LCA 6897/14

Applicant: **Radio Kol BaRamah**

v.

Respondent: **Kolech – Religious Women's Forum**

Attorney for the Applicant: Moti Arad, Adv.

Attorneys for the Respondent: Asaf Pink, Adv., Orly Erez-Likhovski, Adv.

The Supreme Court

Before Justices E. Hayut, Y. Danziger, D. Barak-Erez

Application for leave to appeal the judgment of the Jerusalem District Court of September 9, 2014, in Class Action 23955-08-12, delivered by the Honorable Judge Gila Kanfi Steinitz

12 Tammuz 5775 (June 29, 2015)

Israel Supreme Court cases cited

[1] LCA 8671/09 *Cellcom Israel Ltd. v. Fattal* (6.5.2010).

[2] LCA 2282/15 *Psagot Provident and Pension Funds Ltd. v. Levy* (8.7.2015)

[3] HCJ 746/07 *Ragen v. Ministry of Transport* (5.1.2011) [http://versa.cardozo.yu.edu/opinions/ragen-v-ministry-transport]

[4] HCJ 153/87 *Shakdiel v. Minister of Religion* [1988] IsrSC 42(2) 221 [http://versa.cardozo.yu.edu/opinions/shakdiel-v-minister-religious-affairs]

[5] HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSc 49(4) 94 [http://versa.cardozo.yu.edu/opinions/miller-v-minister-defence]

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

[7] LCA 8821/09 *Prozansky v. Layla Tov Productions Co. Ltd.* (16.11.2011) [http://versa.cardozo.yu.edu/opinions/prozansky-v-layla-tov-productions-ltd]

[8] CA 5378/11 *Frankl v. Allsale* (22.9.2.2014).

[9] LCA 9615/05 *Shemesh v. Focaccetta Ltd.* (5.7.2006) [http://versa.cardozo.yu.edu/opinions/shemesh-v-focaccetta-ltd]

[10] CA 9494/08 *Pan v. Israel Railways* (27.6.2013)

[11] CA 6887/03 *Resnik v. Nir Cooperative* (20.7.2010)

[12] LCA 3814/14 *Hogla Kimberley Marketing Ltd. v. Mastei* (6.7.2015)

[13] LCA 1868/15 *Yetedot T.S.M.V. Publishing and Advertising Ltd.* (15.3.2015)

[14] HCJ 6111/94 *Committee for the Preservers of Tradition v. Chief Rabbinical Council of Israel* [1995] IsrSC 49(5) 94

[15] HCJ 1514 *Gur Aryeh v. Second Authority for Television and Radio* [2001] IsrSC 55(4) 267 [http://versa.cardozo.yu.edu/opinions/gur-aryeh-v-second-television-and-radio-authority]

[16] HCJ 1067/08 *Noar KeHalacha Assoc. v. Ministry of Education* (6.8.2009) [http://versa.cardozo.yu.edu/opinions/noar-kehalacha-v-ministry-education]

[17] LCA 8014/09 *Dikla Insurance Co. Ltd. v. Friedman* (21.4.2011)

[18] LCA 729/04 *State of Israel v. Kav Mahshava Ltd.* (26.4.2010)

[19] CA 10085/08 *Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel v. Estate of Tufik Raabi* (4.12.2011) [http://versa.cardozo.yu.edu/opinions/tnuva-central-cooperative-v-raabi-estate]

[20] LCA 2128/09 *Phoenix Insurance Co. Ltd. v. Amossi* (5.7.2012)

[21] CA 4534/14 *Daniel v. Direct Teva Ltd.* (14.6.2015)

[22] HCJ 428/86 *Barzilai v. Government of Israel* [1986] IsrSc 40(3) 505

[23] HCJ 910/86 *Maj. (ret.) Ressler v. Minister of Defense* [1988] IsrSC 42(2) 441

[24] CA 8416/99 *E.I.M. Electronics and Computers (1999) Ltd. v. Mifal Hapayis* [2000] IsrSC 54(3) 425

[25] CA 7699/00 *Tamgash Management and Project Development Co. Ltd. v. Kishon River Authority* [2001] IsrSC 54(4) 873

[[26] LCA 3489/09 *Migdal Insurance Co. Ltd. v. Zevulun Valley Metal Plating Ltd.*, (11.4.2013)[27] AA 980/08 *Minirav v. State of Israel – Ministry of Finance,* (6.9.2011)

[28] HCJ 7200/02 *D.B.S. Satellite Services (1998) Ltd. v. Council for Cable and Satellite Broadcasts* [2005] IsrSC 59(6) 21

[29] HCJ 6792/10 *D.B.S. Satellite Services (1998) Ltd. v. Knesset* (20.7.2014)

[30] HCJ 1030/99 *Oron v. Speaker of the Knesset* [2002] IsrSC 56(3) 640

Israeli District Court cases cited

[31] Class Action (Econ.) 2484-09-12 *Hatzlaha, Consumer Movement for the Promotion of a Fair Society and Economy v. Cohen* (18.2.2013)

[32] CC (Center-Lod District Ct.) 25435-03-15 *Kolian v. Yetedot T.S.M.V. Publishing and Advertising Ltd.* (13.3.2015)

Israeli Magistrates Court cases cited

[33] CC (Bet Shemesh Mag. Ct.) 41269-02-13 *Phillip v. Aboutbul* (2015).

[34] SC (Beer Sheva) 33424-02-12 *Michaeli v. Chevra Kadisha – Ofakim Religious Council* (15.6.2012).

[33] SC (Bet Shemesh) 2917-10-11 *Marsden v. Negdi* (5.7.2012).

United States courts cases cited

[36] *Wal-Mart Stores, Inc. v. Dukes et al*. 564 U.S. 1, 11 (2011).

