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Finally, Our Own *Brown*! (?)

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The decision in Noar Kahalacha*, an anti-segregation in education case that was recently delivered by the Israeli High Court of Justice, has been 'naturally' celebrated as the 'Israeli* Brown*'. But is it? This article points to the differences between the monumental US Supreme Court decision of* Brown *and the Israeli* Brown*-equivalent –* Noar Kahalacha*. It contends that the two cases bear differences that stem from the divergent patterns of discrimination they represent, and that they reflect these differences squarely. The discrimination patterns reflected by the cases differ by virtue of traits that are traditionally overlooked in antidiscrimination theoretical analysis. Comparing the two cases, therefore, allows us an opportunity to revisit the notion of discrimination and its antidote, antidiscrimination. Drawing on the dichotomous concepts of de jure/de facto discrimination and difference/sameness discrimination, the article shows how these dual theoretical notions are determinative in shaping the distinctiveness of each of these cases. While the African American victims in* Brown *were easily recognised as a distinctive group suffering from de jure discrimination, the Mizrahi victims in* Noar Kahalacha *– who suffer from de facto discrimination within a Jewish hegemonic society – lacked such clear recognition. Accordingly, the discrimination narrative that* Noar Kahalacha *provides is very incomplete and carries only limited potential for effective application in future struggles to eliminate discriminatory practices against Mizrahis in Israel.* Brown*, on the other hand, carries a converse trait. Though criticised,* Brown*, nevertheless, strongly signifies the recognition by White America of its overarching discriminatory practices, and implies a genuine dedication to break from it. This understanding further illuminates the limitations embedded in the possibility of 'importing' highly contextual antidiscrimination jurisprudence from abroad into our system's highly contextual reality of discrimination.*

Keywords: antidiscrimination law, *Brown*, Mizrahis, *Noar Kahalacha*, difference

1. Introduction

On her first day of school in 2007, Yael, a ten-year-old student at a Beit Ya'acov ultra-orthodox elementary school for girls, arrived at what had been her school for the past four years. Upon entering her classroom, however, she discovered that her classmates were all of Mizrahi extraction.[1] She was further notified she should have no contact whatsoever with any of her former Ashkenazi classmates.[2] It was then that Yael realised that the students were being physically

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[1] The term 'Mizrahis' is used to refer to Jews of Arab/Muslim descent.

[2] 'Ashkenazi' is a term describing Jews of European descent.

separated within her school based solely on their ethnicity. The school was virtually being divided into two separate schools, with the Mizrahi students separated from the Ashkenazi students. Physically, the two groups were being isolated in two separate buildings, divided by a partition wall, with separate entrances, different school uniforms and differently timed class intermissions. The school's administration rationalised its actions by going as far as to stigmatise Mizrahi culture and individuals – characterising the Mizrahis as suffering from lower spiritual levels[3] – in order to justify this separation. Yael was never to be the same again: her self-esteem was lowered to a point where she hated herself, her dark skin and her dark-skinned parents.[4]

The stunning treatment of Yael and her friends, popularly known as 'the Immanuel ordeal', echoes the discriminatory treatment of black students in the United States (US) during the mid-twentieth century.[5] Both cases, respectively, seem to have been afforded similar antidiscriminatory relief in the courts.

In 1954, the US Supreme Court declared the racial segregation of students in public schools unconstitutional in the famous case of *Brown* and *Others v Board of Education of Topeka* ('*Brown*').[6] In 2009, a monumental decision was delivered by the Israeli Supreme Court against the blatant discriminatory behaviour displayed in the 'Immanuel ordeal' in *Noar Kahalacha v Ministry of Education* ('*Noar Kahalacha*'), in which the Court declared the students' segregation to be unlawful as well as unconstitutional. Finally, some have solemnly declared,[7] we have our own *Brown*![8] But do we?

The superficial clear similarities between *Brown* and *Noar Kahalacha* render the comparison between the two cases almost inevitable. Notwithstanding this flattering comparison, however, a

[3] HCJ 1067/08 *Noar Kahalacha v Ministry of Education* (not published, judgment delivered on 6 August 2009) ('*Noar Kahalacha*'), opinion of Justice Levi, para 4, in which he refers to the report of the special investigator, who identified the reasons for segregation as emanating from distinctive levels of compliance with Jewish religious rules by the girls and their families.

[4] This seemingly melodramatic tone is based on evidence as was manifested in an affidavit provided by Yael and presented to the Supreme Court, regarding the mental harm she sustained as a result of being discriminated against.

[5] Apart from common sense dictating such a comparison, the petitioners themselves have advanced such an analogy in their petition to the court, describing the situation in the Beit Ya'acov school as an 'apartheid'. See s 3 of the petition, available at http://www.nevo.co.il.ezproxy.colman.ac.il/PsikaSearchResults.aspx?MenuId=10 (restricted access).

[6] 347 US 483 (1954).

[7] Most of the declarations were made in the media, and are therefore hard to locate now. However, the Court itself in *Noar Kahalacha* (n 3) made several references to *Brown* throughout its deliberation and decisions. See, for example, Justice Meltzer's reference in para 4 to his decision and the Justices' remark in HCJ 1067/08 *Noar Kahalacha v Ministry of Education* (not published, judgment delivered on 15 June 2010) on the parents' obligation to comply with the Court order as a means to avoid measures similar to those taken against some white parents in the *Brown* case.

[8] It should be stated, in the outset, that using *Brown* as a monument of success and a yardstick for the erosion of discrimination is questionable in and of itself: Mark Whitman, *Brown v Board of Education: A Documentary History* (15th anniversary edn, Markus Wiener 2004) 310–34. However, within the American as well as international antidiscrimination legal discourse, *Brown* is identified as the cornerstone for abolishing segregation and voiding its harmful underlying premise of 'separate but equal' doctrine. In this respect, regardless of its limited effect, *Brown* substantiated the legal field as yet another venue for vindicating the right to equality of African Americans. With these reservations taken into account, I still share the view of it as praiseworthy and aspirational.

closer look into the structure of the two cases reveals what could more readily be considered irreconcilable differences between them, rather than compelling similarities.

My contention in this article is that *Brown* and *Noar Kahalacha* bear differences that stem from the distinct patterns of discrimination they represent, and that they reflect these differences squarely. Comparing these cases, therefore, allows us an opportunity to revisit the notion of discrimination and its antidote, antidiscrimination, within two liberal legal schemes: American and Israeli. Interestingly, the differences between the two cases make up what seems at first glance to unite them: the fact that they both afforded protection to groups that were discriminated against on the basis of their origin (race-based origin in *Brown* and ethnicity-based origin in *Noar Kahalacha*). The discriminations fought against in these cases, however, carry some important, yet traditionally overlooked differences which part the cases considerably from one another. Drawing on antidiscrimination theories, I shall introduce the dichotomous concepts of de jure/de facto discrimination and difference/sameness discrimination. These concepts will be proved to be determinative in shaping the distinctiveness of each case, as produced through the Court's understanding of the petitioners' discrimination and the legal recognition it warrants.

While the African American victims in *Brown* were readily recognised as belonging to a distinctive group suffering from discrimination, *Noar Kahalacha*'s Mizrahi victims lacked such clear recognition. Though it has been lingering for over six decades now, discrimination against Mizrahis in Israel is still covert and, to a substantial extent, denied. Accordingly, the discrimination narrative in *Noar Kahalacha* produced by the court suffers from incompleteness and carries only limited potential for effective application in future struggles to eliminate discriminatory practices against Mizrahis in Israel. Although it carries a strong antidiscrimination sentiment, the *Noar Kahalacha* decision failed to provide any overarching recognition of Mizrahis as a discriminated social category. Instead, one might even read it, to an extent, as virtually incorporating the illegal 'separate but equal' ideology into the heart of its leading opinion, as I will demonstrate below.[9] *Brown*, on the other hand, carried converse traits. Though criticised for many just reasons, *Brown* nevertheless strongly signified the recognition by White America of its overarching discriminatory practices, and implied a genuine dedication to break from it.

My argument advances in four parts. In Section 2, I will introduce Mizrahis as a discriminated group, characterised with overarching inferiority in almost every aspect of social mobility indicators. This will set the stage for comparing the two cases as relating to two discriminated groups suffering from systematic discrimination. In Section 3, I will introduce the dichotomous concepts of de jure/de facto discrimination and of difference/sameness discrimination as the building blocks of shaping the path available for discriminated groups seeking relief through antidiscrimination laws. Section 4 will constitute the groups African Americans and Mizrahis as prototypical examples of these dichotomous concepts. It is suggested that the dichotomous underlying concepts of discrimination dictated the scope and strength of the antidiscrimination relief afforded

[9] Only in one of the concurring opinions – by Justice Meltzer – can one identify rejection of this ideology, allowing a more broadly conceived antidiscrimination policy into the ruling. This relatively non-dominant portion of the ruling will be discussed in detail below.

by the courts to abolish segregation in these cases. Section 5 will discuss the injustice embedded in the different scope of protection provided against each type of discrimination and will argue against the implicit utilisation of the concepts of de jure discrimination and 'difference' alone as proxies of authentic discrimination.

