

Gender and Nationalism in Court Rulings: Family Unification Decisions Rendered by Women Supreme Court Justices

By Sawsan Zaher¹

"We bring an individual and collective perspective to our work that cannot be achieved in a system that reflects the experiences of only a part of the people whose lives it affects"²

The Supreme Court case of *Adalah, et al., v. the Minister of Interior, et al.* dealt with the unification of Arab Palestinian families in the State of Israel.³ The petition was dismissed by a majority of six justices, among them female Justice Miriam Na'or. The supporters of the minority position were three female justices (Justices Dorit Beinisch, Esther Hayut and Ayalah Procaccia), the Arab justice (Salim Joubran), and the soon-to-retire Chief of the Supreme Court (Justice Aharon Barak). In this short article, I will discuss the rulings rendered in this case by the female justices of the Supreme Court in an attempt to understand whether their participation brought added value to this important case. The issue under discussion raises a number of questions regarding the role of women as justices, such as: Is there added value in the appointment of women to the judicial bench? Do female justices have a unique voice compared to their male counterparts, and, if so, how can these differences be measured? Do such differences mean that women justices are biased in matters relating to women? And should female justices exclusively represent the interests of women in issues related to them?⁴

The legal literature discusses four roles that can be applied in examining judicial decisions rendered by female justices.⁵ Firstly, in the *representative* role, female justices can be seen to side with women when cases presented to them have a direct influence on women's lives and status, such as cases related to sexual harassment, domestic violence, abortion, and women's employment and representation in the workplace. Secondly, in the *token* role, female justices adapt themselves and their decisions to the opinion of the dominant male majority in the court in which they sit without seeking notoriety or to attract attention to the special voice that characterizes them as women, given their being a minority within the judicial system. Thirdly, in opposition to tokenism, in the *outsider* role female justices tend not to be bound by norms connected to and identified with the institution to which they belong. Thus, they ignore and/or do not abide by institutional customs. In such cases, they are capable of making decisions in opposition to institutional stances, of going against the tide and upholding a minority opinion. Finally, applying the theory of psychologist Carol Gilligan that women take a different approach to moral issues from that of men, female justices assume a role of offering a *different voice*. According to this theory, female justices think differently from their male counterparts and therefore bring a gendered perspective based on their life experiences as women in society.

¹ The author is an attorney with Adalah – The Legal Center for Arab Minority Rights in Israel.

² Quotation from a response by Justice Christine Dorham of the Utah Supreme Court (USA) to a question regarding female judges. Citation taken from Martin, E. (1990). "Men and Women on the Bench: Vive la difference?" *Judicature* 73, p. 204.

³ H.C. 7052/03, *Adalah, et al., v. the Minister of Interior, et al.*, (unpublished decision, rendered on 14 May 2006).

⁴ See. Martin, E., (1993). "Women on the Bench: A different voice." *Judicature* 77, p. 126.

⁵ With regard to the role of women as justices, see Allen, D. and Wall, D. (1993), "Role Orientation and Women State Supreme Court Justices." *Judicature* 77, p.156.

In order to examine whether the female justices assumed the *representative* role in their rulings, one must first establish whether the issue before them was directly and solely related to women, as well as the degree to which it has an influence on their lives. The Nationality and Entry into Israel Law that was the subject of the petition aims to deny requests for family unification between Arab citizens of Israel and Palestinian residents of the occupied territories on grounds that the Palestinian spouse constitutes a security risk at every point in time. It is true to say that the issue has an especially severe and exceptional direct influence on women. Even if we accept the judgment of a majority of the Supreme Court justices that the law was adopted against the background of the armed Israeli-Palestinian conflict and therefore has security-related purposes, the influence of armed conflicts on women has been recognized in the UN Security Council's Resolution No. 1325 entitled *Women, Peace, and Security*. This decision recognizes, *inter alia*, the fact that conflict has a more severe, or at least a different, impact on women and young girls. However, the law influences everyone: men, women and children. Among other things, it violates the right to family life, the right to love and the right to family autonomy, thus violating the right to parenthood. In addition, the law discriminates against Arab citizens on the basis of nationality.

Therefore, in this case, it is not possible to analyze the female justices as acting in the *representative* role in reaching their decisions. The absence of this approach can also be seen in the different analyses the female justices made in arriving at their rulings. For example, a review of the rulings rendered by Justices Beinisch and Hayut, who voted with the minority, shows that their final conclusion was based on a strict balance between the right to family life and the defense of the state's security. The two justices recognized, as a legal right, the right to family life in Israel as part of the right to dignity enumerated in the Basic Law: Human Dignity and Liberty. Further, Justices Beinisch and Hayut recognized that security was the primary aim of the Nationality and Entry into Israel Law, and therefore that it sought to safeguard the security and lives of Israeli citizens against any security threats resulting from the entry of "potential terrorists," who in their words might exploit the family unification route to attack state security. What was decisive for them was the lack of proportionality embodied in the law, which allowed it to sweepingly deny family unification for all applicants; this and no more. Had the law established a means of checking the security risk posed by each Palestinian spouse seeking unification with their family, it would have met the proportionality test and the justices who voted with the minority would have then joined the majority.

