר להשתייכותו לזרם זה או אחר.

> Various religious streams operate within Judaism, both in the State of Israel and outside of it. Each stream operates according to its own viewpoint. Each and every Jew in Israel – just as each and every non-Jew - has the right to freedom of religion, of conscience, and of assembly. Our fundamental conceptions grant to each and every individual the liberty to decide for themselves whether to associate with this or that stream.

The *Naamat* decision dealt with questions of adoption – the right of parents to register their adopted children, converted by non-Orthodox rabbis, as "Jews" on their identity documents. It did not rule on the question whether the word "Jew" (יהודי) in the Law of Return can be applied to a person who converts to Judaism within the borders of the State of Israel under the supervision of the non-Orthodox movements. *That* step is the *ḥiddush* of Chief Justice Hayut's opinion, which extends Barak's reasoning in *Naamat*, along with other precedents, to this case.

Hayut begins (in paragraph 21) with the critical term שנתגייר, "one who has converted," in the Law of Return. If, as the Court has previously ruled, the Jews in Israel constitute a *secular* entity - a *people* (עם) rather than a "religious community" (עדה) – then the definition of "conversion" for purposes of that law cannot be restricted to the *Orthodox* version of that process. Thus, the Chief Justice, relying again on precedential decisions, defines a "convert to Judaism" as:

מי שעבר גיור בקהילה יהודית מוכרת בהתאם לאמות המידה המקובלות בה

> one who has gone through the process of conversion within a recognized Jewish community/congregation (*k'hilah*) in accordance with that community's accepted criteria.

A "recognized Jewish community/congregation" is one that possesses זהות יהודית משותפת, מבוססת וקבועה, "a common, well-founded, and established Jewish identity." Note that this definition does not mention the word *halakhah* or make reference to any particular ritual requirement for *giyur*. From here it is but a logical step to Chief Justice Hayut's critical finding of fact (paragraph 24):

הקהילות הלא-אורתודוכסיות שבהן התגיירו העותרים שבפנינו הן קהילות מבוססות בישראל, והן בעלות זהות יהודית משותפת וידועה ומסגרות קבועות של ניהול קהילתי. הליך הגיור בהן נעשה על ידי גוף דתי שהוסמך לכך בקהילה שאותה הוא משרת.

> The non-Orthodox communities in which these appellants have undergone conversion are communities that are well-founded in Israel, and they are characterized by a definite and common Jewish identity, with established forms of communal administration. The process of *giyur* in each of these communities is supervised by a religious establishment possessing the authority to do so within the community it serves.

In short: as far as the Israeli court system is concerned, all "recognized Jewish communities" are created equal. Each one administers conversion according to its own rules, and it is not for the *secular* courts, whose job it is to define the term שנתגייר ("one who has converted") in the *secular* Law of Return, to decide the validity of conversion procedures according to Jewish *religious* law. Based upon this understanding, the Israel Supreme Court had no choice but to grant legal recognition to conversions processed in Israel by the established Reform and Conservative movements. And so it ruled, accepting at long last the claims of these appellants for Israeli citizenship under the Law of Return.

The Takeaways.

From our perspective, three major points emerge from this ruling that deserve our attention.

- The Israel Supreme Court has reiterated a position that it has taken over seven decades: the Law of Return is a *secular* act of legislation. It defines "who is a Jew?" – and, especially relevant here, "who is a convert to Judaism?" – for purposes of citizenship in the State of Israel, a secular rather than a religious entity. The Court offers no opinion as validity of these or any other conversions according to Jewish religious law (*halakhah*). As a secular court, it is not competent to render such an opinion, and it has no reason nor interest in doing so.

- At the same time, the Court emphasizes that גיור, conversion, is a *religious* process. There is no such thing as *giyur* administered by the government of Israel. Conversions are administered by "a recognized Jewish community/congregation." The Hebrew term used for community/congregation is קהילה, *k'hilah*, which suggests a body organized on religious lines. [3] Thus, what constitutes valid *giyur* is very much a matter of Jewish religious law (*halakhah*), even though the Court as a secular body properly abstains from declaring what that law has to say.

- The Jewish religious movements that administer conversion disagree profoundly on what constitutes valid *giyur* under *halakhah.* The Orthodox rabbinate does not accept the halakhic validity of conversions supervised by non-Orthodox rabbis and *batei din.* This situation will in all likelihood continue, regardless of this or any other ruling of the Israel Supreme Court. This is why we remark, at the beginning of this essay, that we haven't yet arrived in "the promised land."

  Some non-Orthodox Jews may conclude that this decision renders the Orthodox objections irrelevant. What does it matter, they may say, that the Orthodox do not recognize the Jewishness of those who convert with us so long as those individuals qualify as Jews for purposes of citizenship in the State of Israel? We disagree. As Jews committed to *halakhah* as a proper form of religious expression for *all* Jewish communities, we are necessarily committed as well to the proposition that the Orthodox rabbinate should enjoy no monopoly over the interpretation of *halakhah*. We, as well as they, are entitled to declare what *halakhah* is and to argue for our understanding of it. We will therefore continue to take part in that argument, which like all good arguments over *halakhah* is the precise meaning of the term *talmud torah*, the study of Torah.

In the meantime, though, we are pleased that the Israel Supreme Court has at long last removed a great barrier to the political equality of the various Jewish communities within the state. We urge the Knesset to refrain from taking any legislative action that would upset the balance that the Court has struck with its interpretive skill, its intellectual integrity, and its perseverance.

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[1] The right to citizenship (as opposed to the right to dwell within the state) was formalized in the 1952 Law of Citizenship (חוק האזרחות). And there are exceptions to the rule. As Hayut points out, section 2.b. of the law allows citizenship to be denied to a Jewish immigrant אם נוכח שר הפנים שהמבקש פועל נגד העם היהודי או עלול לסכן את בריאות הציבור, ביטחונו או שלומו, "should the Minister of the Interior become aware that the claimant works against the Jewish people or is liable to endanger the public health, security, or welfare."

[2] The final words in Chief Justice Hayut's opinion – הגיע העת, "the time has come" – make it abundantly clear that the Court is tired of the government's numerous delays in finding a solution. One justice dissented from the ruling, not on substantive grounds – he accepts the Court's reasoning – but because he would be willing to give the government one more year to devise a legislative solution.

[3] That's not the only conceivable meaning. *K'hilah* can refer to a general social grouping, such as the members of a local Jewish community, regardless of synagogue affiliation or religious practice. Still, it's clear that the Court, which never suggests a secular alternative for conversion, reads the term in its religious context.