2. MIZRAHIS AS A DISTINCTIVE DISCRIMINATED GROUP

One of the main ethnic fractures of Israeli society lies between the two ethnic groups of Ashkenazis and Mizrahis, which roughly comprise an equal share of Israel's veteran Jewish society.[10] The Mizrahi group consists of Jews who have Arab and Islamic ancestry, whereas Ashkenazis are of Euro-American descent. Mizrahis, as a general matter, are a disempowered group, suffering from social inferiority traits typical to discriminated groups.[11] Statistics indicate that Mizrahis' access to the education system, and their representation in it, is poor. Though students are not formally segregated from one another based on their origin, a study held in 'integrative' schools has revealed a clear ethnic division in which Ashkenazi students are overrepresented in prestigious science programmes, while lower and middle tracks of education – which offer limited potential for social mobility – are overpopulated by Mizrahis.[12] This may explain how, upon finishing high school, Ashkenazis are almost 100 per cent more likely to be found eligible for matriculation certificates.[13] These discriminatory patterns diffuse into higher education where this stratification spreads to the highest levels of academia – academic university faculty – creating particularly substantial gaps. There, the representation of Mizrahis is as low as 9 per cent, and Mizrahi women amount to only 1.7 per cent of faculty members.[14] Female professors of Mizrahi descent represent only 3 per cent of female professors in Israeli universities.[15]

[10] Since the rift is primarily intra-Jewish, it is important to posit it within the *Jewish* numerical context. This context excludes the population identified in Israeli sociology as 'immigrants' (mainly from the former Soviet Union and Ethiopia), which is not taken into consideration in the statistics brought into this article. All statistics therefore should be read in light of this equal share they should have had in representational terms. In the statistics presented below, the family patriarch's descent was the predicate for determining a person's origin.

[11] In light of the numerical proportions of Israeli society mentioned above, the choice of 'minority' to describe Mizrahis signifies political powerlessness rather than numerical disadvantage. The dominance of a hegemonic group in society is derived from its possession of power to dictate to others the basic rules upon which that society is founded and through which it operates. Being a 'minority', therefore, signifies a process of disempowerment. This term is very commonly used in Critical Race Theory as a means to signify that power is drawn on politics not numbers, as best proved, for example, by the South African apartheid political system.

[12] A study led by Dr Nissim Mizrachi of Tel Aviv University, which examined three randomly chosen 'integrative schools'. The study's conclusion can serve to demonstrate the probable situation of segregated schools: Nissim Mizrachi, Yehuda C Goodman and Yariv Feniger, '"I Don't Want to See It": Decoupling Ethnicity and Class from Social Structure in Jewish Israeli High Schools' (2009) 32 Ethnic and Racial Studies 1203 (in Hebrew).

[13] Such as in development towns, which are underdeveloped cities built in the wilderness of Israeli periphery: Erez Tzfadia and Oren Yiftachel, 'State, Space, and Capital: Immigrants in Israel and Social Spacial Stratification' in Dani Filk and Uri Ram (eds), *The Power of Property: Israeli Society in the Global Age* (Hakibbutz Hameuhad and The Van Leer Jerusalem Institute 2004) 197–221 (in Hebrew).

[14] Israel Blechman, 'The Ethnic Composition of Research Universities in Israel' (2008) 33 Theory and Criticism 191 (in Hebrew).

[15] Statistic taken from Iris Zarini, 'Mizrahi Professors: How the Habitus Redirects Minorities in Israeli Academia', MA thesis, still under supervision by Dr Henriette Dahan Kalev and Professor Uri Ram, Ben Gurion University,

This low representation decreases even more by deciles in more prestigious science faculty positions.[16] Israeli law faculties, for example, consist of only 6 per cent of Mizrahis.[17]

A direct reflection of their inferiority in the educational sphere are the enduring patterns of disadvantage in the job market experienced by Mizrahis.[18] In addition to the general correlation between Mizrahi origin and low economic status,[19] Mizrahis are also characterised by patterns of underrepresentation in the management job market (which is only 29 per cent Mizrahi, compared to 54 per cent Ashkenazi), and overrepresentation in the blue collar job market (which is 38 per cent Mizrahi as against 21 per cent Ashkenazi).[20] As a result, disparities in salaries are particularly staggering. Statistics from as recently as 2007 show that the average Ashkenazi employee's salary is roughly 31 per cent higher than that of the average Mizrahi.[21] Accordingly, the poverty rate among Mizrahis is nearly three times greater than it is among Ashkenazis.[22] Adding to these discrepancies is the unemployment gap, whereby Mizrahis are disproportionately represented and are unemployed at a rate five times higher than that of Ashkenazis.[23] Even the military service,

2007. I extracted statistics regarding the following universities: Hebrew University, Tel Aviv University, Haifa University, Bar Ilan University, Ben Gurion University and the Technion.

[16] Interestingly, the law faculty is considered to be the most prestigious of academic schools. This fact is reflected in the ethnic breakdown of the law faculty, where there is the lowest percentage of Mizrahi academics. The faculty of social sciences, on the contrary, which is considered by most as the least prestigious, has the highest percentage of Mizrahis in its academic staff: see Gad Yair and Didi Shamas, 'Ethnic Bias or Social Neutrality at the Universities: Consequences for Affirmative Action for Students from Asia and North Africa' in Anat Maor (ed), *Affirmative Action and Equal Representation in Israel* (Ramot 2004) 495, 502–03 (in Hebrew).

[17] This data is drawn from my own research. I examined the staff at twelve of the law faculties in Israel. I excluded Sapir College, whose staff seemed to be in its formative stages, and therefore had no accurate portrayal. I also excluded six staff members whose ethnic origins were unclear. However, even if all six are of Mizrahi origin, that only raises the percentage of Mizrahis to 7.5%. The percentage of Arab staff is even more disturbing – a mere 2.5%, with only one woman. Because of a lack of cooperation on the part of the staff, I could not examine the ethnic composition of all the different faculties. This lack of cooperation is indicative of an overall social phenomenon, characterising studies in this field. Similar difficulties occurred in the study conducted by Yair and Shamas, ibid 497, and the study conducted by Mizrachi (n 12), as these researchers have reported.

[18] Yinon Cohen, 'Socio-economic Gaps between Mizrahim and Ashkenazim, 1975–1995' (1998) Israeli Sociology 115 (in Hebrew). For a structural analysis of the Israeli job market based on ethnicity status, see Shlomo Swirski and Deborah Bernstein, 'Who Worked Where, for Whom and for What: Economic Development in Israel and the Emergence of an Ethnic Division of Labor' in Uri Ram (ed), *Israeli Society: Critical Perspectives* (Breirot 1993) 120 (in Hebrew).

[19] For a Marxist analysis of the status of Mizrahis, see Shlomo Swirski, *Not Weak, Weakened – Orientals and Ashkenazim in Israel: Ethnic Division of Labor* (Notebooks for Research and Critique Publishing 1981).

[20] The majority of the data given in this article is taken from the website of the Adva Center, an institute for the research of Israeli society, investigating inequality and social injustices in Israel. The ethnicity-based occupational gap relating to men in 2007 is to be found at Adva Center, 'Occupation, by Ethnic Group and Gender, 2007', available at http://adva.org/Uploaded/Occupation_continent_select,%202006_2.pdf. As of 2007, in the more service oriented positions, such as sales and secretarial jobs, the division is 24% Ashkenazis against 31% Mizrahis: See Adva Center, ibid. A more concise portrayal of the social reality in Israel can be found in Iris Gerby and Gal Levy (under the guidance of Ruth Gabizon), *The Socio-Economic Gap in Israel* (Israeli Democracy Institute 2000) (in Hebrew).

[21] Adva Center, 'Income by Ethnic Group, 2007', December 2008, available at http://adva.org/Uploaded/Income%20by%20type%202007_1.pdf.

[22] Gerby and Levy (n 20) 48–52.

[23] 1.5% of the Ashkenazi population are unemployed, whereas the unemployment rate for the Mizrahi population is 7.5%; meanwhile, 10% of Palestinians are unemployed: Adva Center (n 20).

traditionally considered a main channel for 'social fusion', was recently accused of having contributed its share in creating and perpetuating patterns of inequality.[24]

Moving on to the cultural arena, Mizrahi cultural institutions suffer from manifestly unequal allocations from the governmental budget.[25] This is not surprising, given that Mizrahis are believed to cultivate inferior cultural virtues, a fact encapsulated in the ridiculed Mizrahi imagery, whereby Mizrahis are reduced to negative stereotypes in popular culture.[26] Mizrahi cultural marginalism stems also from the geographic periphery and segregational living that characterises their life in Israel.[27] Systematic inferiority is also demonstrated by the minimal share of Mizrahis of private capital ownership, generated by institutionalised discrimination in housing policies.[28] The strong nexus between ethnicity and capital was recently more clearly recognised in a government appraisal discovering that living in the proximity of Mizrahis is a factor in lowering property values, while living in the proximity of Ashkenazis raises them.[29]

This is the snapshot of Jewish Israel's social disparities as of the early twenty-first century.[30] However much it has improved from the past, this social snapshot is still worrying. The slow progress of Mizrahis up the social ladder has primarily reflected the progress and development

[24] Yagil Levy, 'Militarizing Inequality: A Conceptual Framework' (1998) 27 Theory and Society 890–97 (in Hebrew). Levy indicates that the army is a mechanism of the establishment, which 'reproduces' the inequality in Israeli society. For a more extensive description of the relationship between the army and Mizrahis: Yagil Levy, *From the 'People's Army' to 'Army of the Peripheries'* (Carmel 2007) (in Hebrew).