Similarly unsuccessful is an attempt to examine the arguments of Justices Beinisch and Hayut according to the *different voice* approach. Their arguments left no space for articulating any "different voice" based upon their life experiences as women in society. Indeed, their willingness to adopt the security component and its insertion deep into the analysis of the balances of rights is evidence of their adoption of a discourse that is more "militaristic" than one emphasizing the *different voice* of the female justices. A more thorough review of their rulings reveals that they lack gender mainstreamed analysis with regard to the meaning of the implementation of the law, the impact of denying motions for family unification between men and women, the destruction of a complete family life and the specific impact that such an act has on women.

Without engaging in a critique here, the social status of the Arab woman, whether she is a citizen of Israel or resident of the occupied territories, is undoubtedly in the private sphere – the home and family. The dismantling of families resulting from the approval of the Nationality and Entry into Israel Law means that a female Palestinian resident of the occupied territories married to a Palestinian male who is an Israeli citizen will be forced to return to her city or village. There can be no doubt that there, she can expect to experience difficulties that will place her in the lowest position on the social-economic scale, one likely to be lower than that which she held prior to her marriage. She will live

as a divorced or as a separated woman, and if she takes her children with her, will be a single parent lacking any social and economic rights. These women will find it difficult to return their father's or family's home. Certainly it will be difficult to find work in the occupied territories with which to support themselves and their children. If they do, they will undoubtedly earn at most an average wage. Conversely, if they are able to remain in Israel as illegal residents, they can expect expulsion at any moment and to be denied the welfare rights awarded to married women and mothers in Israel. Palestinian women who are Israeli citizens would be influenced similarly by the division of the family, as similar social norms prevail in Arab society in both places.

Justice Beinisch, for instance, decreed in her ruling that she does recognize the right to family life as a legal right included within the right to dignity. However, she added that only the narrow, core meaning of this basic right is included within the right to dignity.⁶ From her point of view, the core of the right to family life is the basic right of an individual to choose a life-partner and undertake the creation of a new family unit. What, however, of all other associated rights? Is it possible to divide the right to family life into sub-rights of lesser or greater importance? Justice Hayut, too, recognized the right to family life as a legal right, even adding that, "the right of an individual to choose a partner with whom to establish a family and thus the right to establish a home in the country in which he is living are in my view among the highest of human rights."⁷ However, later in her ruling, Justice Hayut adopted the "security" discourse of Deputy Chief of the Supreme Court, Justice Mishael Cheshin, who led the majority opinion. Accordingly, she wrote that, "imposing limits on family unification for residents of the area [the occupied territories] due to security needs is a requisite and should not be disparaged."⁸ As noted, the conclusion of Justice Hayut's ruling is based on the lack of proportionality of an all-encompassing violation of the right to family life.

Justice Procaccia also concurred that the right to family life under conditions of equality constitutes part of the legal right to human dignity.⁹ However, it is possible to discern in her ruling an expansion of the right to family life beyond the core indicated by Justice Beinisch. For example, Procaccia established that "the Israeli partner has the right to have their partner and children live in Israel."¹⁰ "The right of an individual to establish a family is at the foundations of human existence. It is difficult to describe other human rights that compare with it in importance and strength. It contains the right to parenthood and the right of a child to grow up with natural parents. Together, they create the right to family autonomy."¹¹ In spite of this, it is possible to view Justice Procaccia's ruling as the exceptional act of an *outsider*. She examined security considerations according to a two-stage process of reliability and robustness.¹² At a time when all of the other justices – male as well as female – with the exception of Justice Joubran, determined that security was the essential consideration in the legislation of the law, Justice Procaccia deviated from the norm, raising doubts over the security-related considerations as opposed to demographic considerations and concerns. Eventually, Procaccia determined that it was not possible to rest upon on demographic considerations in examining the constitutionality of the law, since the state did not rely upon them as the foundation of the legislation in its arguments.¹³