[37] *Brown v. Board of Education*, 347 U.S. 483 (1954)

[38] *Amchem Products, Inc. v. Windsor* 521 U.S. 614 (1977)

Israeli Legislation cited

Basic Law: Human Dignity and Liberty

Civil Wrongs Ordinance [New Version], sec. 6

Class Action Law, 5766-2006

Equal Rights for Persons with Disabilities Law, 5758-1998, sec. 19(53)

Prohibition against Discrimination in Products, Services and Entry to Places of Entertainment and Public Places Law, 5761-2000

Abstract

The District Court certified the application of Kolech – Religious Women's Forum Organization (hereinafter: Kolech) to bring a class action against the radio station Kol BaRamah Ltd. (hereinafter: the radio station), holding that the declared policy adopted by the radio station in the years 2009-2011, whereby women could not be heard on the station's broadcasts, constituted prohibited discrimination under the Prohibition against Discrimination in Products, Services and Entry to Places of Entertainment and Public Places Law, 5761-2000 (hereinafter: Prohibition against Discrimination Law). (It should be noted that the change in the management of the radio station as of the year 2011 was the result of a regulatory and monitoring process instituted by the Second Authority). Hence this Application for Leave to Appeal, which was heard as an appeal, at the center of which lie the following questions: Does the policy of the radio station, according to which women are not heard on its broadcasts, constitute cause for bringing a class action? Under what conditions is an "organization" authorized to bring such an action?

The Supreme Court (*per* Justice Y. Danziger, Justices E. Hayut and D. Barak-Erez concurring) dismissed the appeal, except for comments on the question of quantification of damages and subject to the determination that in adjudicating the case, the District Court will not address violations that occurred in the period after the beginning of the process of regulation, for the following reasons:

After a short discussion of the general phenomenon of exclusion of women from the public domain, and after the Supreme Court expressed its feeling of disgust and revulsion at the existence of this phenomenon in those cases in which it amounts to prohibited discrimination, and after setting the parameters of the discussion as a class action on grounds of discrimination, the Court proceeded to examine the central questions presented by the case. The Court concluded that there were no grounds to intervene in the majority of the determinations of the District Court or in its conclusion that the said action is suitable for adjudication as a class action, both in its substance and in the manner in which it was submitted. In particular, no grounds were found for intervening in the two central determinations according to which Kolech is an organization that is eligible to bring a class action by virtue of section 4(a)(3) of the Class Actions Law, and there is *prima facie* cause for bringing a class action under the provisions of sec. 3(a) of the Class Action Law and item 7 of the Second Appendix to that Law.

Sec. 4(a)(3) of the Law states that an "organization" (within the meaning of the definitions section of the Law) may bring a class action, provided that the action addresses an area that is among its public purposes, and provided that it would be difficult to submit the application on behalf of a plaintiff who has a personal cause of action. In the opinion of Justice Danziger, narrow, cautious interpretation should normally be adopted in removing the procedural barriers that the above sec. 4(a)(3) places before organizations that wish to submit an application for certification of a class action, out of concern that lack of caution in this regard is liable to encourage the phenomenon of bringing baseless actions, and even affect cases in which there would not seem to be any difficulty in bringing the action in the names of plaintiffs with personal causes of action.

An organization seeking to bring a class action in place of a plaintiff with a personal cause of action must meet the following cumulative conditions: first, the organization must prove that it complies with the conditions of sec. 2 of the Class Action Law, which include proving that it is an active, recognized organization, that regularly and actually operates, and has been doing so for at least a year, and that the purpose of its activity is clearly a public purpose; secondly, the organization must prove that the lawsuit is within the area of one of its public purposes; thirdly, the organization must prove that a difficulty exists in submitting the application in the name of a person with a personal cause of action. The term "difficult" should be examined in accordance with the case and its circumstances, and with regard to several indicators, among them a lack of financial means among potential plaintiffs; areas or situations in which the direct victims are not aware of the fact of the harm done to them due to gaps in knowledge or an inability to comprehend the harm; and cultural barriers which make

it difficult to find a plaintiff with a personal cause of action. All these are relevant to situations characterized by the existence of a cultural gap that deters plaintiffs with a personal cause of action from turning to the courts, and does not constitute a closed list. As a rule, proving this condition will require that evidence be presented showing that the organization acted with "due diligence" to locate a plaintiff with a personal cause of action, in both the quantitative and the qualitative sense, but subject to the possibility of there being exceptional situations in which the court will be satisfied that there is an inherent difficulty, or that there are special, known and convincing data arising from the circumstances of the case that would suffice to show a difficulty in finding a plaintiff with a personal cause of action.

As the District Court determined, Kolech – whose purpose is promoting the status of women in the religious community and in Israeli society – complies with the above conditions, and it is therefore a "qualified organization" for the purpose of bringing a class action. The main reason supporting the conclusion that it was difficult to find a plaintiff with a personal cause of action in the present case is that there is a reluctance on the part of ultra-Orthodox women to place themselves at the forefront of the struggle to increase gender equality in the ultra-Orthodox community, for fear of harm to their position in the community. In this regard, the cultural aspect carries great weight, and it is sufficient to support the concern that had Kolech not submitted the application for certification of the class action, it would not have been submitted at all. The Court added that even had it been possible to locate a plaintiff with a personal cause of action who could have submitted the application herself, it would not have been right in the circumstances to order that the request be denied or dismissed *in limine*, but at most, to order that the organization be replaced by that plaintiff.

