

# THE LAW OF EQUAL OPPORTUNITIES IN EMPLOYMENT: BETWEEN EQUALITY AND POLARIZATION

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## I. INTRODUCTION

Israeli law on employment discrimination is rather developed “on the books” but only in its infancy “in action.” In this article I would like to describe the historical development of the law, the reasons for its underdeveloped implementation over a long period of time, and the relationship between the law and society. Admittedly, numerous explanations can account for the gap between the law on the books and in action, such as problems related to the legal process (rules of procedure, evidence, and available remedies), or to the nature of discriminatory practices (difficult to name and claim, practiced in private even when public, complex and multifaceted). Such accounts may be simpler than the one offered here, and may also be more universal in nature. Without denying the validity of such explanations, this article emphasizes a particular view of how the law interrelates with the constitution of identity groups and the role of civil society in setting the law into motion, with the manifold groups protected by the law considered to be competing for judicial attention and sympathy. The article was written for a broader project that compares labor law in three Mediterranean states.<sup>1</sup> The choice of accounting for the development of the equal opportunities law from the particular perspective of the interaction between law and social developments, suggests that despite cross-border transplantation of ideas and legal institutions, this body of law is strongly attached to local developments in the social sphere. Thus, describing this relationship is important for explaining the law, but at the same time it also provides a fascinating text on Israel’s many social cleavages and the role of law in

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1. The articles comparing Turkey, Greece and Israel appear in this volume of the *Comparative Labor Law and Policy Journal*.

mediating them (or making them more acute). Hence the legal system here is both an independent subject of study, as well as a text on the changing nature of Israeli society.<sup>2</sup>

In the first section of this article I will describe the formal black-letter development of the law, from 1948 to the present, outlining five stages in the development of the legal concept of antidiscrimination and equal opportunities. In the second section I will probe into several judicial decisions that discuss the problems of various categories of workers that suffer discrimination—women, Arabs (minority), homosexuals, religious and secular workers, people with disabilities, and workers who are summoned to military reserve duty. The third section summarizes the discussion and illuminates the usefulness of legal statutes and cases as a social text for those who wish to understand the changing nature of Israeli society.

The discussion depicts the move from a class-based system of interests' representation to a more fragmented identity-based and group-based system. It indicates that the emergence of a more rigorous system of guarantees against discrimination is reflective of the growing fragmentation of society, the emergence of a lively civil society as a means of compensation for the gradual fragmentation of class, and the role of law as a strategic vehicle for fostering the identities of social groups. Hence, in the current legal developments, we see signs of social weakness as well as adaptation and activism that engage in social transformation. Moreover, the study of groups reveals the intrinsic limitation of the equal-opportunities legal project. Consequently, while the development of this body of law transforms and advances domestic percepts of equality, it is at the same time a fundamental premise of the Israeli neo-Liberal economic system. The law may play a role in advancing equality claims, but at the same time it trumpets inequality and polarization.

## II. THE DEVELOPMENT OF ANTIDISCRIMINATION AND EQUAL OPPORTUNITIES LAWS IN ISRAEL

The development of the Israeli law in the area of employment discrimination can be broken up into five stages, each distinct in its view of the discrimination problem and the appropriate method of addressing it.<sup>3</sup> When considering these developments it is important not only to observe

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2. Guy Mundlak, *The New Labor Law as a Social Text: Reflections on Social Values in Flux*, 3 ISRAEL STUD. 119 (1999).

3. This distinction builds on Frances Raday's earlier attempt at periodization, at the time consisting of three stages. Frances Raday, *Women in the Labor Market*, in WOMEN'S STATUS IN ISRAELI LAW AND SOCIETY 64–116 (Frances Raday, Carmel Shalev & Michal Liban-Koby eds., 1995) (in Hebrew).

the changes *within* the Israeli legal regime, but also to assess them in relation to developments that have taken place worldwide. These comparisons highlight the fact that, already at an early stage, the Israeli statutes were among the more developed in the world.

*In the first stage*, equality was presented as a general principle, although not legally binding across the board. Moreover, the major emphasis was on gender discrimination and, to a lesser extent, the equality of minorities. This stage can be identified in The Declaration of the Establishment of the State of Israel (1948) and later in the Women's Equal Rights Law (1951).<sup>4</sup> Despite the importance of such references in the declaration and in one of the first statutes enacted by the Israeli legislature, this stage had only a marginal impact. A general claim only was presented; the problems of discrimination were not addressed in any specific way, nor was any effective remedy to them provided. Any effort to give these two documents some kind of quasi-constitutional standing in later litigation was rejected by the court.<sup>5</sup>

*The second stage* emphasized the need for protections, the need for protections to women. In 1954 the legislature passed the Women's Work Law, which protected women from dismissals at times of pregnancy, as well as from work with hazardous materials, and provided them other ancillary accommodations at work.<sup>6</sup>

The seeds of the *third stage* of equal-opportunities legislation appeared in statute already in 1959, in the Employment Service Law, which declared that it is impermissible to discriminate at the time of employment placements.<sup>7</sup> The statute prohibited discrimination on the basis of several grounds, inter alia—gender, age, religion, race, ethnicity, country of origin, beliefs and views, or party affiliation.<sup>8</sup> Although this prohibition of discrimination was limited to the stage of initial placements by the publicly administered employment bureau, its expressive importance should not be understated. Comparing the appearance of this statutory prohibition to other countries at the time, it is important to recognize that it came prior to the civil rights movement in the United States and similar social processes in other developed economies. Its introduction was influenced by the affiliation of one of the important advisors to the Ministry of Labor at the time—Tzvi Bar-Niv, who later was appointed as the first president of the

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4. The Declaration of Establishment of the State of Israel (1948), Women's Equal Rights Law, 5177-1951, 5 LSI 33 § 1 (1951-52) (Isr.).

5. HCJ 153/87 Shakdiel v. Minister of Religious Affairs [1988] Isr SC 42(2), 221 (Isr.).

6. Employment of Women Law, 5714-1954 §§ 6-9 (1954) (Isr.).

7. Employment Service Law, 5719-1959 § 42 (1959) (Isr.).

8. The Labor Court held that this rather long list is not exclusive and merely demonstrative. The Labor Court, for example, added a prohibition to discriminate on the basis of trade union membership. See Nat'l Labor Court 52/12-4 Gen. Histadrut and Sea Officers' Union v. Zim PDA 26:3 (1993) (Isr.).

Israeli Labor Court (established in 1969). Bar-Niv was also well-connected to the ILO, and he imposed emerging and, at the time, innovative policies that were discussed at international forums.<sup>9</sup> The third stage was further developed by the legislation of the Equal Wages for Men and Women (1964), which advanced the principle of equal pay for equal work.<sup>10</sup>

The two statutory provisions remained almost dormant for several years. However, during the 1970s the National Labor Court contributed two important cases regarding gender equality. In the first, the court held that a collective agreement in El-Al (Israel's air carrier) that provided separate promotion schemes for men and women was void on the basis of a general doctrine of public policy.<sup>11</sup> The agreement allowed men to be promoted to the top-ranking status of purchaser, while women were denied this possibility and were granted a special "cosmetics allowance" instead. The court held that "separate but equal is never equal," drawing on the powerful rhetoric of the American courts in a different context. Similarly, the court also held that separate wage tables in a collective agreement, one for men and the other for women, were void because they contradicted public policy, despite the slim differences between the two wage scales.<sup>12</sup> The court held that the problem lay not with the magnitude of the wage gap, but with the mere assumption that such separate wage scales are permissible. In these two decisions the court laid on the table highly important principles—some of which were "radical" in terms of jurisprudence and social policy. First, the court was willing to intervene in the autonomy accorded to the social partners in collective bargaining. In no other area of labor law was the court willing to intervene in this autonomy. On the contrary, the general policy of the court was to uphold and secure this autonomy in light of individual claims that might undermine collective quid pro quo.<sup>13</sup> Second, the court was willing to apply the public principle of equality in the private sphere, although the infusion of public values into the private sphere was methodologically developed only twenty years later by the Supreme Court.<sup>14</sup> Despite these remarkable achievements, for the time, hardly any cases on employment discrimination were brought to the court until the late 1980s.

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9. GUY MUNDLAK, *FADING CORPORATISM: ISRAEL'S LABOR AND INDUSTRIAL RELATIONS IN TRANSITION* ch. 3 (2007).

10. Male and Female Equal Pay Law, 5756-1996 (1996) (Isr.).

11. Nat'l Labor Court 33/3-25, *Comm. of Airline Personnel and El-Al Israel Airline Carrier v. Edna Chazin* PDA 4:365 (1973) (Isr.).