6 Para. 6 of Justice Beinisch's ruling.

7 Para. 4 of Justice Hayut's ruling.

8 Ibid.

9 Para. 1 of Justice Procaccia's ruling.

10 Ibid.

11 Para. 6 of Justice Procaccia's ruling.

12 Paras. 11-16 of Justice Procaccia's ruling.

13 Para. 14 of Justice Procaccia's ruling.

In terms of the robustness of the security concern, Procaccia, together with her colleagues who supported the minority position, argued that the state had not demonstrated that the indiscriminate violation of a constitutional right is able to withstand the proportionality test of the limitation clause.¹⁴ Thus, the ruling of Justice Procaccia combines the roles of the *different voice* and the *outsider*, as on the one hand she expanded the content of the right to family life, while on the other she allowed herself not to be constrained by the majority opinion and, indeed, deviated from it. However, the analysis assigns greater weight to the role of the *outsider*, as Justice Procaccia dared to take an additional step and made a comparison between the issue before the Supreme Court and the U.S. Supreme Court decision in the case of *U.S. v. Korematsu*. In this case, Japanese residents and American citizens were placed in detention camps during the Second World War for the lack of loyalty demonstrated by a minority of individuals of similar racial origins. Procaccia called on the Court to refrain from issuing a verdict similar to that rendered by a majority of the U.S. Supreme Court in *Korematsu*, which legally endorsed the sweeping sanctions taken against American citizens of Japanese origins. The majority opinion in this case applied similar arguments to those made by the majority in the case of the Nationality and Entry into Israel Law. Justice Procaccia even emphasized how later legal thought has recognized the *prima facie* mistake made in the judgment rendered in *Korematsu*,¹⁵ stating that the majority ruling in the American case “has been considered by many to be one of the darkest episodes in the legal history of Western states.”¹⁶ Undoubtedly, the comparison between the two cases represents an extreme deviation from conventional Israeli security discourse, and situates Procaccia in an extremely radical position relative to the positions of the other male and female justices regarding this ruling. Accordingly, her stance was strongly criticized by her fellow justices, as detailed below.

A review of the ruling rendered by Justice Na'or reveals a totally different stance. She adopted the opinion of Deputy Chief Justice Cheshin to deny the petition on the basis that “the Israeli spouse does not have a legal right, as part of the right to dignity, to family life if the spouse is a foreigner in Israel.”¹⁷ She added that the law does not violate the principle of equality due to relevant differences between the suspect groups, and therefore does not violate the right to human dignity and is not discriminatory.¹⁸ She even goes so far as to determine that, even if there was a violation of the principle of equality, “it is possible to remove such a violation by comparing between the status of the two groups: the discriminated group versus the group enjoying equality... and with regard to the matter before us, if the possibility of family unification was annulled for all the citizens and residents of Israel, then there would no longer be a basis for the claim of a violation of equality. Thus, even if we *assume* a violation of the right to equality within the law, the legislator would be able to create anew equality between the groups in such a manner.”¹⁹ That is to say, not only does Justice Na'or disagree that there is a violation of the right to family life in this case, but she also proposes to annul the possibility of family unification for all citizens and residents of Israel in order not to create the foundation for a claim of a violation of the principle of equality. Furthermore, with regard to the security consideration, Justice Na'or's analysis adopted the security and militaristic stance argued by the state and the justices from the majority position, including the opinion of Justice Cheshin. There is no doubt that, this being the case, the *token* role can be ascribed to Justice Na'or, in that she adapted her ruling to both the dominant opinion held by the majority of the Supreme Court justices as well as to that

¹⁴ Para. 19 of Justice Procaccia's ruling.

¹⁵ Para. 21 of Justice Procaccia's ruling.

¹⁶ Ibid.

¹⁷ Para. 4 of Justice Na'or's ruling.

¹⁸ Para. 11 of Justice Na'or's ruling.

¹⁹ Para. 13 of Justice Na'or's ruling.

held by the state through her total compliance with the norms identified with the institution to which she belongs.

If we locate Justice Procaccia at the extreme, radical end of the spectrum due her stance as an *outsider*, then the ruling rendered by Justice Na'or stands at the opposite end of this spectrum. Procaccia's position as an *outsider* was referred to in the criticism of the comparison she made between the case of the Nationality and Entry into Law and *Korematsu*. In this regard, Justice Na'or joined the acrimonious criticism of Justice Cheshin.²⁰ Na'or herself stated that in raising *Korematsu*, considered a shameful event in American history, Justice Procaccia had "gone too far," and even "sends a warning in her ruling."²¹ Such a warning was unacceptable to Na'or, who claimed that there is no basis for comparing between the two cases, even though she agrees that the U.S. Supreme Court made an erroneous judgment.

In conclusion, although a majority of the female justices sided with the minority in this ruling and comprised a majority within the minority stance (whose members included three female justices, an Arab justice, and a Jewish male justice), there is no doubt that their ruling was detached from their life experiences as women. With the exception of Justice Procaccia, the remaining justices adopted the national-security discourse that dominates the Supreme Court. While Justice Procaccia deviated from this consensus, it is difficult to attach her opinion to the discourse derived from the feminine experience, as it lacks other characteristics that distance it from the dominant discourse. It is possible, however, to relate her ruling to an attitudinal stance that is disconnected from her gender association.²² In any event, it was the security-militaristic discourse that dominated the ruling. Accordingly, my attempt to find differences between the justices with regard to the legal discourse in Israel on a gender related basis was unsuccessful. It would appear that it does not have a place given the presence of the Jewish-Zionist nationalist discourse in confrontation with the factor of Arab identity. Thus, the presence of this factor in the ruling canceled out the feminine identity of the Jewish justices.

²⁰ See para. 13 of Deputy Chief Justice (retired) Cheshin's ruling.

²¹ Para. 22 of Justice Na'or's ruling.

²² With regard to the rulings of male/female judges according to an *attitudinal model*, see Beiner, T. (1999) "What Will Diversity on the Bench Mean for Justice?" *Michigan Journal of Gender & Law* 6, p. 113.