As for the cause of action, the Court decided that the Prohibition against Discrimination Law applies in the circumstances of the case. As the District Court determined, the prohibition against discrimination in the provision of a "public service" refers not only to access to the broadcasts of the radio station, but to all the services that the station provides to listeners, including the possibility of listeners participating in programs. Denying this possibility to women because they are women – provided such denial is proved – is certainly liable to amount to discrimination to which the Prohibition against Discrimination Law applies. Pursuant to this, the Court dismissed the argument of the radio station that gender distinction is necessitated by the traditional religious nature of the radio station and is due to the halakhic position of the station's rabbinical committee, and therefore there is no discrimination, or alternatively, that the exceptions specified in the Prohibition against Discrimination Law apply such that it is not possible to sue the station for its policy. The Supreme Court held that the policy adopted by the radio station does, indeed, constitute discrimination under sec. 3(a) of the Law, and that there are no grounds for applying the exceptions prescribed in secs. 3(d)(1) and 3(d)(3) of the Law, according to which it will not be considered discrimination where "the action is necessitated by the character or nature of the product" and that it is possible to maintain "separate frameworks for men or women, as long as this separation is justified". In this context, the Court determined that in order for either of the two above exceptions to apply, it must be proven that the religious norm is indeed binding, or at least justifies adopting the differential attitude to women. In the present case, it cannot be said that religious practice mandates or justifies application of the exceptions in the Prohibition against Discrimination Law, particularly when the halakhic opinion upon which the station relies – that of the late Rabbi Ovadia Yosef – stated specifically that the prohibition on allowing women's voices to be heard is not in the category of a halakhic prohibition, but rather, in the category of "enhancing a precept" [*hidur mitzvah*]. Moreover, the facts in the present case show that the cultural and the religious character of the radio station was preserved even after the said practice of excluding women from the broadcasts of the station was stopped in the framework of the regulatory process, and what is more, the scope of the activity of the station actually continues to grow. Moreover, the exception specified in sec. 3(d)(3) of the Law does not apparently apply in our case, *inter alia*, for the reason that it refers to the existence of "separate frameworks" for men and women, i.e., an arrangement of separation. In our case,

there was no arrangement of separation but an arrangement that apparently prevented women, and only women, from participating in the broadcasts of the radio station.

Further, no cause was found for intervening in the determinations of the District Court with respect to the immunity provided in sec. 6 of the Civil Wrongs Ordinance.

With respect to harm and calculating the compensation, even though the Court accepted some of the arguments raised by the radio station regarding the harm, it was of the opinion that this element was proved by Kolech at the required *prima facie* level for this stage of the proceedings, and therefore there is no reason to depart from the final conclusion of the District Court that it had been proven to the required extent that the members of the class incurred harm due to the policy of the station. At the same time, the Court decided to intervene in certain determinations of the District Court in this context, such as the determination regarding the possibility of awarding damages in the suit "without proof of harm". The Court held that it was not possible to award damages without proof of harm in the circumstances of the case, notwithstanding the possibility of doing so under the Prohibition against Discrimination Law in matters other than a class action. A second comment referred to the matter of the relief that was sought – NIS 104,000,000. It was noted that the case raised questions concerning the appropriate method of calculation of the compensation in the circumstances of the case.

No grounds were found for intervening in the determination of the District Court whereby a common question existed in respect of all the members of the class, i.e., **"**whether the station acted in a prohibited discriminatory manner against the members of the class in that it prevented women from being heard on air from the time it began operating and until today, Nov. 6, 2011…"; according to the Court, the focus on the issue of the common question should be on the tortious conduct of the radio station during the period of the declared policy. This question is one that stands at the center of the action. The District Court should not address questions that relate to the period of time after the commencement of the regulatory process, in the course of which the two concrete violations occurred. The Supreme Court also found no grounds to intervene in the determination that there is a "reasonable possibility" that the above question will be decided in favor of members of the class.

Neither was reason found to intervene in the determination of the District Court that a class action is the suitable means of conducting the said dispute, insofar as the period prior to the beginning of the regulatory process is concerned. As opposed to this, the Court held that with respect to the period of the particular instances of violation, a class action is not necessarily the most efficient way of conducting the particular dispute, and it is preferable that it be adjudicated in the framework of personal actions brought by the women who were allegedly harmed, to the extent that they wish to do so.

Furthermore, the conditions laid down in secs. 8(a)(3) and 8(a)(4) were met. There is reasonable basis to assume that the interests of all members of the class will be represented and conducted in an appropriate manner and in good faith.

Consequently, it was ruled that the decision of the District Court will stand, except for any changes necessitated by what has been said above.

Justices E. Hayut and D. Barak-Erez concurred with the above and added comments, *inter alia*, regarding procedural questions related to class actions being brought by means of an organization, and on the substantive issue of the exclusion of women, including reference to an additional aspect relating to the "location" of the present case on the private-public continuum.

.

JUDGMENT

Justice Y. Danziger

Does a radio station's policy that women will not be heard on its broadcasts constitute cause for bringing a class action, and under what conditions will an "organization" be permitted to bring such an action? These are the central questions before the Court.

Introduction

1. The Jerusalem District Court granted an application to certify a class action submitted by the organization "Kolech – Religious Women's Forum" (hereinafter: Kolech) against the Kol BaRamah Ltd. radio station (hereinafter: the radio station or the station), claiming that the station's declared policy that women would not be heard on its broadcasts constitutes prohibited discrimination under the Prohibition against Discrimination in Products, Services and Entry to Places of Entertainment and Public Places Law, 5761-2000 (hereinafter: the Prohibition against Discrimination Law). The court dismissed various arguments raised by the radio station regarding the suitability of the action for adjudication as a class action. Thus, for example, the station's argument that the application for approval should be dismissed because it was not submitted by a plaintiff who has a personal cause of action was dismissed. In addition, the argument that there was no cause for bringing the action since the Prohibition against Discrimination Law does not apply in the circumstances of the case was dismissed. It was held that the policy adopted by the radio station constitutes blatant gender discrimination under the Prohibition against Discrimination Law, and therefore there is cause for adjudicating the suit as a class action. It was further held that the action raises questions that are common to all members of the class; that it is the efficient and fair way to decide the dispute; that there is a reasonable possibility that the dispute will be decided in favor of the members of the class; and that it is reasonable to assume that the action will be presented and conducted in the appropriate manner. The application for leave to appeal was lodged against this decision