[25] The Sister Institute, 'Data Report – Budget Allocations for Cultural Institutions in Israel, 2008', prepared by the Coalition of Civil Society Organizations for Equality in Budget Allocations, 23 November 2010, available at http://www.achoti.org.il/?p=52.

[26] For Mizrahi representation in satire and pop culture, see Galit Saada-Ophir, 'Borderland Pop: Arab Jewish Musicians and the Politics of Performance' (2006) 21 Cultural Anthropology 205. For the stereotypical representation of Mizrahis in Israeli cinema, see Ella Shohat, *Israeli Cinema: East/West and the Politics of Representation* (Anat Glickman tr, Breirot 1991) (in Hebrew), and Dorit Dayan, 'Sephardi Jews in Israeli Advertising Commercials, 1957–2000', MA thesis, Bar Ilan University, 2003. For the distortion of the Mizrahi figures in pop culture, see Yifat Ben Hay-Segev, 'Mizrahim in Israel Talk about Prime-Time Television Shows: An Audience Reception Study', PhD thesis, Bar Ilan University, 2007. For the distortion of the Mizrahi figure in literature, see Dror Mishani, *The Ethnic Unconscious: The Emergence of 'Mizrahiut' in the Hebrew Literature of the Eighties* (Am Oved 2006). Mishani analyses the Mizrahi stereotypes presented in the Israeli literary masterpieces: *Black Box* by Amos Oz, *Heart Murmer* by Yehoshua Kenaz, and *Five Seasons* by AB Yehoshua; Hanan Hever, 'Color and Race in Israeli Fiction' in Yehouda Shenhav and Yossi Yonah (eds), *Racism in Israel* (Hakibutz Hameuhad and Van Leer Jerusalem Institute 2008) 119 (in Hebrew).

[27] Erez Tzfadia, 'Immigrants in Peripheral Towns in the Israeli Settler Society: Mizrahim in Development Towns Face Russian Migration', PhD thesis, Ben Gurion University, 2002 (in Hebrew). The thesis examines Israel's immigration and settlement policies for Mizrahi immigrants to Israel as a basis for their inferior status, distancing them from cultural, political and economic power sources; Adriana Kemp, 'Borders as Yanos: Space and National Identity in Israel' (2000) 16 Theory and Criticism 13, 21–23 (in Hebrew); Benny Nuriely, 'Strangers in a National Space: The Arab Jews in the Lod Ghetto, 1950–1959' (2005) 26 Theory and Criticism 13 (in Hebrew).

[28] For a systematic and historical analysis of the discrimination of Mizrahis in housing and property policies, see Claris Harbon, 'Affirmative Localization: The Story of Women Repairing Historical Injustice' in Daphne Barak-Erez and others (eds), *Studies in Law, Gender and Feminism* (Nevo 2007) 413 (in Hebrew). For a more concise analysis, See Gerby and Levy (n 20).

[29] See the study results, as published on the Ministry of Justice's website, July 2010, available at http://www.justice.gov.il/NR/rdonlyres/3D8B97D5-10E8-4477-9B99-4B50C79794C3/21486/ahlusia.pdf.

[30] Although the situation report seems to be more 'consequential' and less 'normative', one can see that, despite the widespread belief that the racism and discrimination of the 1950s are no longer as prominent, it is not uncommon that key Israeli public figures speak in a racist manner towards Mizrahis. For example, Haim Hefer, a well

of Israeli society as a whole rather than some process signifying a neutralisation of the power struggle between Mizrahis and Ashkenazis.[31] More importantly, even today, the gap between the groups is significant, with some studies indicating its growth over the last decades.[32] As of today, the Ashkenazi group is positioned at the top of power structures in Israeli society, and constitutes 'the Archimedean point, from which all the cultures, groups and forces in Israel develop'.[33]

Lastly, it is important to note that, though subject to lingering discrimination for over six decades now, Israeli society still suffers from a dynamic of denial of this phenomenon, which keeps unchallenged the socio-economic inferior position of Mizrahis and its unjust roots.[34]

3. Comparing Apples and Oranges in the Same Orchard

I return now to the shared characteristic of *Brown* and *Noar Kahalacha*: Mizrahis and African Americans suffer from discrimination: however, it is different in depth and breadth. It is this reality of discrimination which brings them together, and simultaneously creates the traits that divide them. Generally, *Brown* can be read as a typical antidiscrimination case aimed at protecting a group suffering from 'classic' de jure discrimination within a clear racial sociological dialectic of 'difference'. *Noar Kahalacha*, on the other hand, should be read as a case that reflects the limits of antidiscrimination discourse typical to using it to protect a group suffering from de facto discrimination, within a 'sameness' social atmosphere. The differences encompassed by the two cases render their similarities limited, yet rich in terms of discrimination typology, theory and analysis. In order to better understand the differences eminent in these discrimination pattern dichotomies and the diverse outcomes they spawn, I shall first turn to introducing their theoretical essence.

3.1 The De Jure/De Facto Discrimination Dichotomy

Two conceptual clarifications are instructive in communicating my argument more intelligibly. The first concerns the notion of de jure as distinct from de facto discrimination. This ephemeral distinction has been progressively blurred, and sometimes it seems to signify little more than a

known poet, noted the 'lack of culture' in the Moroccan ethnic group, and Natan Zach, yet another respected poet, in an interview on a TV programme recently described Mizrahis as 'cavemen' who appreciate violence.

[31] Levy described the Mizrahis' progress in Israel as limited: 'As privileged and subordinated groups alike attain upward mobility, their positions might be changed, but not the power relations between them as long as that mobility occurs within the previously constructed confines and point of departure of each group. Here is the genesis of the syndrome in which subordinated groups find themselves "going up a downward escalator"': Levy (n 24) 898.

[32] For an increase in the gap in education, which is one of the more telling fields as far as future inequality is ensued, see the study of Momi Dahan and others: 'Have the Gaps in Education Narrowed?' (2002) 49(1) Economics Quarterly 159 (in Hebrew).

[33] Baruch Kimmerling, *The End of Ashkenazi Hegemony* (Keter 2001) 12 (in Hebrew).

[34] This unique social phenomenon and its origins are introduced below, in the text accompanying nn 75–80.

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legal conclusion.[35] Deservedly, it has been criticised for having an elusive, false jurisprudential effect, enabling the court to draw a thin, changeable line between de facto and de jure acts.[36] Though fully aware of this criticism and supportive of it, I still maintain that at some level the distinction matters; specifically, it matters to the way in which discriminated groups perceive themselves and how others perceive them. To use the distinction critically, I hereby employ it consciously in its extremely technical sense, to make my theoretical point. When using the phrase 'de jure discrimination', I refer to a most materialistic, formal meaning: namely discrimination that is affected by overt, explicit and systematic laws and regulations. 'De facto discrimination', on the contrary, results from actions that are covert and are not formalised in primary legal texts. The second clarification pertains to the identification of most liberal legal systems as systems which underwent a transition from a 'discriminatory stage', wherein both de jure and de facto discriminatory practices were used against disempowered groups, to a 'remedial stage', wherein the same legal system uses its antidiscrimination laws to remedy existing discrimination, be it de jure or de facto.[37]

Against this conceptual backdrop I wish to advance the novel argument that discriminatory legal rules have a *potentially* important constructive and constitutive value for groups seeking equality through the law.[38] This notion does not imply that discrimination is virtuous. Rather, it stresses that a specific form of discrimination – namely de jure discrimination, primarily set to negatively influence the well-being of the discriminated group in the *discriminatory stage* – carries with it some future positive remedial effects. It improves the group's ability to better utilise the legal system for eroding discrimination in the *remedial stage*. More specifically, de jure discrimination creates effects that are crucial to a successful legal fight. These effects shape the manner by which a discriminated group's status is generated, rendering it eligible for antidiscrimination relief. Conversely, groups that suffer mainly from de facto discrimination often lack this ability. Thus, groups confronted with de jure discrimination in the *discriminatory stage* might be better off in the *remedial stage* than groups *only* facing de facto discrimination. The reason for this paradox is simple: it is easier to fight legal battles for a group remedy when a group has already been identified as the 'outlawed' and is asking to be 'inlawed'. In doctrinal terms, my argument is apparent in the prerequisite of the Equal Protection jurisprudence – which prevails in Israel in a manner resembling the United States paradigm – requiring that one must be discriminated against because of one's membership in a recognisable, distinct group in order to be

[35] John E Canady Jr, 'Overcoming Original Sin: The Redemption of the Desegregated School System' (1990) 27 Houston Law Review 557, 589; Joelle S Weiss, 'Controlling HIV-Positive Women's Procreative Destiny: A Critical Equal Protection Analysis' (1992) 2 Seton Hall Constitutional Law Journal 643, 687–88.

[36] For a challenge to this distinction, in order to demonstrate a de jure discrimination that allows for de jure relief, see Jorge C Rangel and Carlos M Alcala, 'Project Report: De Jure Segregation of Chicanos in Texas Schools' (1972) 7 Harvard Civil Rights-Civil Liberties Law Review 307 (challenging the denial of the de jure discriminated against status for Chicanos in Texas).

[37] The most paradigmatic example that springs to mind is Germany before and after the Second World War. In this article, however, this characteristic will be presented in the Israeli as well as the American legal systems, as reflected through their unique peculiarities.