12. Nat'l Labor Court 37/71-3 *Elite v. Lederman* PDA 9:255 (1978)

13. See MUNDLAK, *supra* note 9, at ch. 4, 5.

14. The Supreme Court developed the indirect adaptation of human rights into the private sphere in the early 1990s. CA 294/91 *Chevra Kadisha v. Lionel Kastenbaum* [1992] lsrSC 46(2) 464 (Isr.).

Toward the end of the 1980s the law of equal opportunities was reinvigorated in the courtroom and by the legislature. A case on equal retirement age for men and women was brought to the court by the newly founded NGO, "The Israel's Women's Network." The case reached the Supreme Court, which intervened, yet again, in a collective agreement that differentiated between the retirement age of men and women.<sup>15</sup> During the court proceedings a new statute, the first since 1964, was passed in the Knesset, holding that retirement age must be equal for men and women, but permitting women to choose between the early retirement age that was common in collective agreements and the age determined for men (i.e., women could choose to retire between the ages of 60 and 65).<sup>16</sup> A year later the cornerstone of the equal opportunities legislation was enacted—the Equal Opportunities at Employment Law (1988)—prohibiting discrimination in all stages of the employment relationship (from hiring to dismissals and retirement), except when there are bona-fide occupational qualifications (BFOQ) that justify distinctions.<sup>17</sup> At first the law was limited to a prohibition on the basis of gender, marital status, and parenthood.

Following the new legislation a trickle of litigation began. This process of litigation can be characterized by three relevant features. First, most of the cases were brought to court by NGOs and cause lawyers. Second, most of them were high-visibility cases of a precedent caliber. Third, developments in litigation were intertwined with developments in legislation. As in the contestation of the differential retirement age, the development of the new body of law was for the most part a joint project of the two branches of government. For example, litigation on equal rights for same-sex partners opened the way for an expansion of the Employment (Equal Opportunities) Law, to which a prohibition of discrimination on the basis of sexual orientation was added.<sup>18</sup> A couple of years later a similar process took place with regard to discrimination on the basis of age.<sup>19</sup> These three features are interrelated. A surge of activity by NGOs brought about a stronger reliance on legal strategies. Precedent cases served as a method of bringing the problem to public attention and constituting the

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15. HCJ 104/87 Neomi Nevo v. Nat'l Labor Court [1990] IsrSC 44 (4) 749 (Isr.).

16. Male and Female (Equal Retirement Age) Law, 5747-1987 (1987) (Isr.).

17. Employment (Equal Opportunities) Law, 5748-1988 (1988) (Isr.).

18. Nat'l Labor Court 53/160-3 El-Al Airlines v. Yonatan Danilowitz, PDA 26:339 (1993) (Isr.); HCJ 721/94 El-Al Airlines v. Yonatan Danilowitz [1994] IsrSC 48(5) 749 (Isr.); Employment (Equal Opportunities) Law, 5748-1988 Amendment 1 (1992) (Isr.).

19. Nat'l Labor Court 58/3-118 Efraim Rekant v. El Al, PDA 28:581(1995) (Isr.); reviewed by HCJ 6051/95 Efraim Rekant v. Nat'l Labor Court, [1997] IsrSC 51(3) 289 (Isr.); HCJ 4191/97 Efraim Rekant v. Nat'l Labor Court [2000] IsrSC 54(5) 330. Employment (Equal Opportunities) Law, 5748-1988 Amendment 2 (1995) (Isr.).

identities of the groups. However, once the initial claims were settled, very little day-to-day adjudication of discrimination claims followed.

Consequently, on the one hand the construction of the new body of law started moving exponentially faster than ever before, but on the other hand it still remained a sideshow in the more general field of labor law, a matter for high-visibility cases rather than a practical tool in the hands of discriminated employees. By 1995, many groups were already recognized in the Equal Opportunities in Employment Law (including gender, personal status, sexual orientation, age, race, religion, country of origin, views, affiliation with political party, participation in military reserve duty; in other statutes there are similar prohibitions with regard to disability and a prohibition of genetic discrimination).<sup>20</sup> At the same time, the evidence indicates that the law was still in its infancy. What caused this gap between the law “on the books” and “in action”? The answers lie with the limits of the antidiscrimination principle as a strategy for equality. There are three plausible components to this explanation. First, the developing law was riddled with an internal tension between the prohibition of discrimination and the recognition of BFOQ. Second, the law required many personal resources, psychological and economic, for individuals to seek adjudication. Third, prohibition of discrimination does not adequately address problems of pre-market discrimination or other complex patterns of discrimination that are strongly embedded in Israeli society and culture.

With recognition of these shortcomings of the equal opportunities legislation came the emerging *fourth phase* of the Israeli law—the move toward constructed equality.<sup>21</sup> Not sufficing with the prohibition of discrimination, this phase is characterized by attempts to overcome the obstacles of implementation, coupled by a higher degree of suspicion toward markets and their power to iron out well-embedded discriminatory practices. The practices advocated in this fourth phase include comparable worth, affirmative action, broad accommodation mandates, and a requirement for a proactive approach by employers to undo discrimination. Comparable worth was introduced by legislation in 1996, undoing the previous law on equal wages for men and women.<sup>22</sup> Affirmative action has been introduced piecemeal and is still not a general requirement. Instead,

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20. Employment (Equal Opportunities) Law, 5748-1988, Amendment 2 (1995) (Isr.); Equal Rights of Persons with Disabilities Law (No. 5758 of 1998) (Isr.); Genetic Information Law, 5761-2000 (2000) (Isr.).

21. I am drawing here on the terminology and analysis of John Donohue III, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583 (1994).

22. Male and Female Equal Pay Law, 5756-1996(1996) (Isr.).

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various requirement of “adequate representation” appear in statutes.<sup>23</sup> Many of these deal with the representation of women, but later a requirement of equal representation was also introduced with regard to the Arab minority, immigrants from Ethiopia, and people with disabilities. Most of the adequate representation requirements are limited to the public sector, although in some contexts (such as people with disabilities) they have been extended to the private sector as well. The clearest example of an accommodation mandate can be found in the Law on People with Disabilities (1998), which adopted the American ADA model and required reasonable accommodation of people with disabilities in the workplace.<sup>24</sup> Attempts to introduce through common law adjudication a general requirement of accommodation, *inter alia* to women and parents, has been rejected thus far by the courts.<sup>25</sup> Other examples of constructed equality can be identified in the recognition that workplace discrimination is part of a broader hegemonic regime. Thus, the recent Law on the Prevention of Sexual Harassment promoted the argument that the law should focus on undoing violence to women and ensuring human dignity at work instead of on equality.<sup>26</sup> The Law on Equal Rights for People with Disabilities embedded the labor market issues in a broader framework of equality that included equal access to public transportation, housing, and more.<sup>27</sup>

Despite the vast project undertaken in the fourth phase, its accomplishments have not yet been fully demonstrated. In some areas change has been immediate although still somewhat unsatisfactory. For example, following the law on affirmative action for women, ministries continued to disregard the requirement, holding that no women applied for a job and hence adequate representation could not be achieved. Once the court held that public companies must take a proactive approach and seek

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23. Civil Service Law (Appointments), 5719-1959 § 15A (1959) (Isr.); Women’s Equal Rights Law, § 6c (1951, as amended in 2001) (Isr.); Equal Rights of Persons with Disabilities Law (No. 5758 of 1998) (Isr.).

24. Equal Rights of Persons with Disabilities Law (No. 5758 of 1998) (Isr.). On the transplantation of the American ADA to the Israeli legislation, see Aric Rimerman & Tal Arten-Bergam, *Legislating Rights For People With Disabilities and its Implementation in Israel: Future Trends and Prospects*, 69 SOCIAL SECURITY 11 (2005) (in Hebrew); Stanley S. Herr, *Reforming Disability Nondiscrimination Laws: A Comparative Perspective*, 35 U. MICH. J.L. REFORM 305 (2002).

25. Petition filed to the HCJ 5235/01 Tenanbaum et al. v. The Head of the Police [2001] IsrSC (petition filed in 2001 and cancelled at the recommendation of the court). The petition is discussed by Dafna Hacker & Michal Frenkel, *Active Parenthood and Equal Opportunities at Work: The Need for Changing the Nature of the Labor Market*, 11 LAB., SOC’Y & L. 275 (2005) (in Hebrew).