The Pertinent Facts

2. The radio station Kol BaRamah has operated since 2009 by virtue of a concession for radio broadcasts issued by the Second Authority for Television and Radio (hereinafter: the Second Authority). The concession was issued to the station after it won a tender published by the Council for the Second Authority for granting a concession for a radio station intended for the "religious-traditional-Sephardic" community. As emerges from the material submitted to us, the radio station has significant influence in the communications market, and today it is the fifth-largest regional radio station in the State of Israel. There is no dispute that since its

establishment in 2009 and until the end of 2011, the radio station maintained a *declared policy* whereby women would not be heard on its various broadcasts. Moreover, there is no dispute that following various regulatory directives, *the station changed its policy*, and as of November 2011, women's voices began to be heard in its broadcasts.

3. The change in the policy of the radio station, which began towards the end of 2011, was the result of regulatory and oversight procedures that were adopted by the Second Authority, in the framework of which various directives were issued to the radio station. The Second Authority began to adopt these procedures after it received complaints against the radio station, which upon investigation, revealed that the policy was based on directives that had been issued by the "Rabbinical Committee", which is the station's "halakhic" [Jewish law] committee, and which plays a role in the station by virtue of the terms of the concession. The purpose of the procedure was to establish rules pertaining to women's voices being aired in the station's broadcasts, while, insofar as possible, conducting a dialogue with the radio station. Against this background, various directives were issued ordering, *inter alia*, that the station allow women who hold public office to be heard on the radio broadcasts, and that its broadcasting schedule would devote a "weekly program" intended for its female audience. These directives were first published in a letter sent by the Second Authority to the station on Oct. 10, 2011, as follows:

> "1. News or currently breaking events transmitting a message to the Israeli public will be broadcast live and unedited. This directive is effective immediately.
>
> 2. When the response of a female public official is required on a particular subject, for journalistic or ethical reasons, or when the public official initiates a request to respond to a particular subject, the station will allow the said official or her representative to participate in the broadcast and to be heard. This directive is effective immediately.
>
> 3. The station will incorporate into its broadcasting schedule a weekly program intended for the station's female listeners, in the framework of which women will be able to speak and make their position heard. This directive will take effect at the beginning of November, 2011.
>
> You are requested to inform the Authority of the manner in which the program will be integrated into the schedule of broadcasts no later than Oct. 24, 2011.
>
> 4. The station will continue to provide a complementary response to the station's male and female listeners by means of the IVR system, *inter alia*, by means of rabbis' wives, insofar as necessary, in different and varied areas. This directive is effective immediately.
>
> As clarified in our discussion, implementation of these directives will be carried out on all the frequencies that serve the station's broadcasts. As

stated, the manner of implementation will be reviewed by the Authority at the end of four months from the times specified above.

4. In accordance with the terms of the letter, the radio station established a weekly program intended for the female audience, albeit at an early hour. Approximately three months later, the Second Authority approved the broadcasting schedule submitted by the station for the year 2012, but at the same time, added a requirement that the station include broadcasts of women holding public office, and that it incorporate into its scheduled programs a "daily broadcast strip", amounting to several weekly hours, in which women would be able to speak on the programs. This requirement, too, was issued in writing, as follows:

1. The station will include women who hold public office in all current events programs of the station. This applies both when the female public official asks to comment on a particular subject that is raised in the program, and when such comment is relevant and required for journalistic reasons.

2. The station will include women who have expertise in various areas in all its broadcasts. This directive is effective immediately.

3. The station will air news or currently breaking events on live transmission without editing that includes considerations of gender distinction. This directive is effective immediately.

4. The station will incorporate into its broadcasts two weekly hours of programming intended for female listeners, with the participation of women. These two hours will be incorporated into the broadcasts of the station as of April 15, 2012, and will be brought prior to that date to the attention of the Board of the Authority.

5. The station will incorporate into its broadcasts two weekly hours in addition to those specified in sub-section (4), in which women will be incorporated into the programs intended for all listeners. These two hours may be in consumer programs, conversations with listeners, youth programs, etc. These two hours will be incorporated into the station's broadcasts as of April 15, 2012.

   The Council notes the statement of the station's owner, Mr. Zvi Amar, on behalf of all the owners of the station, that the station will act diligently and in good faith to include women who are public figures and experts in all broadcasts of the station.

5. The dialogue in the framework of the regulatory process continued into the years 2013-2014, when the Second Authority approved the broadcasting schedule submitted by the station in relation to those years, but it continued to oversee and to issue directives to the station. *Inter alia*, the Second Authority decided that the station would increase the number of weekly hours in which women would be permitted to go on air. The latest relevant directive that was issued to the radio station appeared in

writing on Jan. 8, 2014, and it determined that there would no longer be any restrictions on women being included in the station's broadcasts:

1. There will be no restriction on women being heard in the station's broadcasts.
2. At the request of the station, the Council approves one hour of broadcasts daily that will be devoted to sermons and to conversations of listeners with rabbis, in which the station will be permitted to exclude the voices of women. The Council is of the opinion that approval of this limited scope in which women will not be heard also provides a response to the most ultra-Orthodox listeners of the station, and it is reasonable and proportionate.
3. In light of the long regulatory process on this matter, which already began in 2011 with the station's declared policy in regard to allowing women to be heard, the Council directs the station's administration to initiate action to encourage women being included in its broadcasts, including female public figures and female experts in various fields.
4. The Council stresses that the station must ensure that it acts lawfully, including in relation to the employment of women at the station.