[38] This notion has been previously advanced by me in detail in Yifat Bitton, 'The Limits of Equality and the Virtues of Discrimination' [2006] Michigan State Law Review 593.

acknowledged as a discriminated group.[39] Groups that suffer from de facto discrimination, on the other hand, face structural barriers in fulfilling this requirement.

The following is a brief introduction of the cumulative effects de jure discrimination confers on a group seeking relief at the remedial stage:[40]

3.1.1 The Distinctiveness Effect

De jure discrimination perpetuates the identity of the discriminated group as distinct and recognisable. Arguably, it identifies groups along lines that are artificial, unstable, inaccurate,[41] baseless at times and vicious always. De jure identification of a 'group' is by far understood as a product of historical, socio-political construction, articulated to best serve and maintain the hegemony's dominance.[42] Nevertheless, and despite the fallacy of its essence, de jure discrimination also constitutes legally recognisable groups. At the remedial stage, these groups can use, for their own benefit, the same classifying rhetoric that was used to define and exclude them; namely, they can trap the legal system by its own definitional creations and use them strategically to protect and benefit the group.[43]

3.1.2 The Visibility Witnessing Effect

De jure discrimination increases the sense of 'realness' of the group's discrimination-based suffering. The legal discourse of discrimination not only classifies groups and shapes their distinctiveness, but also manifests their presence as the law's subjects. This public presence also narrates their discriminated experience, vindicating the group's need for, and entitlement to, legal redress.

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[39] This requirement, although rarely discussed, is crucial in pleading a constitutional violation: 'the first step is to establish that the group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied': *Castaneda v Partida* 430 US 482 (1977) 494.

[40] For an in-depth analysis of these effects, see Bitton (n 38) 605–26.

[41] The unnaturalness, instability and inaccuracy of the legal construction of race can be demonstrated in one example of the American construction of the Blacks. This legal entity was defined differently from one state to the other. For the myriad definitions in the different states, see Pauli Murray, *States' Laws on Race and Color and Appendices* (2nd edn, University of Georgia Press 1997).

[42] Ian F Haney Lopez, 'The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice' (1994) 29 Harvard Civil Rights-Civil Liberties Law Review 1, 29; further references to classic writing on the issue can be found at Gloria J Liddell, Pearson Liddell Jr and Donald Shaffer, 'Is Obama Black? The Pseudo-Legal Definition of the Black Race: A Proposal for Regulatory Clarification Generated from a Historical Socio-Political Perspective' (2010) 12 Scholar 213, 234–38.

[43] The danger of reiterating racial perceptions through essentialism lurks those fighting it. See Paul Gilroy, *Against Race: Imagining Political Culture Beyond the Color Line* (Harvard University Press 2000) 12. Critical awareness of this danger is therefore imperative, and requires strategic planning. Such planning is offered by Gayatri Chakravorty Spivak, 'Subaltern Studies: Deconstructing Historiograph', in Gayatri Chakravorty Spivak (ed), *In Other Worlds: Essays in Cultural Politics* (Routledge 1988) 197, 205: 'I would read it [the Subaltern Studies Group's text], then, as a *strategic* use of positivist essentialism in a scrupulously visible political interest … This would allow them to use the critical force of anti-humanism … even as they share its constitutive paradox: that the essentializing moment, the object of their criticism, is irreducible.'

3.1.3 The Collaborating Organisational Effect

De jure discrimination increases the ability of minorities to politically organise both within and between their groups, in terms of gaining goodwill supporters from within the hegemony. This grants them a tool which has a key role in determining their political power.

3.1.4 The Institutional Memory and Blameworthy Effect

De jure discrimination powerfully situates its addressees within the legal system as the subjects of legal practice. Therefore, the notion of institutional memory and blameworthiness of the hegemony suggests that the hegemony deems it important that the same legal mechanism which was used *against* the group, be used *by* the group to provide the remedies it warrants.

3.1.5 The Presumption of Intentional Discrimination Effect

The presence of de jure discrimination is an important factor in establishing that a discriminatory act was intentional. Intention to discriminate, in return, is considered indisputably unjust and warrants strong legal reaction in favour of its victims. As opposed to the rather institutional nature of the former effect, this effect is more internal to the legal system's perception of discrimination as particularly severe when motivated by intent.

To summarise, discrimination discourse dictates the way in which discriminated groups are viewed by the law and imposes frameworks that structure what can be experienced or what meaning this experience can encompass. Groups suffering from de jure discrimination, while brutally excluded from society by the law, were included in society's primary legal text.[44] They received 'visibility' (albeit notorious), and were constituted as a legal entity (albeit as a discriminated, invented entity). It was within the discrimination discourse that they actually existed, while de facto discriminated groups did not. Not being legally excluded, they were actually completely invisible, and 'none included'.

3.2 The Sameness/Difference Dichotomy

The second dichotomy to dominate the antidiscrimination stratagem is the one manifested in the perception of 'difference' as underpinning the basic notion of discrimination. Heavily relying on 'difference' in legally defining discrimination, this notion fails to acknowledge that some groups are actually discriminated against within settings characterised by 'sameness'. To explicate, the claim I advance here – using the difference/sameness dichotomy – is that rooting a discrimination theory in the idea of 'difference' alone misses the bulk of discrimination practices that are formed within a socio-legal 'sameness' environment. Under this proposition, groups associated by

[44] In typifying 'primary legal text' I exclude any non-regulatory official action and include federal and state constitutional provisions, state primary legislation and local specific regulations.

socio-legal means with the hegemony would not be recognised as discriminated against. The group's real 'difference' from the hegemony, in de facto terms, is blurred by this association. More generally, I argue that by posing as the 'antidote' to discrimination, antidiscrimination discourse is trapped by 'poisons' carried by the same drug. Instead of judging its addressees according to the simple, however broad, question 'were they discriminated?' as expected by the notion of 'antidiscrimination', it allows traditional notions of 'discrimination' to dictate the scope of its relieving effect.

Understanding the concept of discrimination as working within the difference/sameness dichotomy scheme is intuitive. 'Differences' are sought in order to generate and justify discriminatory differential treatment.[45] Yet, I find it useful to revisit the conceptual roots of discrimination, even only briefly, so as to better understand this configuration and, consequently, its paradoxical implications and limitations on advancing equality. Consider first the dictionary definition of 'discrimination'. Dictionaries typically offer at least two definitions of discrimination that diverge into formal and substantial inquiries. First, discrimination is defined as the making of distinctions.[46] Accordingly, on the methodological level, the practice of distinction requires noticing 'difference', be it real or imagined.[47] On the substantive level it requires that these differences serve as the motivation for differential treatment of the group. This essential component of discrimination is perfectly embodied in the formal paradigm occupying the US Supreme Court's remedial discourse, associating antidiscrimination primarily with 'anti-classification' or 'anti-differentiation'.[48] The second dictionary definition is the 'disadvantaging of a group'.[49] This more substantive definition, while offering a broader conception of discrimination, still stresses the pivotal role difference plays in it.[50] It requires that an identifiable 'different' group be subject to subordination while denying this possibility for 'same' groups. Both definitions hence are

[45] Jane Flax, 'Beyond Equality: Gender, Justice and Difference' in Gisela Bock and Susan James (eds), *Beyond Equality and Difference: Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992) 193.

[46] *American Heritage Dictionary of the English Language* (4th edn 2006) 517: 'the ability or power to see or make fine distinctions'; *Merriam-Webster's Collegiate Dictionary* (11th edn 2005) 358: 'the quality or power of finely distinguishing'; *Random House Webster's Unabridged Dictionary* (2nd edn 2001) 564: 'the power of making fine distinctions'. In his oft-cited, seminal article Owen Fiss used the term 'antidiscrimination principle' to refer to a principle against distinction making: see Owen Fiss, 'Groups and the Equal Protection Clause' (1976) 5 Philosophy & Public Affairs 107, 157–58. The flipside of this notion of discrimination lies in Western law's view of equality as stemming from Aristotle's notions of sameness and difference, according to which equality is guaranteed only to those who are 'similarly situated', meaning alike.

[47] This notion is compatible with Foucault's perception of discrimination as an instrument for proactively establishing identities and differences: see Chris Horrocks and Zoran Jevtic, *Introducing Foucault* (Icon Books 1999) 64.

[48] Lackland H Bloom Jr, 'Hopwood, Bakke and the Future of the Diversity Justification' (1998) 29 Texas Tech Law Review 1, 5–7.

[49] *American Heritage Dictionary of the English Language* (n 46) 517, 3184; *Random House Webster's Unabridged Dictionary* (n 46) 564, 1525.

[50] This substantial account of discrimination is most notably attributed to Owen Fiss' work (n 46). However, even the broadest notions of 'antidiscrimination as antisubordination' still acknowledge that subordination pertains to 'different' and 'identifiable' groups. Both these notions are briefly and effectively reviewed in Jack M Balkin and Reva B Siegel, 'The American Civil Rights Tradition: Anticlassification or Antisubordination?' (2003) 58 University of Miami Law Review 9.

blind to the fact that sameness, not only difference, can distribute power and enable discrimination. Although being identified as 'same' generally protects a group against discrimination, attribution of 'sameness' to a group in circumstances where its difference is *denied* renders it ineligible for protection provided by antidiscrimination law. Within this conceptual framework, sameness arises where difference sinks. The two concepts are positioned as a zero sum game, in a multifaceted reality, tolerating the subordination of 'sames', simply because they are not 'different'. Under this paradigm, discriminated groups that allegedly bear no difference from the hegemony are facing substantial difficulties in seeking the protection of an antidiscrimination law. Their vulnerable existence within a 'sameness' socio-legal atmosphere calls for a special, more nuanced analysis.