26. Prevention of Sexual Harassment Law, 5758-1990 (1998) (Isr.). On the shift from equality to dignity, see Orit Kamir, *Dignity, Respect and Equality in Sexual Harassment Law: Israel’s New Legislation*, in NEW DIRECTIONS IN SEXUAL HARASSMENT LAW 561 (Catharine MacKinnon & Reva Segal eds., 2003).

27. Equal Rights for Persons with Disabilities Law § 19 (No. 5758 of 1998) (Isr.). On the need to expand beyond the matter of employment see Ariela Ophir & Dan Ornstein, *Equal Rights for Persons with Disabilities Law: Emancipation at the end of the 20<sup>th</sup> Century*, in THE GOLDBERG BOOK 41 (Aharon Barak et al eds., 2001) (in Hebrew).

female candidates for their board of directors until adequate representation has been reached, the share of women on the boards of publicly-owned companies surged from 5% to 36%.<sup>28</sup> The downside of this development was that “adequate representation” was achieved for the most part to an extent on boards of directors, but adequate diffusion to the civil service as a whole did not take place. Moreover, the evidence regarding the views of women on the board indicate that their power and interest in bringing in “a different voice” are rather limited.<sup>29</sup> Other areas of the new legislation remain relatively underdeveloped at present, for example the requirement for reasonable accommodation or comparable worth.

Despite the continuously slow implementation of the law, it seems that in tandem with the development of the constructive equality phase, previous phases have also begun to receive more attention. There has been considerably more case law since the turn of the 21st century, and the issues of discrimination and equal opportunities have repeatedly appeared on the court's docket.<sup>30</sup> Moreover, in contrast to the impasse of the third stage, much of the new case law is currently being written in the lower labor courts, and not in precedent cases of the National Labor Court and the Supreme Court. As in the previous phase, the role of NGOs and cause-lawyers remains of utmost importance in bringing these cases to court, but some of the litigation is already being considered “routine.”

*The fifth and final stage* is somewhat fragile and less distinct than the others, but it is significant nevertheless. Over the last few years, the courts have alluded to a general principle of labor market equality as a means of resolving various allegations of discrimination. Formally, this would seem to bring the legal development to a closure, as this was also the first phase in the evolution of the law. However, now that the general principle of equality *follows* after the other phases it has come to mean something rather different. It is being used by the courts when statutes (or even prior case law) do not provide targeted responses to legal challenges. For example, in a case regarding the use of affirmative action (adequate representation) in the National Insurance Institute (NII), it was found that the law requiring adequate representation for women covered all the levels of employment in the NII, except for one (the vice-directors). The Supreme Court held that the general principle of equality extends the particular appearances of

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28. The data on this matter has been compiled in a publication of the Israeli Women's Network. TAL TAMIR, *WOMEN IN ISRAEL 2006: BETWEEN THEORY AND REALITY* (2007) (in Hebrew).

29. Daphna Izraeli, *Gendered Politics in Israel: The Case of Affirmative Action in the Appointment of Women to Boards of Directors*, 10 *DEMOCRATIC CULTURE* 215 (2006) (in Hebrew).

30. Guy Mundlak, *Is the Law on Equal Opportunities Working?*, in *LAW, SOCIETY AND CULTURE: DOES LAW MATTER?* (Dafna Hacker & Netz Ziv, eds, forthcoming 2009) (in Hebrew).



adequate representation in the statute.<sup>31</sup> The labor court used a similar strategy in a case where a new female worker or candidate was dismissed for reason of pregnancy. The Women's Work Law extends protection against dismissals to workers who have been employed for more than six months. The Labor Court held that above and beyond the statute there is a general principle of equality that prohibits discrimination more generally.<sup>32</sup> Consequently, the courts have made the particular statutes on equal opportunities mere illustrations and examples of the broader principle. The holes in the dense net of rules prescribed by statutes and case law have therefore been filled by a general target of equality, and one that has already become part of the (partially written) Israeli Bill of Rights.

Needless to say, the closure of the legal developments by the general principle of equality does not render problems of enforcement, or the value-laden dilemmas concerning how far the equality project should be taken, redundant. It merely provides an even denser set of norms that favor the view that markets must step aside and clear the way for the equality project. Some may view this development as a virtue, others as a vice. Regardless of one's normative stance, the project of equal opportunities remains only partially fulfilled, even if more elaborate, sophisticated, and dynamic than ever before.

As noted earlier, to understand the power and weakness of the equal opportunities project we may choose to observe the problems associated with the legal process, or those related to the vagueness of the normative stance underlining the value of equality. While I do not wish to underplay the importance of both points of view, in my opinion a view of the project from the perspective of groups and associations is particularly useful. The way collectivities and organizations in civil society act to advance the law on the one hand, and to reap its fruits on the other, channels the law's development. Observing the interplay between law and individuals, collectivities and civil society, further allows a better understanding of the interplay between the social and legal systems in Israel.

### III. REPRESENTATIVE CASES AS A SOCIAL TEXT

A closer look at some of the leading cases reveals the achievements and limitations of the equal-opportunities project. At the same time it also tells the story of the many cleavages that cut across Israeli society. I will use the cases to demonstrate both aspects, hence also their

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31. HCJ 2671/98 Israel Women's Network v. Minister of Labor and Welfare [1998] IsrSC 52(3) 630 (Isr.).

32. DC (TA) 56/3-2018 Jackline Yonai-Salim v. Gold Shop Inc [1998] IsrDC (Isr.); Nat'l Labor Court 30630/98 Dr. Alma Levi v. Redd Ramot Advanced Tech. Inc [2002] (Isr.).

interconnectedness. Generally, the cases demonstrate that some cleavages do not easily lend themselves to treatment by the equal-opportunities project. Moreover, they show that there is a complex relationship of complementarity and rivalry between the equal-opportunities project and other means of social transformation, most notably the classic means—collective labor representation.

A. *Equality for Whom? Who is In and Who is Out of the Equal Opportunities Project?*

It was noted in the first section that the Law on Equal Opportunities in Employment originally extended protection only to women and parents. Gradually, other groups were recognized as requiring the (negative) protection or (positive) support of the law. In comparison to other states, Israel has reached a rather expansive list of groups recognized as victims of discrimination. However, the compilation of the list and its implementation reveals that while some groups have succeeded in advancing significant claims within the equal opportunities framework and have capitalized on the legal gains in the labor market for the group as a whole, others have not. Among those who haven't are Jews who are discriminated against on an ethnic basis ("Mizrachim"), new immigrants, and even the Palestinian citizens of Israel (the Arab minority).

Perhaps the group that suffers the most discrimination among those recognized in the Employment (Equal Opportunities) Law is the Arab minority in Israel.<sup>33</sup> However, it appeared in the law only in 1995. This in itself reflects the Arab minority's more difficult situation. As will be discussed in the following subsections, it seems that a group must succeed in mobilizing change *before* it can be expected to gain legal recognition as a "group that suffers discrimination." The change in the statute came at a time when the Arab population started using the legal system more actively to pursue rights claims. However, little has been done in the field of discrimination in employment, and therefore the case law on discrimination against Arabs is scanty. Of particular interest is the single case discussing the requirement for prior military service in hiring.<sup>34</sup> In this case, the state brought charges against a temp-work agency that sought to hire only applicants with prior military service. The regional labor court held that prior military service is a requirement with a disparate impact on the Arab

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33. On the extent of discrimination of Arabs in Israel, see Yitchak Haberfeld & Yinon Cohen, *Development of Gender, Ethnic, and National Earnings Gaps in Israel: The Role of Rising Inequality*, 36 SOC. SCI. RES. 654–72 (2007); BENJAMIN WOLKINSON, ARAB EMPLOYMENT IN ISRAEL: THE QUEST FOR EQUAL EMPLOYMENT OPPORTUNITY (1999).

34. DC (TA) 001308/99 State of Israel v. Tafkid Plus Inc et al. [2003] IsrDC (Isr.).

minority, and may even serve to disguise disparate treatment. Hence, limiting hiring only to candidates who have performed military service is discriminatory, except if there is a BFOQ that justifies the criterion. While some of the temp agency's clients needed workers with a special security approval, others did not, and the court held that it could therefore hire Arab workers as well.