6. And indeed, the process of gradual regulation that began in 2011, at which time the declared policy of the station stated that women would not be heard in its broadcasts, took shape. By 2014, all the previous restrictions on airing women's voices in the station's broadcasts were removed, with the exception of the restriction in sec. 2 of the letter dated Jan. 8, 2014. The Second Authority even emphasized its satisfaction with the dialogue and with the process of "genuine internalization" on the part of the station, and it announced that the station's concession would be extended for another three years.

Report of the Departmental Team for Examining the Phenomenon of "Exclusion of Women"

7. Parallel to the regulatory procedures undertaken by the Second Authority, the Attorney General also turned his attention to this matter and examined the phenomenon of "exclusion of woman" in the public domain in general, and the activity and policy of the Kol BaRamah radio station in particular. This was pursuant to an increasing number of reports on various manifestations of exclusion of women. On Jan. 5, 2012, the Attorney General appointed a team to investigate all aspects of this phenomenon. The team was asked to examine the legal aspects of some of the manifestations of the phenomenon in the public domain, and to formulate recommendations for addressing them. In this framework, the team also examined the policy of the radio station. On March 7, 2013, the team submitted a report to the Attorney General (hereinafter: Report of the Departmental Team). Insofar as the policy of the radio station was concerned, the Report stated that "exclusion of

women" on the part of the station was expressed in that, initially, women were not heard at all. At the same time, the report described the change that had taken place at the radio station in complying with the directives of the Second Authority, noting that over time, women began to be heard over the airwaves, and that a noticeable trend of adding broadcasts and programs dedicated to women could be discerned.

8. The Report of the Departmental Team added that three meetings had been held on the subject of the activities of the radio station, and that there had been meetings with the representatives of the Second Authority, the Commission for Equal Opportunity in the Workplace, and the representatives of the radio station. The Departmental Team noted that it was impressed by the significant progress that had been made following the actions of the Second Authority, which led to women being heard on the broadcasts of the radio station. Nevertheless, it was noted that at the time of the writing of the Report, the broadcasting of women's voices by the station was still subject to significant restrictions. The team was of the opinion that these circumstances raised legal and constitutional difficulties. An important point in relation to the case at hand, which is addressed in the Report of the Departmental Team, addresses the application of the Prohibition against Discrimination Law to the activities of the radio station. In this context, the Departmental Team thought that the statutory provision according to which "communications services" constitute a "public service" also applied to the activity of the radio station, and therefore its policy should be "treated" in accordance with the provisions of the Prohibition against Discrimination Law. This point was summarized in para. 198 of the Report of the Departmental Team, which noted that the routine broadcasting arrangements "*entail a violation of the basic rights to dignity, equality and freedom of expression and they are contrary to the provisions of the Prohibition against Discrimination Law…*".

9. The Attorney General adopted the Report of the Departmental Team, and subsequently sent a letter, on May 7, 2013, to a number of government ministers. The letter included specific reference to the activity of the radio station, and mentioned that its broadcast practices entailed a serious violation of women's basic rights. It should be noted that the Government of Israel also adopted the Report [Resolution no. 1526 of the 33rd Government of Israel, "Prevention of the Exclusion of Women from the Public Domain" (March 30, 2014)].

Arguments of the Parties in the District Court

10. Kolech submitted its application for certification of the class action as a non-profit organization devoted to social and cognitive change in regard to gender equality in the religious community in Israel. Kolech claims that the station's policy constitutes unlawful discrimination under the provisions of sec. 3(a) of the Prohibition against Discrimination Law, which prohibits, *inter alia*, acting in a discriminatory manner in the provision of a public service "due to gender". Kolech concentrated its arguments on two major focal points of discrimination that existed, in its view, in the activity of the radio station. *The first point of discrimination lay in not allowing*

women to "appear on air". In this context, it was alleged that in the relevant periods, the radio station prevented women from appearing on air and speaking in the broadcasts, first in a comprehensive manner, and later, in a partial manner, whereas men were allowed to be heard. *The second point of discrimination lay in the "deprivation of content" from the male and female listeners of the radio station*. This point of discrimination related to the fact that due to the policy of the radio station, listeners received communications services "purely from the male sex", with women being excluded from the world of communications content. As a consequence of the policy adopted by the station, the listeners were deprived of the opportunity to listen and to be exposed to the opinions of women. Kolech added that these two focal points of discrimination reflect conduct that is a serious violation of the basic rights of women under Basic Law: Human Dignity and Liberty and its derivatives, including their right to dignity, to equality, and to freedom of expression.

11. On the legal plane – since we are dealing with the area of class actions – Kolech argued that the suit should be certified as a class action under item 7 of the Second Appendix to the Class Action Law, 5766-2006 (hereinafter: Class Action Law), namely, for a cause according to the Prohibition against Discrimination Law. In accordance with the various provisions of the Class Action Law, Kolech asked that it be determined that the "class" in the name of which the class action would be conducted would include "*all the female listeners of the radio station and all the women who wished to listen to the station but refrained from doing so due to the discrimination against women at the station*", and that the "relief" would be "*by way of issuing an order directing [the station] to cease discriminating against women at the Kol BaRamah radio station, and financial compensation for members of the class*". It should be noted that Kolech brought support for its various arguments, both concerning the definition of the class and with respect to the damage caused to its members, in an expert opinion prepared by the Sarid Institute for Research Services Ltd. In the framework of this opinion, a survey was conducted that examined the extent of damage to women from the policy of the station. Based on the data from the survey, Kolech estimated the number of women who were harmed by the policy of the station "to a great extent" at some 64,000 women. Kolech pointed out that, indeed, it is difficult to quantify the non-monetary damage, but at the same time, it is possible to do so based on cases in which compensation was awarded for violation of the Prohibition against Discrimination Law. Against this backdrop, Kolech set the sum of compensation at NIS 104,000,000, explaining that the compensation for each member of the class amounted to between NIS 1,000 and 2,000. Kolech added that the action raises questions common to all members of the class; that a reasonable possibility exists that the action will be decided in its favor; and finally, that the class action is the most efficient way to decide the dispute.