4. Discrimination Typology: African Americans, Mizrahis, and their Distinctiveness

4.1 African Americans as a De Jure Discriminated Group

African Americans constitute the most prominent group to have historically suffered from de jure discrimination in the United States, thereby reflecting the peculiar way by which de jure discrimination creates a legally cognisable discriminated group. Both slavery and the Jim Crow laws were aimed at African Americans, creating a state-sponsored, constitutionally protected system of racial discrimination that took place even after the abolition of slavery from 1890 through the mid-twentieth century.[51] To make the point clearer within the American context, one can distinguish the experience of African Americans from that of Mexican Americans, who did not explicitly fall under any of America's de jure discriminatory regulations during the Jim Crow era. Although almost exclusively not subjected to prominent or legally visible de jure discrimination,[52] Mexican Americans nevertheless did suffer from discriminatory practices such as chronic abuse and segregation.[53] In accordance with my argument, this group characteristic can offer a new prism for understanding why African Americans were more successful than Mexican Americans in utilising the legal system at the remedial stage to their benefit, however limited.[54] Part of this success can be

[51] For more information about the Jim Crow legal system of segregation, see F James Davis, *Who is Black? One Nation's Definition* (Pennsylvania State University Press 1991) 51–70. For more on the constitutionality of slavery, see Geoffrey R Stone and others, *Constitutional Law* (4th edn, Aspen 2001) 422–31.

[52] To be sure, I do not intend to state that there was no formal regulatory de jure discrimination against Mexican Americans whatsoever. However, this form of discrimination was sporadic and rare. See, for example, a Californian regulation known as the 'Greaser Act' from 1855, in which vagrancy was banned on 'all persons who are commonly known as "Greasers" or the issue of Spanish … blood': 113 California Statute 175 (1855), excerpted in Haney López (n 42) 29.

[53] For a brief history of Mexican American encounters with the law, see Reynaldo Anaya Valencia and others, *Mexican Americans and the Law: ¡El Pueblo Unido Jamas Sera Vencido!* (University of Arizona Press 2004) 4–10.

[54] Bitton (n 38) 603–35. For the devastating consequences of the courts' reluctance to perceive Mexican Americans as a distinctive 'race', see Ian F Haney López, 'Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory' (1997) 85 California Law Review 1143, 1158.

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traced down to the contribution their de jure pattern of discrimination had to the process, mainly in the inception period of the remedial stage.[55]

Despite their perception as a group enjoying ultimate recognition as being discriminated against, it should be noted that, under contemporary American legal discourse, the African Americans' status has changed dramatically. Dominated by a 'colourblind' ideology,[56] and characterised by the complete erosion of formal discrimination, the American legal system currently treats African Americans as 'colourless' individuals, thereby depriving them of most of the benefits obtained by the aforementioned effects.[57] This article's contention, nevertheless, seems to be strengthened by this evinced legal transformation, which ascertains the strong nexus between de jure discrimination and the efficacious legal fight for equality. Hence, in comparing *Noar Kahalacha* with *Brown*, this article is able to demonstrate the full force of its argument, by capturing in *Brown* a moment in time when the transition to the remedial stage in America was in its initial phases and the freshly induced effects of de jure discrimination were most felt.[58]

4.2 MIZRAHIS AS A DE FACTO DISCRIMINATED GROUP

The Mizrahis are a legally unrecognised group. Despite being subjected to lingering de facto discrimination, Mizrahis are largely absent from the Israeli antidiscrimination discourse. This somewhat surprising absence is better understood when compared with the social and legal status of the Israeli Palestinians,[59] a group that is perceived as the prototypical de jure discriminated 'other' in the Israeli socio-legal context. Furthermore, Israeli socio-legal pathology has positioned Palestinians concurrently at the discriminating stage and remedial stage, wherein they are simultaneously discriminated against and granted protection from discrimination through antidiscrimination laws.[60] Measured against the Palestinian saliency, the unrecognised socio-legal status of

[55] Bitton, ibid. The stage of commitment to the 'antidiscrimination principle' began gradually after the Civil War and during the Reconstruction, but is much more evident, coherent and holistic since the mid twentieth century: Paul Brest, 'The Supreme Court, 1975 Term – Foreword: In Defense of the Antidiscrimination Principle' (1976) 90 Harvard Law Review 1. Kimberle Crenshaw marks the abolition of the Jim Crow legal system as the crucial point of transition into the 'formal equality' era: Kimberle Williams Crenshaw, 'Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law' (1988) 101 Harvard Law Review 1331, 1377. The effect of this type of clear recognition of a category of race is still relevant today for laws applying to such a category in a remedial manner: see Sharona Hoffman, 'Is There a Place for "Race" as a Legal Concept?' (2004) 36 Arizona State Law Journal 1093, 1103–07.

[56] The shift to colourblindness was a counter reaction to considering race consciousness the main component of white supremacy ideology: see Garry Peller, 'Race Consciousness' [1990] Duke Law Journal 758, 759–61.

[57] See, for example, Kimberle Crenshaw's concern over what she identifies as 'the loss of collectivity' that followed the erosion of formal discrimination: Crenshaw (n 55) 1383.

[58] Kimberle Crenshaw marks the abolition of the Jim Crow legal system as the crucial point of transition into the 'formal equality' era: ibid 1377.

[59] Palestinians in this article refer to the group of Israel/Palestine-born population, living within the boundaries of the State of Israel, and holding Israeli citizenship.

[60] Israel forbids the passing of Jewish ownership of lands (Israeli Lands Law, 1960 (Israel), s 2a), and states explicitly that the spouses of Israel's Arab citizens do not acquire Israeli citizenship by the act of marriage (Citizenship and Entrance to Israel Law (Temporary Order) 2003 (Israel), s 2). At the same time, Israel's constitutional legacy ensures equality to all its citizens, be they Arabs or Jews, by declaring itself to be a democratic constitution-based

Mizrahis is easier to comprehend. The legal system reveals very small and fragmented traces of acknowledging anti-Mizrahi discrimination, in either its discrimination or antidiscrimination discourse, rendering the existing literature and case law regarding antidiscrimination laws relatively irrelevant to their case.[61]

In one of the rare discussions of the Mizrahi group in the Israeli legal discourse, a Mizrahi scholar has observed:[62]

> What were the legal manifestations of the status of Mizrahi Jews? The issue is much more subtle than that of the status of Israeli Arabs or women. In the case of Arabs and women, explicit legal norms discriminated or at least recognized differences. With regard to the Mizrahim, Israeli law appears to have been blind. Formally they have been treated as equal.

My legal analysis, however, goes against existing legal categories as dictating the realm of criticism. Therefore, notwithstanding the absence of Mizrahis from the surface of the legal system, I endorse identifying Mizrahis as a legal category eligible for antidiscrimination relief. On that same token, this endorsement acknowledges as well as challenges the unique pathologies eminent in the Mizrahis' struggle for equality, generated by the aforementioned dynamic of denying their discriminated status.

4.3 African Americans as Excluded 'Others' (Establishing 'Difference')

Using legislation to discriminate provokes a sharper sense of humiliation, of otherness and of alienated outsider-ness.[63] Reflecting this notion is Dean Ely's psychological approach to the legislative process, which represents de jure discrimination as a positioning of the relations between the relevant groups in a 'we–they' dichotomy. 'We' refers to the hegemonic oppressor, represented, in the case of African Americans, by the white legislator, while 'they' refers to

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state (Basic Law: The Human Dignity and Liberty (Israel), s 1a). Israeli Supreme Court rulings, as well as specific legislation, provide unique protection from discrimination to the Arab Palestinian citizens of Israel, and even apply affirmative action rules in their favour. See HCJ 6924/98 *The Association for Human Rights in Israel v Israeli Government and Others* 2001 PD 55(5) 15 – imposing affirmative action in favour of Arab Israelis on all governmental and quasi-governmental entities; HCJ 1113/99 *Adalah – Legal Organization for the Rights of the Israeli Arab Minority in Israel v Minister of Religious Affairs and Others* 2000 PD 54(2) 164 – ordering the Ministry of Religious Affairs to reallocate its budget more equally between Jewish and Arab Israelis. Arab Palestinian citizens of Israel are, therefore, trapped in a unique paradoxical position, where on the one hand they suffer from being the de jure discriminated against group, while on the other hand they enjoy the benefits of being subjected to antidiscrimination and affirmative action laws.

[61] In a previous article, I have set a discrimination typology that can shed some light on the process shaping this phenomenon: see Yifat Bitton, 'Wishing for Discrimination? A Comparative Gaze on Categorization, Racism and the Law' (2008) 2 Sortuz: Onati Journal of Emergent Socio Legal Studies 39.

[62] Pnina Lahav, 'Forum: Assessing the Field. New Departures in Israeli Legal History, Part Three – A "Jewish State … to be Known as the State of Israel": Notes on Israeli Legal Historiography' (2001) 19 Law & History Review 387, 414.

[63] Patricia J Williams, *The Alchemy of Race and Rights: Diary of a Law Professor* (Harvard University Press 1991) 88–89.