The military service case only scratches the surface of the social embedment that characterizes the discrimination against Arabs in the Israeli labor market. In fact, direct discrimination is pervasive and often merges with pre-market discrimination.<sup>35</sup> Allegedly "legitimate" factors in hiring, such as prior schooling and experience in the labor market, already reflect entrenched patterns of discrimination. Similarly, prior military service is often used as a barrier to hiring Arabs. Some workplaces and even sectors shut themselves off to Arab workers, hence channeling the Arab population into low-status and low-paying jobs.<sup>36</sup> Many of these factors are difficult to tackle in a typical employment discrimination lawsuit. Generally, discrimination in hiring and job segregation is difficult to prove with regard to all bases of discrimination. Yet, the problem of pre-market discrimination makes it necessary to address discrimination in other fields of social and economic rights, such as schooling and general infrastructure.<sup>37</sup> The Labor Court has yet to develop doctrines that draw on patterns of discrimination outside the labor market as justification for intervention in employers' decisions. These barriers may therefore account for the lack of attention to litigation of employment discrimination cases even among the NGOs advocating the rights of the Arab minority. The paucity of litigation in this field is therefore illustrative of the antidiscrimination project's intrinsic limitations, which shorten its reach and attenuate its efficacy as a vehicle of change.

By contrast, other groups, which suffer from a lesser problem of discrimination, have succeeded in gaining more leverage from the law of equal opportunities in employment. An interesting contrast to the Arab minority is provided by the group of soldiers that perform reserve duty. Reserve duty in the military is generally compulsory, mostly for (Jewish) men, although the share of the population that takes part in reserve duty is

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35. Pre-market discrimination describes unequal ability to develop the necessary labor market skills, caused by factors that do not stem from the labor market itself, such as discrimination in schooling or unequal division of labor in the household.

36. See WOLKINSON, *supra* note 33.

37. This is more typical of the discrimination litigation carried out by NGOs representing the Arab minority. Cf. HCJ 6488/02, Nat'l Committee of Arab Mayors et. al. v. Director's Committee for Fighting Unemployment in Settlements with High Unemployment Rates et. al. [2004] lsrSC (Isr.); HCJ 2773/98 and HCJ 11163/03, High Follow-up Committee for the Arab Citizens in Israel et. al. v. Prime Minister of Israel [2004] lsrSC (Isr.).

in decline and the burden is unevenly distributed.<sup>38</sup> For a group of men who take an active role in combat-related reserve duty, this can be an onerous burden, with a month or more of reserve duty every year.<sup>39</sup> As the burden became less universal over the years, some employers adopted a preference against workers who need to frequently abandon their job because of reserve duty. This problem was addressed rather extensively in the Employment (Equal Opportunities) Law, prohibiting discrimination on the basis of participation in reserve duty.

Moreover, the Law of Discharged Soldiers has been amended so as to prohibit dismissals at the time of reserve duty, for any reason.<sup>40</sup> This prohibition is only matched by the prohibition of dismissals of women at time of pregnancy and maternity leave.<sup>41</sup> In fact the two types of prohibition are often presented in the Israeli discourse as an "equality" arrangement that addresses the allegedly similar problems of men and women in Israeli society. In both contexts, adjudication was quick to follow and members of these two groups have with relative frequency had recourse to the administrative agencies and the courts, claiming unlawful dismissals. The National Labor Court has also expanded the discretion accorded to the Committee that is responsible for approving dismissals of reserve soldiers, allowing it to prohibit dismissals even if they are not directly related to the reserve duty itself.<sup>42</sup>

The relatively good position of reserve soldiers in statute and litigation should be contrasted to that of pregnant women, and more importantly to that of the Arab minority. The comparison to women highlights the interesting analogy that has been forged, in both law and politics, between pregnancy and reserve duty, treating the two alike as part of a national demographic and security-related objective.<sup>43</sup> The protection accorded to reserve soldiers is actually used as justification for upholding the relatively stringent statutory prohibitions on the dismissals of women at the time of pregnancy and maternity leave. However, despite the analogy, men on

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38. For an indication of the relatively small share of employees who are required to participate in reserves duty, see the survey conducted by the Ministry of Industry, Commerce and Employment, *Businesses whose Workers Participated in Active Reserves Duty in 2007* (2008). Informal estimates cite that only 10% of the population at the relevant age take part in reserves duty. The figure is reported in the Knesset's Research Paper, *The Hardship of Employees on Reserves Duty* (2003).

39. The Reserves Duty Law (2008) seeks to limit the number of days of reserve duty to which a worker can be called, but this part of the new law will only come into effect in 2010.

40. Discharged Soldiers (Reinstatement in Employment) Law, 5709-1949 § 41(b) (1949) (Isr.).

41. Employment of Women Law, 5714-1954 §§ 6-7 (1954) (Isr.).

42. Nat'l Labor Court 347/06 State of Israel v. Tana Industries Ltd. (2007) (Isr.).

43. On the coupling of the two, cf. HCJ 335/76 Lifschitz-Aviram v. Israel Lawyers Assoc. [1977] IsrSC 31 (1) 250 (Isr.); Frances Raday, *On Equality, in WOMEN'S STATUS IN ISRAELI LAW 19* (Frances Raday, Carmel Shalev & Michal Liban-Kooby eds., 1995) (in Hebrew); Omi Morgenstern-Leissner, *Hospital Birth, Military Service and the Ties that Bind Them, The Case of Israel*, 12 NASHIM: A JOURNAL OF JEWISH WOMEN'S STUDIES & GENDER ISSUES 203 (2006).

reserve duty still receive more recognition by the public and in case law than women. Although the prohibition of women's dismissals for reasons related to pregnancy has been on the law books for years, its enforcement has been uneven; men, on the other hand, have succeeded in gaining very rapid recognition, especially at times of military tension.

A comparison with the Arab minority is even more striking. The Arab minority, which is denied employment opportunities because they do not have prior military service, receives protection in the same statute that protects active military reserve soldiers. Nevertheless, while the former have not succeeded in drawing on the equal opportunities legislation, the latter succeeded in doing so very rapidly.

In the comparison to Arabs and women it should be emphasized that military service and reserve duty provide a high level of social networking that is beneficial in the labor market as well. Furthermore, there are also workplaces that value participation in active reserve duty as a display of civic virtue. So, while it would be rare to hear an employer who values pregnancy or being without prior military service as an "added qualification," the implications of taking part in reserve duty are more mixed and, some would argue, with a tilt toward the positive side. Pre-market discrimination against Arabs is a difficult issue to raise in employment discrimination cases, because different levels of schooling are considered a "legitimate" factor in the labor market itself. The flip side of the coin is that positive social networking that results from reserve duty is also discounted in discrimination claims, because direct discrimination against an individual in reserve duty should not be overlooked because of other positive externalities. On the face of it, both parts of the equation are correct, but they highlight the equal-opportunities project's very partial reach in trying to redress social biases.

Despite the fact that workers on reserve duty and Arab workers appear to be protected evenly by the same statute, the effects of the law are rather different. The recognition of workers who must attend compulsory reserves as a group that suffers discrimination proved to be more effective than the recognition of the Arab minority, because the nature of equal-opportunities litigation is more appropriate for the type of discrimination suffered by workers on reserve duty. Their general strength in society, complemented by a very specific form of discrimination in the labor market, ensures a relatively higher rate of effectiveness. By contrast, the weaker social and economic status of the Arab minority, coupled with the overreaching inequality they experience in education, infrastructure, and budgets, induces a lower level of legal effectiveness.

B. *Equality for Whom? Labor Market Asymmetries*

One of the questions that often appears in the discussion of the equal-opportunities project is whether the law must be “gender- (or race, or other groups) blind,” or, rather, keep its eyes wide open to prevailing differences. In this section I would like to address this dilemma from one particular perspective—whether discriminatory preferences are treated symmetrically. Otherwise stated, should a company that prefers to hire only men (Jews) be regarded in the same manner as a company that prefers to hire only women (Arabs).<sup>44</sup> While male- (Jewish-) only policy is generally regarded as discriminatory (unless there is an exceptional BFOQ justification), the reverse (female/Arab only) policy is less obvious. The justifications that can be extended to these kinds of preferences are similar to those voiced in the context of affirmative action—a need to redress past injustice; open opportunities for groups that are constantly excluded; to allow the formulation of identity groups; or to present a role-model for disadvantaged groups, which extends their belief in their possibilities and opportunities. While in the contexts of gender and nationality/ethnicity, for example, it is quite clear which is the stronger and which the weaker group, I would like to demonstrate the applicability of this dilemma in a more ambiguous context—that of religion. That is, discrimination against religious (Jews) in comparison to discrimination against secular (Jews). My intention in focusing on the Jewish population is to avoid the ethnic/national dimension.