12. The radio station requested that the application to approve a class action be denied. First, the station contended that Kolech – as an organization that is not an injured party with a personal cause of action – is not qualified to file a class action. It argued that Kolech had not proved that it had acted with due diligence to locate a

person with a personal cause of action prior to submitting the class action, as required by the Class Action Law. In that context, it was contended that Kolech is also not qualified to submit the class action because there is a difference between its national-religious world view and the world view of the women who constitute the target audience of the radio station, who are from the ultra-Orthodox Sephardic sector. On the merits, the radio station contended that there is no cause of action because sec. 3(a) of the Prohibition against Discrimination Law does not apply in the circumstances of the case. In this context it was contended that the section requires that there be no discrimination in *access* to the service or product, whereas in the present case, the service that the radio station provides is accessible to all listeners, and every woman can listen to the radio station, just like any man. Therefore, it was argued, the relevant section of the Prohibition against Discrimination Law does not apply. Alternatively, it was argued that the practice adopted by the station does not in any way constitute "discrimination", but is rather a "permitted distinction". The radio station's version was, therefore, that if it is held that the Prohibition against Discrimination Law applies, then the exceptions enumerated in secs. 3(d)(1) and 3(d)(3) apply, whereby an act is not considered to constitute discrimination when it "is necessitated by the character or nature of the product," and by which it is permissible to maintain "separate frameworks … for men or women … on condition that the separation is justified …"

13. The radio station further argued that apart from the fact that no grounds exist for submitting a class action, no harm was caused to the members of the class. *Inter alia*, it was argued that women in the relevant class are not at all interested in being exposed to or having their voices heard in the wider public, and similarly they are not interested in hearing the voices of other women. In this context, the radio station also attacked the findings of the survey, pointing out that Kolech did not submit any substantial proof for the existence of harm, as was claimed. As for the requested relief, the radio station claimed that if it is awarded, the station's character will be harmed and the purpose for which it was established will be frustrated. The radio station additionally claimed that weight should also be attributed to the regulatory procedures it underwent, and to the fact that it complied with the directives of the Second Authority. In this context, it was argued that due to the fact that its activity was in accordance with the directives of the Second Authority, it has immunity from being sued under sec. 6 of the Civil Wrongs Ordinance [New Version] – immunity that applies to acts that were done in accordance with statutory provisions or by virtue of legal authority. It was argued that this immunity applies as of the date on which the station was established, since the concession to operate the station stated that a "spiritual committee" would be set up that would determine the rules for its broadcasts. It was noted that the station acted in light of these provisions in good faith, in the reasonable belief that it acted in accordance with the valid legal permission of the spiritual committee not to broadcast women's voices, and upon the basis of the opinions of the leading rabbis in Israel.

The Decision of the District Court

14. The District Court initially addressed the qualification of Kolech to apply for certification. The court noted that the provisions of sec. 4(a)(3) of the Class Action Law allow an "organization" to submit a class action subject to two cumulative conditions: one, that the action filed is within the area of one of the objectives of the organization; and two, that in the circumstances of the case, submitting the request for certification on behalf of a person who has a personal cause of action would prove problematic. The District Court held that Kolech met these two conditions. It stated that Kolech provided proof that it was an organization that had been acting for years to promote the status of women in religious Jewish society, and as such, the action was *clearly* within the area of its objectives. It also stated that Kolech proved that it would be difficult to find a woman with a personal cause of action, in that there is an inherent difficulty in placing an ultra-Orthodox woman "at the forefront of the battle", due to the fear of reprisal by the society in which she lives and the social harm that she would likely incur. The court also found support for its conclusion in the findings of the survey that was submitted on behalf of Kolech, from which it emerges that the percentage of women who stated that they are prepared to take legal action to change the policy of the station is extremely small. Finally, the court remarked that because the action raises issues that are of public importance, the fact that it was submitted by an organization that has resources and knowledge has the potential to realize the objectives of the Class Action Law.

15. The court subsequently addressed the question of whether, in the circumstances of the case, there were grounds for submitting a class action. Central to this issue was the question of whether sec. 3(a) of the Prohibition against Discrimination Law applied in the circumstances. The Court dismissed the narrow interpretation of the radio station, whereby the section treats only of prohibiting discrimination in the form of *access* to a service or a product, and therefore, would not appear to be relevant in our case. It was noted that the language of the section refers to the prohibition of discrimination in providing a "public service", and the Law defines *communications services* as such a service. Furthermore, the communications services provided by the radio station include news and commentary broadcasts, as well as offering listeners the opportunity to express their opinions on the air. The court emphasized that this conclusion is also necessitated by the purpose of the Law, which is the prevention of discrimination, and in particular discrimination of the type expressed in the case at hand. The court therefore held that the policy of the radio station may fall within the purview sec. 3(a) of the Prohibition against Discrimination Law, however it distinguished between *two different periods* in which discrimination, as defined by the Law, occurred, as follows:

a. *The period of the declared policy* (2009 – Nov. 6, 2011): In relation to this period, the District Court held that the policy adopted by the radio station constituted prohibited discrimination within the meaning of sec. 3(a) of the Prohibition against Discrimination Law. It added that the exceptions in secs.