African Americans as the de jure discriminated group.[64] In this framework, discrimination labelled African Americans as a 'minority' in the sense that there is a majority manifesting political superiority over them, and forcing them as a group to admit their relative political powerlessness. This explains why African Americans, as the addressees of the discriminating laws, could not see themselves as its authors.[65] De jure discrimination against African Americans created a clear 'we–they' political structure, which encouraged the development of a group consciousness among its own members and vis-à-vis the white group.

4.4 MIZRAHIS AS INCLUDED 'SAMES' (ESTABLISHING 'SAMENESS')

The Israeli legal system draws heavily upon common law tradition and, like the latter, constructed its account of discrimination around the axle of 'difference' as its constitutive element. Adopting the Aristotelian justice equation, the Israeli Supreme Court has embraced the American idea of 'discrimination as classification'[66] in its founding case law concerning conceptualising what constitutes 'discrimination'.[67] Within this conceptual framework, Mizrahis are almost inevitably unidentifiable, and are therefore set no 'class' by which an Aristotelian query can be ignited.

The Israeli legal system has, formally, adopted the 'melting pot' ideology that promotes a Zionist Jewish ethos of one land for all Jews. This mechanism proposed a unifying, sameness-based, 'all Jew encompassing' de jure rhetoric. Exemplary of this is the Israeli Law of Return of 1950,[68] declaring the right of every Jew to immigrate to Israel, supplemented by a provision in the Nationality Law of 1952 that grants automatic Israeli citizenship to every immigrant Jew.[69] These laws function, in effect, as political signifiers, demarcating Israel as an arena for fighting 'outside' social threats, thereby dismissing as irrelevant 'internal' intra-Jewish social problems of hierarchies and power relations.[70] Differential treatment statutes often focus upon Jewish exclusiveness, as demonstrated, for example, by Israel's ban, through a constitutional basic law, of

[64] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press 1980). I refrain from using this analysis to justify court intervention, as Ely does, and rather borrow the idea of the alienating power of discriminating laws.

[65] Here, this article adopts Habermasian terms: Jurgen Habermas, 'Struggles for Recognition in the Democratic Constitutional State' in Amy Gutmann (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press 1994) 121–22.

[66] Conceptualising 'difference' as 'classification' was first introduced in the seminal article by Owen Fiss (n 46).

[67] HCJ 528/88 *Avitan v Israeli Land Administration* 1989 PD 43(4) 297, 300, opinion of Justice Or, para 4; HCJ 153/87 *Shakdiel v Minister of Religious Affairs and Others* 1988 PD 42(2) 221; HCJ 4541/94 *Miller v Minister of Security* 1995 PD 49(4) 94; HCJ 678/88 *Kfar Vradim and Others v Minister of Treasury and Others* 1989 PD 43 (2) 501, opinion of Justice Or, para 8; HCJ 1703/92 *CAL Airlines v Israel Prime Minister and Others* 1998 PD 52 (4) 193, opinion of Chief Justice Barak, para 15 (discrimination is different treatment of equals and equal treatment of different).

[68] Law of Return, 1950 (Israel). This law is also known as the Law of 'Shevut'.

[69] Citizenship Law, 1952 (Israel), s 2. In addition, Israel's Declaration of Independence declares Israel to be the home of all Jews: 'In the state of Israel the Jewish people have raised'.

[70] Yossi Yonah, 'Israel's Immigration Policies: The Twofold Face of the "Demographic Threat"', (2004) 10 Social Identities 195.

non-Jewish ownership of lands.[71] This structure largely hid the Mizrahis' suffering from de facto discrimination and has made the legal sphere both structurally and symbolically irrelevant to the Mizrahi struggle for equality.[72]

The Arab-Jewish dialectic under which Mizrahis are considered 'sames' is further nurtured by their socially perceived identity. Mizrahis are in a way both Jewish and Arab. Their sameness is therefore twofold: first, they share an illusory 'sameness' with the Ashkenazi hegemony; more specifically, they share the fact that they are both 'fundamentally different' from the ultimately defined 'others' – the Palestinians – by virtue of their shared nationality and religion. Profoundly, however, the hegemony in Israel has built itself up by relying on the Mizrahis' consent, affirmation and consensus, rather than on overt submission and emphasis on differences.[73] It treated the Mizrahis as 'brothers' (more plausibly, as sisters …) coming from the Arab Diaspora to the land promised to all Jews, while at the same time designated them to be their Jewish society's working and exploited class.

Secondly, and concurrently with their perceived equal membership of the Israeli Jewish hegemony, Mizrahis share with Palestinians – by virtue of their Arab descent – similarities that are at best unacknowledged and at worst tabooed and denied. These relatively immutable similarities, analysed from an Orientalist vantage point – which tends to denounce Arab culture and origin as inferior to that of the European – function as primary generators of discrimination against Mizrahis.[74] In these respects, they suffer from discrimination by virtue of sameness rather than difference.

Understanding Mizrahi identity as constructed within 'sameness' warrants the introduction of yet another socio-legal Israeli phenomenon: namely, the 'dynamic of denial' from which Mizrahis suffer. This notion of popular denial was identified by a prominent Mizrahi critic within his theoretical critique of Zionism.[75] Rejecting the idea that Zionism was constituted on Jewish

[71] Basically, the Israeli land regime is structured according to an idiosyncratic historic national setting. During the 1960s, the legal system facilitated ample mechanisms through which the new Israeli state has rapidly gained control over lands within its territorial boundaries. The Jewish Agency and the Israel National Foundation were established as institutions designed to facilitate the ethnically centred objective of Jewish land territorial control. Both functioned as a legal and practical means for collective, rapid and systematic acquisition of land and for creating centralised control over it. For a critical analysis of the legal process that constituted Israel as an ethnocracy rather than a democracy, see Alexander (Sandy) Kedar, 'The Legal Transformation of Ethnic Geography: Israeli Law and the Palestinian Landholder: 1948–1967' (2001) 33 New York University Journal of International Law & Policy 923, 936–49. For the legislative history of the Jewish land ownership principle, see David Kretzmer, *The Legal Status of the Arabs in Israel* (Westview Press 1990) 49–76.

[72] Studies in identity perception reveal an interesting dissonance through which Mizrahis identify more with being a part of the Jewish people than with being Israeli citizens, whereas Ashkenazis identify themselves primarily as Israeli citizens: Michael Schulz, 'Israel between Conflict and Accommodation: The Transformation of Collective Identities: A Study of a Multi-Melting Pot Process', dissertation thesis, Goteburg University, 1996, 253–56. One shocking datum indicates that Israeli Arabs are more likely to identify as Israelis than Mizrahim.

[73] Yehouda Shenhav, *The Arab Jews: A Postcolonial Reading of Nationalism, Religion and Ethnicity* (Stanford University Press 2006) 17.

[74] The notion of Orientalism was 'translated' into the Israeli Jewish context primarily in Ella Shohat's work: see Ella Shohat, 'The "Postcolonial" in Translation: Reading Said in Hebrew' (2004) 33 Journal of Palestine Studies 55.

[75] Shenhav (n 73).

nationalism alone, Yehouda Shenhav identifies the triad of nationalism, religion and ethnicity as lying at the heart of the Zionist project. Besides providing a conceptual framework for Zionism, the triad functioned as 'categories of practice'. Put simply, Shenhav's argument is that Zionism excluded Palestinians as a national practice, excluded Mizrahis (and Arabs) as an ethnic practice, and excluded all non-Jews as a religious practice.[76] Interestingly, however, contrary to its non-Jewish exclusionary practices, Zionism used unique 'exclusion alongside inclusion' practices vis-à-vis Mizrahis as part of its genuine attempt to realise the dream of the 'Jewish state'. Identifying Zionism as premised on this conceptual practical triangle not only challenges the traditional perception of it as a purely national project, but also provides, in my opinion, the analytical framework for establishing the dynamic of denial vis-à-vis Mizrahis. The hidden ethnic premise of Zionism and its practicality, specifically, constituted the ethnic division within Israel and nourished it.

This dynamic of denial dictated the three manners in which the Mizrahi ethnicity category in Israel is generally perceived: (i) as nonexistent;[77] (ii) as an essentialist category signifying a 'cultural' group of people sharing some cultural background similarities; and (iii) as the new Israeli home-grown class suffering from a disadvantage in education, geographic residence, employment, and so on.[78] All of these perceptions are reductionist in the sense that they exclude considerations of historical and political contexts, which led to creating Mizrahis as an identifiable group[79] – at least in the sense that belonging to it has substantial distributional effects.

In sum, anti-Mizrahi discrimination is constituted and nurtured within a socio-legal 'sameness' context and 'difference' denial, which deprives them of their right to enter the garden of antidiscrimination Eden and enjoy its fruits, albeit unripe.[80]

5. REFLECTIONS ON TYPICALITY: *BROWN* AND *NOAR KAHALACHA*

Brown and *Noar Kahalacha* squarely reflect their differences in discrimination types. The extent and firmness of legal recognition that both groups were accorded by the courts were fundamentally different. Detailing their impact on the courts' reasoning in both cases, I shall now demonstrate how central these overlooked differences in discrimination types are to utilising the law for the benefit of discriminated groups.

[76] ibid 12–16.