The religious-secular cleavage is of utmost importance in understanding Israeli society. It reflects competing visions of the nature of the Jewish state, as well as of what it fundamentally means to be Jewish (from a religious, historical, or cultural standpoint; a uniformly objective or individualized subjective view). It has been an animating force in important political and social developments, most notably—the impasse in establishing a constitution for Israel upon its foundation.<sup>45</sup> Ever since, religion has been one of the most hotly contested social spheres. Consequently, the role of law in this sphere has been controversial as well. The question regarding the role of law is all the more difficult because of the relationship between the religious law and the state law. The state (secular) law can be liberal and pluralistic, but in this it must accept a body

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44. The question of symmetry rises in various contexts, ranging from affirmative action to preferences in hiring, segregated schooling for women or minorities, accommodation mandates and more.

45. Giora Goldberg, *Religious Zionism and the Framing of a Constitution for Israel*, 3 ISRAEL STUDIES 211 (1998); Shuki Friedman & Amichai Radzyner, *The Religious Community and the Constitution: What Can History Teach Us?* (Israeli Democracy Institute Policy Paper No. 69 (2006) (in Hebrew)).

of law that is based on God's command, neither liberal nor pluralistic. There is an embedded asymmetry in the construct of the legal debates.<sup>46</sup>

The social and legal dilemmas that pertain to the religious-secular cleavage in Israel are also reflected in the labor market. However, shared intuitions regarding other categories of groups that suffer discrimination, such as gender and ethnicity, do not replicate well in this context. Women are clearly discriminated against relative to men, and Arabs are discriminated against relative to Jews. The elderly are discriminated against compared to the young, homosexuals encounter difficulties not experienced by heterosexuals, and the disabled need accommodation mandates to compete with the able. The situation of secular and religious Jews cannot be neatly ordered in the same manner. Israel's Jewish population is spread across a continuum, one pole of which is ultra-Orthodox, the other secular. Along the continuum there are many groups and many shades.<sup>47</sup> There is no clear-cut distinction between categories along the continuum, and it is also difficult to identify whether a group is "strong" or "weak" with respect to the labor market. Even if we assume that the religious population is numerically a minority, this is compensated by religious tilt in Israel's self-definition as a Jewish state. The question of discrimination in this context, at least as it has been played out in the courtroom thus far, is mostly one of tolerance and accommodation. While the question is applicable to all groups along the continuum, the judicial treatment of the two groups is asymmetric.

One of the problems the labor courts have dealt with is the difficulty encountered by religious workers who are required to work on the Sabbath. The law permits the employment of workers on Sabbath only by special permission from the Ministry of Labor.<sup>48</sup> Yet, even if the employer receives such permission, does the law permit a preference for workers who are willing to work on the Sabbath? The labor court applied the usual standard of discrimination on this issue, and held that such a preference can only be permitted if it is necessary for the job.<sup>49</sup> Yet, the court held that the employer's convenience in sorting weekend shifts does not in itself justify such a preference. In that particular case some of the workers were willing

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46. Gila Stopler, *The Conflict Between Freedom of Religion and Association and Equal Employment Opportunities: A Comparative Look*, 11 LAB., SOC'Y & L. 323 (2005) (in Hebrew).

47. Ultra-Orthodox Jewish men present particular problems, which Orthodox Jews do not share. Most of them do not serve in the military and have no secular schooling. They turn to studying in a Yeshiva, either because they view religious schooling as a vocation or because they want to avoid military service. Their problems are distinct and I will not deal with them here. On ultra-Orthodox in the labor market see Daniel Gottlieb, *Poverty and Labor Market Behavior in the Ultra-Orthodox Population in Israel* (Van-leer Program on Economy and Society, Research Paper No. 4 (2007) (in Hebrew)).

48. Hours of Work and Rest Law, 5711-1951 12 5 LSI 1125 § 12 (1951) (Isr.).

49. Reg'l Lab. Court (TA) 4785/02 Kashni v. Mun. of Ra'anana (2002) (Isr.).

to work on the weekend (particularly given that weekend shifts pay more), and the court required the employer to accommodate the religious worker's needs in light of his religious beliefs. In another case the court found that an applicant for a job in a high-tech company was discriminated against when the employer found during the job interview that he was religious and unwilling to work on the Sabbath.<sup>50</sup> High-tech companies' need to be synchronized with a parent-company and commercial partners in time zones around the world was not found to be sufficient justification to uphold the employer's preference for a nonreligious worker. In both cases the refusal to work on the Sabbath was not treated as merely a preference, but as a strict requirement mandated by religious belief, which the employer had to accommodate. Absent a general accommodations mandate in Israeli law, the court applied the same logic (albeit not explicitly) that is applied to people with disabilities, viewing accommodation mandates as the legal remedy to what an employer may deem to be a disability. In a different type of case, the court also held that the secular school system cannot discriminate against a teacher on the basis of his affiliation with a Christian missionary sect, as long as he does not attempt to recruit children or otherwise bring his religious views into the workplace.<sup>51</sup>

A different approach can be seen in the court's treatment of cases in which workers in a religious organization did not conform to the expected religious requirements. In one case, a kindergarten teacher in an independent ultra-Orthodox daycare was dismissed when it was discovered that her husband was not observing religious duties and that she had refused to send her own children to an ultra-Orthodox school.<sup>52</sup> She herself was religious, and it was not disputed that in her work she conformed to all the religious duties and instructed the children accordingly. The court held that the dismissals were unlawful, but only because they did not comply with certain administrative rules regarding the employment practices of teachers in independent religious schools. At the same time, the court held that the dismissals were not discriminatory, and that a religious group can impose such requirements on its workers. In a different case an unmarried kindergarten teacher in an ultra-Orthodox day-care was dismissed after finding out she was pregnant.<sup>53</sup> The court upheld the employer's view that she was not dismissed because of pregnancy, or because of her marital status, but because she had violated the moral code. It was claimed that the educational project would be disrupted given this state of affairs. The court

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50. Reg'l Lab. Court (BS) 1777/99 Ephraim Oved v. Lam Research Ltd. (2002) (Isr.).

51. Reg'l Lab. Court (TA) 7899/02 Ze'ev Bern v. Mun. of Petah Tikvah (2005) (Isr.).

52. Reg'l Lab. Court (NZ)1693/98 Rosenbaum v. State of Israel, Ministry of Educ. (1999) (Isr.).

53. Reg'l Lab. Court (TA) 1298/03 Le'ah Rahhum v. State of Israel, Ministry of Labor and Welfare (2006) (Isr.).



adopted the group's moral view, but neglected to see its consequences for the individual woman at stake. An unmarried ultra-Orthodox woman who is pregnant suffers from multiple forms of discrimination (unwed, lack of experience in secular establishments, and ostracism in religious establishments) and is unlikely to find a job in either a religious or secular workplace.

Placing the two groups of cases side by side makes it clear that there is a clash between the secular liberal project of equal opportunities and the set of religious duties. The court requires tolerance and even accommodation from the secular employer, but accepts exclusion and closure on the side of the religious employer. This asymmetric treatment is not necessarily wrong but it encapsulates much of the tension between secular and religious Jews in Israel. More generally, it displays the problem of pluralistic societies in accommodating non-pluralistic groups within them. An option of strict separation between state and religion would have mandated a more symmetric response to these problems. The Israeli solution currently resists strong separation, favoring religious closure and counting on secular tolerance. However, this tilt does not resolve the fragile status quo between religious and secular Jews, and is in fact a small part of its contested imbalance.

The comparison between religious and secular resonates with the previous comparison between military service and gender/ethnic-based discrimination. In both comparisons, despite the use of universal concepts of discrimination and relatively identical legal instruments, the guarantee of equal opportunities is applied differently. Consequently it serves as a legal project that trumpets difference instead of underscoring equality. For liberals who deem the equality of individuals to be a simple project of blindness to color, gender, or religion, this should be particularly worrying. However, the critical assessment outlined here does not stem from a normative liberal point of view. The analysis demonstrates that even if we believe that equal-opportunities legislation should be sensitive to context and aware of how discriminatory practices are socially embedded, there are competing claims of equality. In translating the equal formulas of the law to multifaceted reality, the courts do not (or cannot) generally upset the social context. Because the equal-opportunities project for the most part isolates discrete events and does not (or cannot) address the broader social framework, its outcomes can be polarizing rather than equalizing.

### *C. Equal-opportunities Legislation—Reflective or Constitutive?*

The portrayal of the equal-opportunities legislation as a trumpet of existing social cleavages and power relations may seem to be

counterintuitive. It is commonly thought that equal-opportunities legislation is directed at mobilizing social perceptions and remedying prevailing biases in society. According to this image, an enlightened legislature or court promulgates a rule that prohibits discrimination against a group that is otherwise being systematically discriminated against in the labor market. Thus, the authors of law are thought of as being a step ahead of societal norms, demonstrating enlightened leadership, and abolishing discriminatory practices. Law plays a *constitutive* role. Assuming the law is effective, we expect to see it change prevailing employment practices, given that employers wish to comply with the law to prevent sanctions, or merely are willing to adopt and apply newly enacted norms. The discrepancy between the different groups can be sorted out once we consider the equal-opportunities legislation as an outcome of social change. Otherwise stated, societal norms lead to legislation (or judicial decisions), hence law is *reflective* of social change.