3(d)(1) and 3(d)(3) of the Prohibition against Discrimination Law, according to which an action is not deemed to be discriminatory where it "is necessitated by the character or nature of the product" and by which it is permissible to maintain "separate frameworks … for men or women … on condition that the separation is justified …" do not apply. *Inter alia*, the court explained that it was not proven that there was a "relevant difference" between men and women that justified the gender distinction that was adopted, for even according to the radio station, the distinction was not based on an explicit religious precept, but was adopted as a "stringency" ("enhancement of the precept" [*hidur mitzvah*]) that is not a halakhic requirement. It was also held that the policy of the station in any case does not meet the condition of maintaining "a separate framework", since the matter at did not involve separation, but rather prevention directed solely at women.

b. *The period of specific violations* (Nov. 6, 2011 –Aug. 28, 2012). In this period, regulatory procedures were undertaken, but it was alleged that in two instances the radio station violated the directives it was given. The *first instance* occurred in November 2011, when the station refused to interview Prof. Sofia Ish Shalom of Rambam Hospital because she was a woman. In respect of this event, the Second Authority imposed a fine of NIS 10,000 on the station. The *second instance* occurred in the same month, when one of the station's producers requested of Rambam Hospital that a medical resident discuss a certain topic on the air. Here, too, the producer stressed that the interviewee must be a man and not a woman. The District Court held that these two violations constituted cause under sec. 3(a) of the Prohibition against Discrimination Law, and it saw no reason to change its conclusion due to any exceptions in the Law.

16. In the framework of the deliberations on the cause of action, the court also considered the radio station's contention that it enjoyed immunity by virtue of section 6 of the Civil Wrongs Ordinance [New Version]. The court considered this argument, even though it pointed out that the radio station had not raised it in its response but only at a later stage, apparently in a "change of front". On the merits, the court held that the argument should be partially accepted. The court explained that, as of the end of 2011, the radio station began to operate in dialogue with the Second Authority and subject to its directives. In these circumstances, it was held that the station should not be held liable in tort for actions that were conducted in the framework of the regulatory process, and that its actions during this period are covered by the immunity granted under sec. 6 of the Civil Wrongs Ordinance. On the other hand, it held that this immunity did not extend to acts carried out by the radio station *prior to the regulatory processes*, nor to acts carried out at in the course of the regulatory processes but which deviated from the directives of the Second Authority.

17. Upon completing its deliberations on the cause for bringing a class action, the court proceeded examine the additional conditions for certification. The court held that under the circumstances of the case, the action raises substantial questions that

are common to all the members of the class. One question was "whether [the station] wronged the members of the class through unlawful discrimination in that it prevented women from being heard on the air from the time that it began its operations and until November 6, 2011…". A second question was "whether [the station] wronged the members of the class through unlawful discrimination in that it prevented women from being heard on the air in the two instances…". The court further held that a class action was the efficient and fair way to decide the dispute, noting that there is an inbuilt advantage in conducting such an action against the background of concerns about various constraints that exist amongst the female members of the class in relation to filing personal actions. It explained that conducting this action as a class action was likely to facilitate modes of proof and relief that would not be possible in personal suits. It was also likely to enable many women to receive appropriate relief for breach of the law, where it was doubtful that these women would turn to the courts as individuals. In relation to the relief, it was further pointed out that according to the Prohibition against Discrimination Law, it is possible, in the circumstances of the case, to award compensation even "without proof of harm". Finally, the court noted that it believed that the case of the members of the class would be conducted in a suitable manner and in good faith.

18. The court summarized its determinations by saying that Kolech had met the burden of proving the fulfillment of all the required conditions for approving a class action. Therefore, and as provided by the legislature in section 14(a) of the Class Action Law, the court held that the class in whose name the class action would be conducted was: "*All the female listeners of the Kol BaRamah radio station and all the women who were interested in listening to the station but refrained from doing so due to discrimination against women at the station from the date of the beginning of the activity of the station and until the date of submission of the application for certification*". The court also held that Kolech and its attorneys would serve as the representatives in the action, and that the requested relief is an order requiring the radio station to desist from its discrimination against women, as well as monetary compensation for the members of the class.

The Application for Leave to Appeal

19. The arguments of the radio station essentially restate the arguments it raised in the District Court, and I will therefore repeat only the main points. The radio station believes that filing a class action is not appropriate in the circumstances of the case, inasmuch as it operated in cooperation with representatives of the Second Authority and in accordance with its directives. In addition, the station believes that the court erred in all its determinations and in its decision to certify the class action. Thus, for example, the radio station claims that the court erred in its determination that Kolech was qualified to submit the class action as an organization. It also claims that there was a mistake in the court's ruling on the existence of a "cause" under sec. 3(a) of the Prohibition against Discrimination Law, and in its ruling that the immunity under sec.

6 of the Civil Wrongs Ordinance applied only from the beginning of the regulatory process and not from the time that the station was set up. Another central argument in the application for leave to appeal is that the court did not explain what "harm" was allegedly caused to the class that would give rise to an entitlement to monetary relief. *Inter alia*, it was stated that the Court erred in its determination that compensation can be awarded "without proof of harm", in view of sec. 20(e) of the Class Action Law which precludes the possibility of doing so in a class action. The station also contests the finding concerning the "definition of the class". According to the station, there was no justification for including all the female listeners of the station in the class. Rather, the class should, at most, comprise only those listeners who requested to be heard on air and were refused. Finally, it was argued that the members of the class do not in any way share common questions. For these and other reasons, the radio station reiterated its position that the class action should not be certified.

20. Kolech objects to the application for leave to appeal. Kolech argues that the decision of the District Court is well-founded and reasoned, and reveals no flaws. As a preliminary argument, it says that the application for leave to appeal does not meet the criteria laid down in the case law of this Court for granting leave to appeal a decision certifying a class action. On the merits, Kolech supports the findings of the District Court both in relation to its qualification and in relation to the existence of cause under sec. 3(a) of the Class Action Law, and with respect to the extent of immunity by virtue of sec. 6 of the Civil Wrongs Ordinance. Kolech objects to the argument of the radio station whereby women were apparently not harmed, since they could "listen" to the radio station. Kolech argues that preventing the possibility of women having their voices heard does not harm only those women who were not permitted to go on air, but it conveys a harmful and humiliating message to all female listeners that the class to which they belong – that of women – is an "inferior" class. Concerning the damage, Kolech adds that at the stage of certifying the class action it is not necessary to prove the *exact* harm caused to each of the members of the class, and that the harm will be calculated and assessed in the principal procedure itself. In any case, Kolech argues, harm was certainly caused due to the significant breach of the rights of the members of the class to dignity and equality.