[77] This perception is usually accompanied by some sense of nostalgia, acknowledging the existence of Mizrahis as a category that is relevant to the past (at times even shameful) of Israeli history, namely the years of the significant immigration to Israel, mainly through the 1950s.

[78] See Shenhav's references (n 73) 11–12. Shenhav, however, does not present the first perception of non-existence I have introduced. This is, in my opinion, missing the most simple and casual mode of denial practised by everyday interactions I have with Israeli people, Ashkenazis and Mizrahis alike.

[79] The richer and more radical, multifaceted category of Arab Jews renders it too problematic to work with within the legal sphere, which has not acknowledged even the popular term of Mizrahis. I, therefore, advocate keeping with the term 'Mizrahi' here, for practical legal reasons.

[80] I adhere to antidiscrimination laws as the best available legal tool to combat discrimination regardless of the inherent limitations of the law as a means of achieving social, and more particularly, racial justice.

5.1 Recognition as a Distinctive Group

As explained before, de jure distinctiveness is imperative for a group wishing to use the legal system to fight against discrimination. Mizrahis, who suffer from a dynamic of socio-legal denial of their experience as a discriminated group, lack this crucial virtue, and the legal system has had an important role in reinforcing this interplay. Mizrahis' antidiscrimination litigation has been meagre and generally ineffective,[81] and the *Noar Kahalacha* case is no different: although it revolved around discrimination against Mizrahis, it failed to identify them as a legally recognised group.

In introducing the rival parties before it – namely, the Ashkenazi school administration and the Mizrahi students – the Court drew on the religion-related language offered by the respondents to justify their discriminatory practices, a practice which was in effect rejected by the Court itself as discriminatory. Instead of identifying the parties in the school as microcosmic representatives of the larger Mizrahi–Ashkenazi rift, the Court identified them as 'Ashkenazis' and 'Sephardics'.[82] This well-known divide, which originated within a historical Jewish religious medieval context, is irrelevant to the rift that generated the segregation in Immanuel: a political rift which reflects the modern Israeli-made Ashkenazi-Mizrahi divide.[83] The religion-based divide between the Ashkenazi and Sephardic cultures has some bearing on the level of integrative leaving practices to a limited extent,[84] but they are all traditionally exercised outside the scope of the elementary educational systems.[85] Notwithstanding its irrelevance to the segregation at hand, however, this divide was cynically abused by the ultra-orthodox Ashkenazi group in order to exclude the Mizrahi students. Read against this realisation, the Court's incorrect categorisation of the parties was not merely a misuse of the language, but also an act that determined the social context upon which the whole case was adjudicated. In assigning the category of 'Sephardic' to the discriminated students instead of 'Mizrahi', the Court disregarded an Israeli reality in which the latter, not the former, suffers from systematic discriminatory practices. This point is clearly shown in Justice Meltzer's appropriate choice to identify the parties before him as Ashkenazis and Mizrahis, putting the conflict in its richer and more accurate context.[86]

[81] Yifat Bitton, 'Mizrahis and the Law: Absence as Existence' (2011) 41 Mishpatim 455, 474–85.
[82] *Noar Kahalacha* (n 3), opinion of Justice Levi, para 2, and opinion of Justice Arbel.
[83] The Ashkenazi–Sephardic divide is meant to distinguish two geographically distinctive branches of the ancient Jewish world, consisting of mainly the European Jewish community, and the community of Sephardic Jews residing on the Iberian Peninsula. The current sociological definition, however, considers Mizrahis as Jews of Arab and Muslim descent alone.
[84] One such legally recognised difference used to be the now abolished custom of nominating two Chief National Rabbinical offices in Israel, one for each religious denomination.
[85] On the day on which the decision was delivered, 6 August 2009, Dr Aviad Hacohen, who represented the petitioners in the Supreme Court proceedings, was ridiculing this artificial justification in an interview on a popular radio show – Nissim Mishal on the Morning – where he challenged: 'Does this religious divide ban girls from talking with one another? From studying the basic principles of a language in English classes or exercising together in Gymnastic classes?'
[86] *Noar Kahalacha* (n 3), opinion of Justice Meltzer, para 5.

The experience of African Americans in 'naming' them and identifying their group by the Court was completely different, but harder to trace through identifying some parallel distinctive 'legal process' for the simple reason that, for the Court, the group pleading before it was undeniably identifiable. The *Brown* Court plainly introduced the various petitioners before it as 'minors of the Negro race', thereby affirming and acknowledging their status as a generally identifiable group.[87] This group recognition was not only effective across different states in the US,[88] but also applied across various discriminatory practices beyond segregation in education. For example, *Moose Lodge No 107 v Irvis and Others*[89] presented the equal protection claim of a 'negro' who was denied service in a club. *Palmer and Others v Thompson and Others*[90] presented the equal protection claim of 'Negro citizens'/'black citizens' against the local authority which decided that closing a public pool was preferable to desegregating it. In all these cases, the courts were never mistaken, inaccurate or divided as to who sought their protection, regardless of the extent to which this protection was provided, if at all.

5.2 VISIBILITY: TELLING THE STORY OF DISCRIMINATION AND NEGLECT

De jure discrimination provides public presence to its subjects and narrates their discrimination experience. The process in which past de jure discrimination was openly discussed in the courts at the discriminatory stage, in turn, affected the transparency and visibility of both the group's 'real' existence and the group's oppression.

A compelling explanation for *Brown*'s monumental eminence in the discrimination discourse might be exactly the emphasis of its judges on openly referencing the suffering and social exclusion of African Americans through de jure discrimination. The National Association for the Advancement of Colored People (NAACP), which argued the case, created a narrative of African American suffering which was embraced by the Court[91] that emphasised the story of the group's oppression.[92] Recognising it as all-encompassing, the Court referred to this suffering as largely experienced by all members of the discriminated group of African Americans. The institutionalised nature of the discrimination in issue represented, in the eyes of the Court, a broader picture of discrimination in educational bodies from which African Americans suffered nationwide.[93]

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[87] *Brown* (n 6) 487.
[88] Petitioners in *Brown* were themselves residents of different states in the US: 'These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware', ibid 486.
[89] 407 US 163 (1972) 164.
[90] 403 US 217 (1971).
[91] The richness of this narrative was not present in the official decision, but it was exposed to the Court. For a discussion of broad areas of the contents of the brief, see Whitman (n 8) 310–34.
[92] 'To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone': *Brown* (n 6) 494.
[93] The Court employs generalised language that gathers the different petitioners, stating that 'a common legal question justifies their consideration together in this consolidated opinion': ibid 486.

An opposite effect is reflected in *Noar Kahalacha*, in which the majority decision refrained from narrating the general story of discrimination from which Mizrahis suffer in Israel. By disregarding the fundamental facts which rendered the segregations in this case outrageous, the Court signified its decision to distance itself from Mizrahi suffering. Moreover, in choosing to identify the segregated students as 'Sephardic' rather than 'Mizrahi', the court has rendered the Mizrahi political story far less relevant to the case.

Interestingly, even within the religious paradigm, the Court's decision lacks any reference to the narrower narrative of discrimination against the Sephardic community within the Jewish ultra-orthodox society or even within the educational system.[94] Rather, it reviewed and criticised the isolated discriminatory practice of the *specific* school of Beit Ya'acov in Immanuel, portraying the case as 'local' as possible, thereby trivialising the severity of the systematically applied discrimination in education from which the 'Sephardi' community suffers in ultra-orthodox communities. Surprisingly, Justice Meltzer, who – unlike his bench counterparts – correctly categorised the segregated students as 'Mizrahis', also refrained from further discussing the overall position of Mizrahis in Israel and omitted any clear generalisation of the issue at hand in other fields or sectors where similar discrimination exists. This omission can be explained as proving the dynamic of denial to be effective even within decisions that are partially cognisant of Mizrahi suffering. A similar effect of this dynamic can be found in the growing body of case law regarding discrimination against Mizrahis in admission to night clubs.[95] There, as well, one can identify this denial recognition pattern, whereby the courts allow discrimination claims by Mizrahis, while refraining from mentioning a Mizrahi category or the Mizrahis' suffering as a discriminated group.[96]

5.3 Sustainability and Endurance of Recognition

The strength and sustainability of a case is best evaluated by its heritage. Monumental is a case that changes the reality of the lives of its beneficiaries, and functions as a prominent precedent in future cases. Notwithstanding its lagging impact on the abolition of the reality of segregation in America, *Brown* is celebrated as the starting point of this abolition. Its strong legal legacy was the 'legal recognition', as Derrick Bell states: 'The significance of this decision is that it altered the status of African Americans.'[97] More importantly, from *Brown* onwards, the viability of every segregation claim brought into court by African Americans was immediately and fully discussed. No special rhetoric or epistemological efforts were required by the courts to define the petitioners

[94] The court's reasoning did not even refer to the Beit Ya'acov school chain more generally, for that matter, although this school chain has a history of discrimination practices against 'Sephardic' students.

[95] Case law following the enactment of the Forbidding Discrimination in Products, in Services and in Admittance to Entertainment Clubs and to Public Places Law, 2000 (Israel). For a general review of this law, see Moshe Cohen Illia, 'The Liberty and the Equality in Light of the Law Forbidding Discrimination in Products and Services' (2002) 3 Aley Mishpat 15 (in Hebrew).

[96] Recent research I have conducted indicates that in only one out of 90 cases concerning night club discrimination incidents the court referred to Mizrahis as a group and stated that it suffered from racism at the hands of Ashkenazis: Bitton (n 81) 511.