These two views need not be mutually exclusive, and we can assume that a state of equilibrium exists. Constitutive norms that are detached from societal norms are likely to be ineffective or of low impact, in comparison to reflective norms. At the same time, social change benefits from law's expressive role. Moreover, particularly in the context of equal opportunities for marginalized groups, the law's constitutive function is to change not merely employers' behavior but also the various groups' perception of their group interests and identity.

Processes of change in Israel help identify how the two roles interact. This is most evident with regard to two groups—gays and lesbians and the “elderly” (designating any form of age-based discrimination). For each of these groups a leading case in the court highlighted the question regarding the sequence of social change.

The first amendment to the Equal Opportunities Law (1988) in 1992 was lobbied for by an NGO representing gays and lesbians, which succeeded in inserting a prohibition of discrimination on the basis of sexual preference.<sup>54</sup> At the time of the change, an air-crew member in El-Al brought a case to the labor court asking to “level up” the collective arrangement that grants flight tickets to partners, including non-married but

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54. See *supra* note 18. Yuval Yonai, *The Law on Homosexuality: Between History and Sociology*, 4 L. & GOV'T 531 (1998) (in Hebrew); Amit Kama, *From Terra Incognita to Terra Firma: The Logbook of the Voyage of Gay Men's Community into the Israeli Public Sphere*, 38 J. HOMOSEXUALITY 133 (2000); Alon Harel, *The Rise and Fall of the Gay Israeli Revolution*, 31 COLUM. HUM. RTS. L. REV. 443 (1999); Aeyal Gross, *Challenges to Compulsory Heterosexuality: Recognition and Non-Recognition of Same-Sex Couples in Israel*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 391 (Robert Wintemute & Mads Andenas eds., 2001).

cohabiting partners, to same-sex partners.<sup>55</sup> The ruling in the case, which spanned three different tribunals (lower labor court, the National Labor Court and the Supreme Court sitting as High Court of Justice), held that the collective arrangement is discriminatory on the basis of sexual orientation. Focusing on the Supreme Court's decision, three positions appear. Justice Kedmi's dissenting view held that there is a relevant difference between the traditional couple, composed of a man and woman, and same-sex partnership. Consequently, the distinction is not voided by the requirement of equal treatment, as the two types of partnership are not alike. Among the two judges that found the arrangement to be discriminatory yet another distinction prevailed, which is more important in the present context. Justice Barak held that the discriminatory arrangement must be remedied because of the amendment to the Equal Opportunities in Employment Law. That is, for Justice Barak the law was constitutive. By contrast, Justice Dorner held that the legislative amendment was reflective of prevailing changes in social attitudes, and therefore the legal claim would have been accepted on the basis of the general principle of equality even prior to the legislative amendment.

In the aftermath of the Supreme Court's decision massive demonstrations, mostly by the religious community, indicated that the dissenting Justice Kedmi was probably the more accurate reader of prevailing social norms. Justice Dorner's belief that the social values of the Israeli people currently accept same-sex partnerships as equal to heterosexual partnerships may have been correct with regard to some segments of the population but not others. Her view elicited vehement replies from the opposing conservative groups. In this sense, Justice Barak's view, which held that the court was authoring a constitutive interpretation of the law, was a more accurate portrayal of the court's action. Clearly, neither Justice Dorner's nor Justice Kedmi's view was merely reflective. They sought to change/preserve traditional norms of partnership in Israel. However, the reflective role of law is not dichotomously distinct from its constitutive role. The case, just as much as the statutory amendment, was the result of a well thought out plan of action that was conceived by the NGO representing gay and lesbian issues.<sup>56</sup> Advancing the claim of equality with regard to a fringe benefit such as airline tickets preceded more ambitious employment-related claims such as pension rights, and employment issues preceded the more "sensitive" issues

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55. A collective *arrangement* is an arrangement that applies to workers as a whole, or to groups of workers, but falls short of being a full-fledged collective *agreement*. According to the law it is predominantly a contractual arrangement.

56. On the legal strategies for advancing gay rights in Israel and their interaction with the law, see *supra* note 54.

of family law (including inheritance, adoption, and outright recognition of gay marriage). The court, though, would not have been able to constitute the principle of equality unless prior social change had already been taking place.

A similar interaction can be observed in yet another case brought by air-crew members against El-Al, arguing that the requirement to retire at the age of 60, while ground-crew workers can work until the age of 65, was discriminatory on the basis of age. Like the case on same-sex partnerships, this one climbed from the lower labor court to the Supreme Court.<sup>57</sup> Unlike the almost unanimous position of the judges in the same-sex partnership case, in the age discrimination case the number of opinions and views was rather high, the points of dispute many. Focusing on the relationship between social and legal change, the difference between the two can be identified in the judges' debate on whether various prohibited bases of discrimination can be ranked.

Some judges remarked that the problem of age-based discrimination is less acute than discrimination on the basis of gender or race. In their view, in the absence of an explicit statutory provision, no such prohibition of age-based discrimination could be identified. The judges did not dispute that the legislature could insert such a prohibition, nor did they argue against the substance of the prohibition, merely claiming that it is not an obvious derivative of the equality principle. Other judges argued that age discrimination is just as morally reprehensible a practice as other forms of discrimination, and that the practice of age discrimination must be judicially condemned regardless of whether the legislator had inserted a specific provision to that effect.

Unlike the same-sex partnership case, here the controversy over the reflective or constitutive role of the law was of practical importance, because some of the petitioners were required to retire prior to the statutory amendment in 1995 that added the prohibition of age discrimination. The majority of the judges, headed again by Justice Barak, rejected the petitions of those who retired before the statutory amendment, but held that in the aftermath of the change in the statute the relevant provisions in El-Al's collective agreement must be voided because they contradict the newly enacted prohibition of age-based discrimination.

The constitutive role accorded to the law prevailed in the majority opinion in both cases. However, just as there is a discrepancy between the law's appearance of equality and its consequences when it comes to entrenching inter-group differences, there is a similar gap between constitutive jurisprudence and reflective reality. Generally speaking, the

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57. *See supra* note 19.

case law had a much more significant impact on gays and lesbians than on the “elderly.” This can be explained by the fact that the objectives of social change with regard to the rights of gays and lesbians were better crafted and more targeted. Those who advocated the gay and lesbian cases viewed the lawsuit as part of a more significant process of mobilizing social change. At the same time, the legal victory was constitutively significant in strengthening the group’s identity, helping to bring its cause “out of the social and legal closet” and a step forward toward more elaborate litigation in the decade that followed. By contrast, the representation of the elderly was more dispersed; the lawsuit brought by the air-crew in *El-Al* was a private lawsuit and not part of a broader strategy, detached from a more comprehensive attempt at fostering change. Only much later did groups representing the interests of the elderly in the labor market evolve, none of which has succeeded in achieving anything like the strength and presence of the gay and lesbian social movement. The difference in the outcomes of the two cases can therefore be partially attributed to the fact that the use of law in the case of sexual orientation was preceded by social change, while in the case of age discrimination it was the initial stimulus to social change. Law proves to be more effective when it reflects prior social change, as in the former, than when it tries to constitute change, as in the latter.

Another difference between the two groups—again in favor of the gays and lesbians—has to do with the nature of discrimination. The problems of older workers are more difficult to address in court in the sense that one of the major problems is discrimination in hiring, which is difficult to prove. By contrast, gays and lesbians were more concerned with value-laden questions regarding the sameness and difference of same-sex and heterosexual partnerships. In this context, the problems of proof are nonexistent, and the tendency is toward high-visibility cases oriented toward social deliberations. As in the previous comparisons, equal-opportunities legislation is more effective in addressing some problems while its shortcomings are more acute in addressing others.

#### *D. From Class-based Representation of Interests to Identity*

The exponential growth in the body of law dealing with equal opportunities in employment has come at the same time as a decline in the area of collective labor law. Admittedly, there doesn’t necessarily have to be a causal connection between the two phenomena. However, in this section I would like to demonstrate the relationship between the fragmentation of the collective labor law regime and the emergence of the equal-opportunities project. This can best be demonstrated when the two collide.

