

"The Philosophers and Intellectuals Can Say Whatever They Say"

*Cheshin and Joubran cite the Book of Genesis and Plato
in ruling on the Supreme Court petition on the Nationality and Entry into Israel Law*

By Dr. Aeyal Gross¹

The ruling on the Nationality and Entry into Israel Law² has many disturbing aspects. The judgment by the Vice President of the Supreme Court, Justice Mishael Cheshin, that it is possible to limit rights because of security interests without having to pass the hurdle of the limitation clause – because such interests can influence the very definition of rights, in his view – creates an opening, in effect, for the unrestricted limitation of rights. If we add to this his ruling that residents of the Occupied Palestinian Territories should be regarded as enemy nationals, and the hints scattered throughout his ruling about the legitimacy of demographic considerations, the result is liable to be fateful for the human rights of Palestinians on both sides of the Green Line, and for human rights and democracy in general. In the more specific context of the right to family life, Justice Cheshin recognizes this right in principle, but attributes meaning to it that substantially reduces its content: the ruling that an Israeli citizen has no right to live in his/her country with his/her spouse creates conditions for fulfilling this right that can be termed unconstitutional.³

It is not only Cheshin's ruling on the narrow scope of the right to family life that needs to be addressed, but also his perception of what constitutes a family. In paragraph 46 of the ruling, Cheshin notes that "we all agree" that "every person has the right to marry and conduct family life." The explanation for this derives from the fact that, "the covenant between a man and a woman, family life, was created before the state and before rights and obligations came into the world... a man needs a woman and a woman needs a man... thus a covenant was forged between man and woman, and with the birth of children the extended family is formed. And within all this, love is created. Thus, with regard to the family, the state came upon something that already existed and spread its patronage over what nature had dictated. Society and the state sanctified the covenant of man and woman in marriage..." Cheshin continues: "The philosophers and intellectuals can say whatever they say... at the very beginning of all beginnings, the family's existence came from God above, from nature, from the genetic makeup of man... this is the way it is in the relations between man and woman, and this is how it is in the relations between parents and their children."

Thus, from Cheshin's perspective, the family that deserves protection is the traditional nuclear family: man, woman and children. Only this structure, ostensibly based on a natural and genetic order, is a family. Only there is love created.

These lines – which reflect a belief in a pre-legal and pre-discursive natural order regarding the question of what a family is, and perhaps also what love is, while ignoring

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² H.C. 7052/03, *Adalah et al., v. The Ministry of Interior* (yet unpublished ruling delivered 14 May 2006).

³ For a discussion on these aspects of the ruling, see Aeyal Gross, "In Love with the Enemy: Justice, Truth, Integrity and Common Sense: Between Israel and Utopia in the Citizenship Law" (yet unpublished).

the fact that the family is a social institution that takes different forms in various societies and times – echo the minority view of Justice Yaakov Kedmi in the Danilowitz⁴ ruling. Kedmi ruled that two people of the same sex cannot be a "couple" because this is contrary to the meaning that life itself has accorded it and to the "natural" meaning of the term. In fact, Cheshin's ruling is adorned with biblical quotations similar to those appearing in Kedmi's ruling, and he sometime draws from identical sources. (The citation "male and female he created them"⁵ appears in both.) It goes without saying that this conception also leaves no room for many other types of families, for example, single-parent families, families of same-sex couples, families with adopted children, and all types of families that are not necessarily built upon a couple-based relationship.

However, after discovering the great similarity between Cheshin in the case of the Nationality and Entry into Israel Law and Kedmi's position in the Danilowitz case, the question remains of why Cheshin noted that the conception he expresses, which disqualifies so many families from being defined as a family, is valid, even if "the philosophers and intellectuals can say whatever they say." What was Cheshin suggesting?

It may be possible to find an answer to this question in the ruling of Justice Salim Joubran, who joined the minority opinion led by Supreme Court President Aharon Barak. Joubran, unlike Cheshin, chose to speak about the fact that "it is man's nature... to search for a (male) partner or (female) partner for himself." This neutral language, though it is limited to the couple model and rejects models of a family that are not couple-based, creates an opening for various types of relationships. While Cheshin supported his statements with a number of quotations from the Book of Genesis, Joubran turned to one of the philosophers Cheshin might be hinting at, and cites statements Plato attributes to Aristophanes in the classic work *Symposium*: "If we become friends and allies of God, we will each have the fortune to find a beloved who is the flesh of our flesh... and the human race would be happy if we bring love to its perfection, and if each of us finds this love who is the flesh of his flesh, and returns to the primeval experience. And if this is the highest good, then now, in the present, the highest good would be what most closely approximates this; that is, that a man attains a congenial love."⁶ Referring to this citation, Joubran notes that there are few choices in which a person exercises his free will like the choice of the person with whom he wishes to share his life.

Indeed, the words of Aristophanes quoted by Joubran address in a detailed and fascinating way the three forms of love: love between men and women, love between women and women, and love between men and men. Aristophanes says of the latter that they do not act this way "from any want of shame," but rather from "manly courage and fortitude." In the section Joubran quoted, there is a passage which the justice chose

⁴ H.C. 721/94, *Danilowitz v. et. al.*, P.D. 48 (5) 749. For an English translation, see <http://www.tau.ac.il/law/aeayalgross/Danilowitz.htm>. For a critical discussion, see Aeyal Gross, "Danilowitz, Steiner and Queer Theory," *Mishpat Nosaf* 147 (2001) (Hebrew); Aeyal Gross, "Challenges to Compulsory Heterosexuality: Recognition and Non-Recognition of Same-Sex Couples in Israeli Law," in Robert Wintemute and Mads Andenas, eds., *Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* 391 (2001).

⁵ The Book of Genesis 1: 27

⁶ Plato, "The Symposium," *The Writings of Plato, Translated to Hebrew by Y.G. Libes*, Vol. B 116 (1999). Cited in paragraph 2 in Joubran's ruling.

to skip, marking it with an ellipsis, in which Aristophanes mentions a loving male couple. Even after skipping over this, however, the spirit of the passage does not change and it speaks about "all of the men and women."⁷

Despite skipping over the explicit reference to the two loving men, Joubran's ruling – in its gender-neutral language and reference to *Symposium*, one of the most important texts in human history that deals with various types of love, both opposite-sex and same-sex – opens up the possibility for all types of love and families (at least those based on a couple). Cheshin's ruling, by contrast, closes the door to any possibility except for the normative heterosexual option. It should be noted in this context that the Nationality and Entry into Israel Law, which hurts so many people, also hurts same-sex couples who cannot live together in Israel. For such couples, even the option that Cheshin's ruling suggests – that they can live together in the Palestinian territories – usually does not exist. This is due to the difficulty of maintaining a family unit based on a same-sex couple in Palestinian society.

In any case, there is a strong connection between Cheshin's heteronormativity and the conclusion he reaches in the ruling: the concept of the family is limited in his ruling, including only the nuclear patriarchal family. This conception of the family reflects a narrow view of the idea of the right to family life and rejects the perception of this right as including the possibility of real and free choice of a partner. This follows from the narrow meaning the ruling attributes to the right to family life and from Cheshin's decision to reject the petition challenging the law's constitutionality. Joubran's ruling, however, both in its reference to *Symposium* and in its bottom line – in which he subscribes to the stance led by President Barak, who also uses broad and neutral language in his ruling with regard to the relationships of couples and families – represents a view that profoundly recognizes a person's right to choose his male or female love, and to choose his life partner.

⁷ For a translation into English of *The Symposium*, see Plato, *The Symposium*, Translated by Christopher Gill, Harmondsworth: Penguin Books (1999).