[97] Derrick Bell, *Race, Racism and American Law* (6th edn, Aspen 2008) 551.

or acknowledge their discriminated position. This ease in asserting claims was the unrecognised yet crucial impact of the previous de jure discrimination, which established African American group recognition.[98] The conceptualisation of litigation as a means of seeking equality between different identifiable groups prompted African Americans seeking equality to bring their segregation claims to court. De jure discrimination thus had the structural effect of enabling the group to gain better control over attempts to reshape the educational system.[99]

Evaluating in the same way *Noar Kahalacha*'s legal heritage to its full extent might be somewhat premature, in terms of subsequent legal analysis as well as practical experience. However, some signs may indicate, even at this early stage, how limited its scope is expected to be. First, regarding the facts of the case itself, as of today not only has the segregation at Immanuel's Beit Ya'acov school not been abolished, it has been reshaped into a more escalated controversy. The Ashkenazi school management, as well as the Ashkenazi parents, initially ignored the Court's decision. Later on, as the pressure from the Court for compliance mounted, they found other creative ways to avoid effective integration with the Mizrahi students.[100] To date, after exhausting compliance-seeking efforts by the petitioners through repeated contempt of court proceedings, the rival parties have come to a self-induced 'compromise' in which the schools are 'voluntarily' completely segregated.[101] Furthermore, in contrast with *Brown*, no ripple effect has been identified in other schools, and the questionable 'change' generated by the *Noar Kahalacha* decision

[98] It is obviously very hard to trace this unrecognised impact, since the courts discussing segregation cases simply overlooked the identity of the African American appellants. Their viability as a recognised group was unquestioned and was a non-issue: see *Griffin v County School Board* 377 US 218 (1964) (the petitioners are laconically described as 'a group of Negro school children'); *Wright v Council of Emporia* 407 US 451 (1972) (the appellants are simply described as 'Negro children'); *Norwood v Harrison* 413 US 455 (1973) (the appellants are described as 'schoolchildren's parents'; later in the case, the court incidentally discusses the issue of school segregation as relevant to 'white' and 'Negro' students: ibid 456); *Cooper and Others, Members of the Board of Directors of the Little Rock, Arkansas, Independent School District and Others v Aaron and Others* 358 US 1 (1958) (again, the court only declared incidentally that the battle around the implementation of *Brown* involved nine 'Negro students': ibid 9).

[99] It is true that the aspirations and the hopes that were forged in *Brown* were not fulfilled, yet *Brown* taught that employing social tactics on top of the legal battle is essential for initiating deeper changes in racial power relations: see Derrick Bell, *Silent Covenants: Brown v Board of Education and the Unfulfilled Hope for Racial Reform* (Oxford University Press 2004).

[100] Ashkenazi parents simply refrained from sending their daughters to school, to a point where Ministry of Education officers filed a criminal complaint against them for disobeying their parental legal obligation to send their daughters to a formally acknowledged school: see Or Kashti, 'The Ministry of Education Filed a Police Complaint Against Ashkenazi Ultra Orthodox who Refrain from Sending their Daughters to Study with Mizrahi Girls', Haaretz, 7 March 2010, available at http://www.haaretz.co.il/news/education/1.1192186 (in Hebrew).

[101] Some chronology: the case was decided in July 2009, yet the petitioner has filed at least three contempt of court motions against the respondents for not complying with the Court's order in its initial decision. The case was eventually put to rest with the parties notifying the Court of a 'settlement', which was in actuality the result of mutual ultra-orthodox pressure to refrain from using the Court's services. The reluctance from using state legal services and resorting to Rabbinical Jewish institutions is well anchored in ultra-orthodox Jewish tradition, whereby the secular legal system is considered illegitimate. The Old Testament states: 'Now these are the ordinances which thou (tha-oo) shalt set before them' (Exodus 21, 1). The Jewish Talmud interpreted 'before *them'* and not 'before non-Jews ('Nochrim') or Laymen' (Divorce 88, page 2). In other words, the Talmud concludes that legal conflicts should be settled by no one other than a Jewish rabbinical judge. Moreover, the prohibition includes non-ordained Jewish rabbinical wise men, who are still considered laymen.

was confined to the school in the settlement of Immanuel alone. As for the potential heritage in terms of legal analysis of *Noar Kahalacha*, no greater success is noted here either, given the fact that the Court has not taken the opportunity at hand to make a statement, as a general matter, as to the Mizrahis' subordinated status in Israel. Treating the case before it almost as a 'private dispute' case, the Court referred to the specific rivals – the Beit Ya'acov school and its students – as its sole addressees. Identifying the groups before it as being outside the Mizrahi–Ashkenazi socio-political rift and positioning them instead on the Sephardic–Ashkenazi religious divide spectrum, the *Noar Kahalacha* ruling has further limited the applicability of the case and its authoritative value. Simply put, one can imagine how this case might be deemed irrelevant to future segregation of Mizrahis cases brought before the same court, for example, in cases dealing with the secular education system, where segregation has been proven to exist.[102] In this respect, Justice Meltzer's usage of the Ashkenazi–Mizrahi divide, however limited, still carries some potential for future utilisation by legal agents seeking legal redress for Mizrahis against discrimination in education. In his opinion, Mizrahis exist within Israeli sociality, not just within its religious community, and are recognised as a group, as opposed to their absence from the ruling suggested by the other panel justices. It comes as no surprise, then, to find that Justice Meltzer was the only one on the bench to openly and directly compare *Brown*'s legacy with his own decision.[103]

Furthermore, with respect to the Mizrahis' struggle for equality more generally, although extensively cited in subsequent cases,[104] none of the references made to *Noar Kahalacha* considered cases in which a Mizrahi claim against discrimination was raised, notwithstanding the fact that tens of such claims have been deliberated and decided by Israeli courts over the last three years.[105] Interestingly enough, most of these decisions can themselves be easily associated with the same critique that *Noar Kahalacha* bears: they, too, fail to clearly recognise Mizrahis as the group to which the plaintiffs belong and based on which they were discriminated.[106] Further manifesting the 'dynamic of denial' advocated throughout this article, this legal phenomenon is particularly peculiar, given the fact that these cases were brought before courts based on the Forbidding Discrimination in Products, in Services and in Admittance to Entertainment Clubs and to Public Places Law, one of the declared goals of which was to prevent discrimination against 'men with Mizrahi appearance'.[107] The difficulty of these courts in acknowledging the Mizrahi identity induced discrimination against the plaintiffs, on the one hand, while providing antidiscrimination relief, on the other, which indicates they share the same theoretical framework

[102] Mizrachi (n 12).
[103] *Noar Kahalacha* (n 3), opinion of Justice Meltzer, para 4.
[104] The most prominent Israeli legal database, Nevo, indicates that the case has been cited 106 times since the judgment was first delivered: see Nevo Legal Database, available at http://www.nevo.co.il.ezproxy.colman.ac.il/PsikaSearchResults.aspx?MenuId=10.
[105] At least 40 cases were decided during 2009 and 2010, according to a study mapping these decisions: Bitton (n 81) 490.
[106] ibid 485–513. A thorough review of tens of cases indicates that in only one of them did the court directly address the plaintiffs' cause of discrimination as emanating from their Mizrahi identity.
[107] See the Law's explanatory notes (n 95).

upon which *Noar Kahalacha* was administered.[108] Both legal settings were similarly shaped by the effects of the de facto-sameness discrimination from which Mizrahis suffer.

6. CONCLUSION

Reflecting on the interplay of the de jure/de facto and difference/sameness dichotomies with achieving legal recognition, a simple proposition might be that an explanation for the higher levels of recognition given to different discriminated groups is the supposition that some groups suffered more than others. This proposition might be true, but levels of suffering are not used as proxies for recognising a group as discriminated. Moreover, as a theoretical matter, the nature of the suffering – be it de jure or de facto – or the nature of the social settings within which it is maintained – be it of difference or of sameness – should have no bearing on recognising a group as one and identifying its entitlement to antidiscrimination remedies. Notwithstanding these conceptual understandings, the reality of African Americans and Mizrahis, as reflected in the cases analysed here, prove the opposite.

EPILOGUE

Yael's story is not hers alone; it is not even the story of her 180 schoolmates. Rather, it is the story of many Mizrahi pupils in contemporary Israel, whereby discriminatory practices against them within the educational system are not limited to the ultra-orthodox community. Similar segregatory practices have been found at some of the top schools in the state's secular school system.[109] There, such discriminatory practices are extremely hard to trace and combat effectively since, from a legal perspective, it is undoubtedly easier to fight against the more blatant and traceable practices. The goal of Mizrahi-cause lawyers and legal academics is to abolish such discriminatory practices everywhere. Ironically, their biggest challenge in the process of achieving that lies less in proving the discrimination and more in proving that Mizrahis exist as a group deserving legal protection against that discrimination. With African Americans, the challenge was converse. *Noar Kahalacha* and *Brown*, therefore, are too distinct from one another to name the former after the latter. They are, however, connected in a way that holds the key to better understanding the typology of the notion of discrimination and the limits it bears in fighting against it when using antidiscrimination legal tools.

[108] An elaborate analysis of the similarities these cases share with *Noar Kahalacha* is provided at Bitton (n 81) 513–15.
[109] Mizrachi (n 12).