A collision between collective agreements and equal opportunities can be best identified when a collective agreement is found to be discriminatory. The assumption underlying collective labor representation is that the trade union representing the workers mediates conflicting needs and interests among the workers, and manages tradeoffs. The trade union faces two types of problems in carrying out this task. First, the concept of solidarity necessarily assumes that the stronger members of the group lend weight to the claims of the weaker members. Hence, from the point of view of a member seeking to maximize short-term gains, solidarity may mean that some individuals must give up their potential gains in favor of others. Second, the interests of different members may not always be commensurable, nor can they be easily reconciled. Some workers prefer longer hours and higher wages, while others prefer shorter hours; some prefer raising their monthly wages, others would rather raise their pension savings and fringe benefits; some prefer promotions on the basis of merit, others on the basis of seniority. Consequently, individual lawsuits are considered to be a threat to the strength of the collective membership.

The potential collision between collective and individual interests animates legal doctrine in the area of labor law generally, such as the role of a “duty of fair representation” (DFR) that is imposed on trade unions vis-à-vis all the workers in a bargaining unit.<sup>58</sup> The doctrine as it was developed in the United States has only hesitantly been accepted over the years in Israel, betraying the stronger collective tilt of Israeli labor law.<sup>59</sup> The intersection between equal opportunities and collective representation represents a subcategory of the DFR dilemma. It does not suggest that all workers must be treated equally, but rather requires equal treatment for groups that have been recognized as being discriminated against and are therefore protected by law. The law of equal opportunities therefore serves as a constraint on the scope of discretion accorded to the union. Moreover, the labor court has also recognized the possibility of filing a discrimination suit against a collective agreement, even if the basis for discrimination is not one of the familiar and recognized bases, such as gender and race, but rather a general claim of unequal treatment that amounts to bad faith.<sup>60</sup>

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58. On the origins of the American DFR and its relationship to individual claims, see Clyde Summers, *Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation*, 126 U. PA. L. REV. 251 (1977).

59. Originally the doctrine was rejected. Nat'l Labor Court 36/4-7 Guy Cherut v. El Al PDA 8:197. In later years it was accepted as long as there is discrimination on familiar grounds such as gender (Nat'l Labor Court 1143/01 Dov Winkler v. Gen. Histadrut PDA 39:153) but was also referred to in situations of occupational differences (Nat'l Labor Court 400024/98 Gen. Histadrut v. Sea Officers' Union PDA 36:97) (Isr.).

60. Reg'l Lab. Court (TA) 5817/00 Aliza Nagler v. El Al (2004) (Isr.).

The intersection between collective representation and equal opportunities appeared already at the beginning of the third phase (the equal opportunities phase) of the law, as described in the previous section. In two cases the National Labor Court voided discriminatory provisions in collective agreements.<sup>61</sup> The new generation of equal-opportunities legislation and adjudication, marked by the case of equal retirement age for men and women, displayed a similar preference for equal opportunities over the autonomy of collective bargaining.<sup>62</sup> Since then, many of the precedent-setting cases have addressed discriminatory agreements.<sup>63</sup>

Two particular cases merit attention in this context. In a case of gender discrimination, an early retirement plan in Israel's largest healthcare provider enabled men and women to retire at the age of 57.<sup>64</sup> According to the law at the time, state-funded old-age pension and pension plans could be provided for men from the age of 65, and for women from ages 60 to 65, according to their choice of retirement age.<sup>65</sup> The early retirement plan provided a contractual pension, described as a "bridge," for men until the age of 65 and for women until the age of 60. The purpose of this seemingly unequal arrangement was so that both men and women would not be stranded without pension and old-age benefits until they could withdraw their pensions and enjoy the state-funded benefits. The "bridge" was formally different but substantively equal because it was extended until the relevant (unequal) retirement age recognized by law. However, the uneven bridging arrangement created an incentive for the healthcare provider to subtly "encourage" women to retire, because the contractual pension that was offered was funded by the employer. A shorter bridge for women meant that similarly situated workers would incur different costs to the employer, contingent on gender. Moreover, men who enjoyed the longer bridge also enjoyed further savings to their pension plan, while women enjoyed a relatively short period of additional contributions.

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61. *See supra* notes 11–12.

62. *See supra* note 15.

63. It should not be assumed those employers who are obligated by collective agreements discriminate more than those who are not. There are other explanations for the prevalence of litigation against collective agreements. First, the agreements are visible and publicly published and therefore it is easier to identify discriminatory practices, in comparison to companies that have no agreement and no management book that is visibly open to the employees or the public. Second, collective agreements in large private-sector companies cover stronger employees, who can afford the economic and personal costs involved. Finally, workers who are covered by collective agreements have a stronger protection from dismissals, particularly from retaliatory dismissals, and can therefore challenge discriminatory practices without fearing for their jobs.

64. The case was heard in three instances: Reg'l Lab. Court (TA) 3-164/99 Eitana Niv v. Gen. Health Care Serv. (1999) (Isr.); Nat'l Lab. Court 238/99 Eitana Niv v. Gen. Health Care Serv. (2000) (Isr.); HCJ 6845/00 Eitana Niv v. Nat'l Lab. Court et al. [2002] IsrSC 56(6) 663 (Isr.).

65. Equal Retirement Age for Women and Men Law (1987, repealed 2004) (Isr.).

While the labor courts acknowledged that the arrangement was discriminatory, they did not void it for two reasons. First, it was a collective agreement that was negotiated with the trade union, and hence it enjoyed the autonomy accorded to such agreements. Second, it was assumed that because the female plaintiffs agreed to take the retirement plan, they had implicitly waived any discrimination claim that could potentially be made. The Supreme Court reversed the decision and held that the autonomy accorded to the bargaining partners must be restricted by the premise of equality, and that an individual cannot waive her claim to discrimination because the right not to be discriminated against is not a contractual matter. In upholding the individual claim, the Supreme Court also emphasized that discriminatory arrangements infringe the rights of the group that suffers discrimination as a whole and not only the rights of the individuals who are discriminated against. Hence, a combination of prioritizing individual claims and the interests of a group overrides the interests negotiated by the union and the employer on behalf of the bargaining unit as a whole.

Unlike the gender-based case, in cases that dealt with mandatory early retirement age that was grounded in a collective agreement the Labor Court upheld the collective agreement and permitted the early retirement scheme. For example, workers for the Dead Sea Works, employed in the Sodom plant, claimed that the agreement requiring their early retirement discriminated against them on the basis of their age.<sup>66</sup> The court found that the exceptionally difficult working conditions in Sodom justified the early retirement provision, which by some workers was considered a privilege, by others an imposition. The National Labor Court gave preference to the trade unions' representation of the collective interest as part of the *quid pro quo* with the employer. As opposed to the disparate retirement age for air and ground crews in El-Al,<sup>67</sup> the court held that in this case the difficulties faced by the workers in Sodom permitted the bargaining partners to negotiate a mandatory retirement age.

Comparing the two cases, it is clear that the courts are generally more willing to intervene in agreements whereby a distinct group is being discriminated against, gender being the primary and more common reason justifying such intervention. By contrast, in the matter of age the court is more tolerant toward the tradeoffs and compromises pursued by the bargaining agents. Consequently it is possible to summarize the state of the law as follows. The courts have gradually adopted the view that the autonomy of the collective sphere is permeable to competing

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66. Nat'l Lab. Court 56/3-196 Dead Sea Works Ltd. v. Shara'abi, PDA 30:283 (Isr.).

67. See *supra* note 57 and accompanying text.



considerations. Moreover, identifiable groups who are being discriminated against have a claim against the collective agreement. Finally, individual as well as group interests override class-based interests and cannot be compromised. While the case law is not always consistent, its overall message is.

The hierarchical structure according to which equal-opportunities legislation supersedes the autonomy of collective bargaining does not decisively prove a causal connection. It does, however, resonate with other pieces of the puzzle that shed light on the causal process.<sup>68</sup> These include, inter alia, the greater role that human rights organizations are taking in the equal-opportunities project, compared to the negligible role of the trade unions; the rise of human rights NGOs and the applicable body of law at a time of decline in collective bargaining; the fragmentation of interests' representation more generally; and the strong individualistic thrust of the equal-opportunities litigation.<sup>69</sup> If the causal relationship is correctly identified, the current exponential growth of employment opportunities adjudication is not only because there were legal barriers in the past, or that more legal claims have been added in statutes, but also because the equal-opportunities legislation has become the more relevant method of voicing labor market claims, compared to the declining relevance of "traditional" class-based collective disputes.

#### IV. THE ACHIEVEMENTS AND LIMITS OF THE EQUAL-OPPORTUNITIES PROJECT IN ISRAEL

The historical overview as well as the four topics that have been presented in greater detail can help to characterize the equal-opportunities project in Israel (although many of the observations are applicable to other countries as well). Let's commence by stating the findings in brief.

First, the equal-opportunities project has been in place since the establishment of the Israeli state, but it has progressed over time, constructing one layer of legal reasoning over another. The cornerstone of the project is in statute, but its main implementation and its complexities are only revealed through reading the case law. There is also a significant gap between the clarity and breadth of the statutory project and the infancy and ambiguity of the case law.

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68. For a broader analysis of the relationship between the decline of the centralized collective bargaining system and the rise of interest groups in civil society, see MUNDLAK, *supra* note 9, at ch. 5.

69. See, e.g., Law on Equal Wages for Men and Women (1996) (Isr.), which advances a comparable worth claim, but merely requires one female worker to identify a single male counterpart who earns more, despite equal characteristics such as education and skills.

Second, the equal-opportunities project now covers and seems to protect quite a few groups, but its effectiveness is not uniform. Some groups have been more successful than others in extracting the full benefit of the law's promise. Some have succeeded because the group forged a necessary level of social recognition, which made the use of law possible. This is best demonstrated by gays and lesbians and, to a lesser extent, the disabled. Others succeeded because they are not discriminated against across the board, and their problem in the labor market is discrete. This is best demonstrated by the group of workers who are recruited for reserve duty. The recognition in statute and implementation in the courtroom are therefore better considered as an outcome of *social* and not merely *legal* recognition.

Third, the discussion has demonstrated that while law is dependent on prior social transformation, it is not merely a mirror of social processes. The law helps groups establish cohesive communities and a legitimate public agenda for change. Consequently, the law springs from activism in civil society, and once the initial impetus is in place it expands the possibilities of groups' strategies for change. Yet this is not a process of inertia. It should not be assumed that the equal-opportunities project is necessarily a vehicle for constant social transformation, as it is also a means for preserving the status quo and for social inaction.

Finally, the above examples have demonstrated the fragmented nature of the equal-opportunities project. Unlike the comprehensive coverage of collective agreements in the past, at present there are no attempts, nor really are there any substantive possibilities, to advance general percepts of equality in the labor market.<sup>70</sup> Women's advocacy groups deal with gender discrimination, and the NGO representing people with disabilities litigates on the basis of the statutory accommodation mandates. This structure of interests' representation has its advantages, and at least one of the reasons for its development was the past marginalization of weaker groups in favor of advancing the broad interests of the working population. Discrimination probably prevailed in collective agreements just as much as it did in the unilateral hiring and wage decisions of employers. Identity groups that have succeeded in actually building a community, like homosexuals and people with disabilities, contributed a dimension that was missing in the old structure of interests' representation. That is, these groups have provided their constituents with a true sense of identity and pride that statewide collective bargaining could never provide.

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70. Kristal Tali & Yinon Cohen, *Decentralization of Collective Wage Agreements and Rising Wage Inequality in Israel*, 46 INDUS. REL. 613 (2007).

Despite the advantage of a fragmented structure of interests' representation, the points summarized here are also indicative of its weakness. It undermines the solidarity of wage and labor market structures, and it provides a stronger claim for individual over collective claims. Clearly, the two sides are not antithetical to each other, but there is a fundamental tension. Moreover, even in organizations where the collective option no longer seems conceivable, the emphasis on the equal-opportunities project over other labor market methods of claiming rights is not consistently positive. This has been demonstrated by the examples showing that adjudication of equal-opportunities matters does not necessarily amend social biases. For example, in the handful of equal wages for women cases that reached the court, the court recognized market pressures as a potential exception to the requirement to apply equal wages,<sup>71</sup> or received an expert opinion in which a job evaluation discounted the positive contributions of the woman-plaintiff and underscored those of the men in the organization.<sup>72</sup> The intrinsic limits of the equal-opportunities project suggest that with some compromises other legal projects may be more useful. This possibility receives theoretical support from the work of Khan and Blau who demonstrate that gender equality is strongly related to general equality in society and only to a lesser extent to the intensity of equal-opportunities legislation.<sup>73</sup>

The gradually intensifying interest in the legal project of equal opportunities comes at a time when inequality in Israel is growing.<sup>74</sup> If we accept Kahn and Blau's proposition, then it seems that the attempt to advance labor market equality may be undermined by growing wage inequality. Inequality has been found to be a result of, among other reasons, the declining scope of collective bargaining and slack enforcement of general labor rights.<sup>75</sup> It should also be noted that whereas in the past the dualism in Israel's labor market infringed the rights of particular and well-identified groups (Mizrachim, Palestinians), today the workforce as a whole is becoming increasingly marginalized. That is, a growing body of workers, who are not always predominantly women, old, or Arab, is employed through temp work agencies and service contractors.<sup>76</sup> Their

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71. Nat'l Lab. Court 1156/04 Home Center (Do It Yourself) v. Orit Goren (2007) (Isr.).

72. Reg'l Lab. Court (BS) 1576/99 Simi Nidam v. Rali Electronics (2003) (Isr.).

73. Francine D. Blau & Lawrence M. Kahn, *Wage Structure and Gender Earnings Differentials: An International Comparison*, 63 *ECONOMICA*, ECONOMIC POLICY AND INCOME DISTRIBUTION 29 (1996).

74. See Kristal & Cohen, *supra* note 70.

75. Tali Kristal, Yinon Cohen & Guy Mundlak, *Rising Economic Inequality and Trade Unions in Israel 1970-2003* (Van-Leer Program on Economics and Society, Research Paper No. 1 (2007) (in Hebrew)); Yinon Cohen et al., *The State of Organized Labor in Israel*, 28 *J. LAB. RES.* 255 (2007).

76. Ronit Nativ, *Employment Through Temporary Work Agencies Israel, 2000*. RESEARCH REPORT – MINISTRY OF LABOR, DEPARTMENT FOR HUMAN RESOURCE PLANNING (2005).

marginalization in the labor market is not receiving attention from the equal-opportunities project. Hence, it may be that if current trends persist, litigating equal wages for men and women will offer only slim promise for those employed in organizations that rely on peripheral employment and offer a thin layer of rights to men and women alike.

We do not need to weigh the advantages and disadvantages of the equal-opportunities project and reach a single verdict. I would not suggest that the equal-opportunities project is unimportant. However, the current survey of developments should at least downplay some expectations regarding what it can deliver. It can help in the effort to induce social change toward groups who are more likely to succeed in inducing social change anyway. It may lead to change, but it may also entrench the status quo and legitimize questionable values. It can help bring change in distinct episodes of discrimination but not necessarily the social infrastructure from which discriminatory values emerge. It may focus attention on groups' marginalization in the labor market, but it may also draw attention away from more comprehensive regulatory projects that have an influence on the level of overall inequality.

All signs seem to indicate that in the future the equal-opportunities project will continue to grow and become perhaps one of the most central fields of Israeli labor law. In a recent amendment to the Employment (Equal Opportunities) Law a new commission on equality was established, and at the time of writing the first commissioner has been appointed.<sup>77</sup> Commissions are a risky venture, as some are purposefully under-funded and denied effective legal powers to carry out their task. The resolution of the funding issue remains to be seen, but in terms of legal powers, the newly established commission was entrusted with broad authority. Most significantly, it can initiate both civil and criminal processes, and request, *inter alia*, a general injunction to remedy past discrimination. The new amendment therefore provided the commission and the courts with the means to devise flexible remedies that can address different forms of discrimination, and to reach deeper into problems of pre-market discrimination and other complex social structures of discrimination. To what extent such changes in the legal process can sway the equal-opportunities project altogether remains to be seen. As noted in the introduction, problems in the legal process and in the percept of equality can account for the partial achievements of the equal-opportunities project. The perspective offered here, which emphasizes the success of the project as a derivative of interests' representation, group cohesion, and an understanding of how inequality and discrimination are embedded in the

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77. Employment (Equal Opportunities) Law, 5748-1988, §§ 18a-18o (amendment from 5.7.2007).

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broader social construct of the group, suggests that the commission actually faces a much greater challenge than just improving the legal process. As long as reserve duty soldiers are “heroes” and the Arab minority “traitors,” secular Jews “flexibly tolerant” and Orthodox Jews “bound by religion,” gays and lesbians “vocal,” and the aged “silent”—inter-group solidarity and equality will give place to polarization. According to this analysis, the major challenge may be to reconfigure seemingly separate and contradictory building blocks of solidarity, class, equality, and group identity—none of which should be neglected.