Deliberation and Decision

21. After examining the material that was presented to us, I have reached the conclusion that granting the application for leave to appeal, and adjudicating it as an appeal, is justified. Even though the criterion for granting leave to appeal a decision to certify a class action has been narrowed over the years (see: LCA 8671/09 *Cellcom Israel Ltd. v. Fattal* [1]; LCA 2282/15 *Psagot Provident and Pension Funds Ltd. v. Levy,* paras. 11-10 [2]), my opinion is that the present application raises several exceptional legal questions that must be discussed already at this procedural stage. Accordingly, the following discussion will address the arguments of the radio station on the merits. I will begin with a short discussion of the general phenomenon of

exclusion of women from the public domain, and I will also define the questions relevant to the class action in the present case. I will subsequently examine whether the conditions for certifying a class action have been met in the present case, focusing particularly on those conditions that relate to the party that is seeking certification and the existence of cause of action.

(A) *Exclusion of women from the public domain – Some preliminary comments*

22. The phenomenon known as "exclusion of women" refers to the particular case of generic discrimination on the basis of sex, the main characteristic of which is not allowing women – by virtue of being women – to receive public services or to take part in public activity. In one sense, the phenomenon is liable to manifest itself in gender *separation*, i.e., in situations in which public services are in fact supplied to women, but separately. This, for example, is the case in relation to gender separation between men and women on buses or in health clinic waiting rooms. In another sense, exclusion of women might also manifest itself in a situation in which women are categorically *prevented* or *constrained* from receiving services or from being active participants in activity that is taking place in the public domain, as if there were a sign to the effect that the service is provided "for men only". This is the situation in respect of the sweeping prohibition on broadcasting women's voices, as in the present case. The practices suspected of being exclusionary of women inherently give rise to questions on different legal planes, and in particular on the public-constitutional plane, where they emphasize the tensions surrounding the rights of women to equality, dignity, freedom of expression, autonomy and freedom of occupation, as opposed to contrary rights and interests that derive from the principle of multi-culturalism, freedom of religion and a desire to prevent harm to religious sensibility (for a discussion of the various considerations, see, e.g.: HCJ 746/07 *Ragen v. Ministry of Transport* [3]; Report of the Departmental Team, at 10-34; Ruth Halperin-Kaddari, *Women, Religion and Multiculturalism in Israel*, 5 UCLA J. INT'L & FOR. AFF. 339, 362-366 (2000); Susan M. Okin, *Is Multiculturalism Bad for Women?* in IS MULTICULTURALISM BAD FOR WOMEN? 9-24 (Joshua Cohen, Matthew Howard & March C. Nussbaum eds., 1999).

23. The theoretical center of gravity in relation to the exclusion of women in Israel – as reflected in the relevant literature and in the Report of the Departmental Team – lies in various manifestations of the phenomenon in contexts that include *religious-halakhic* aspects. In particular, disagreement arises in relation to the question of whether these aspects justify according a separate or limited status to women in the public sphere, having regard to the entire range of conflicting interests (see, *inter alia*: Alon Harel and Aharon Schnarch, *Separation of the Sexes on Public Transportation*, 3 ALEI MISHPAT 71(2003) (Hebrew) (hereinafter: Harel & Schnarch)); Noya Rimalt *The Separation between Men and Woman as Discrimination between the Sexes*, 3 ALEI MISHPAT 99 (2003) (Hebrew) (hereinafter: Rimalt); Zvi Triger, *Separation between Women and Men as Sexual Harassment*, 35 IYUNEI MISHPAT 703, 709-713

(2013) (Hebrew) (hereinafter: Triger); Alon Harel, *Regulating Modesty Related Practices*, 1 LAW AND ETHICS OF HUMAN RIGHTS 211(2007)). As we have said, the Report of the Departmental Team dealt in depth with the phenomenon of the exclusion of women in this context. In doing so, specific instances of the phenomenon were discussed, and the various cultural and halakhic interests were considered – including gender separation and distinction in cemeteries, in state ceremonies, on public transportation and the free movement of female pedestrians in ultra-Orthodox neighborhoods. As mentioned in the Report of the Departmental Team, the criterion that was adopted for examining the constitutionality of every instance that was suspect in relation to exclusion of women was that which had been formulated over the course of many years in the case law of this Court in relation to discrimination. According to this criterion, what must be examined is whether there is a "relevant difference" that derives from the character and nature of the public service that justifies the gender separation. As the Court has pointed out, in the framework of this examination, weight should also be attributed to the unique cultural aspects of the ultra-Orthodox community, including the question of how to relate to the fact that women in the ultra-Orthodox community are members of a class that is a "sub-minority" within the ultra-Orthodox minority (Report of the Departmental Committee, paras. 13, 25 and 242).

24. Indeed, the practice that is suspected of being exclusionary will be examined on its merits, according to its nature and characteristics, and according to the rules that were laid down in the case law in relation to similar instances of discrimination, all, of course, with the necessary changes by virtue of the various interests resting on the scales (see: Aharon Barak, HUMAN DIGNITY: THE CONSTITUTIONAL RIGHT AND ITS DERIVATIVES, vol. 2, 703-705 (2014) (Hebrew); HCJ 153/87 *Shakdiel v. Minister of Religion* [4], at 242-243); HCJ 4541/94 *Miller v. Minister of Defence* [5], at 109-110; HCJ 2671/98 *Israel Women's Network v. Minister of Labor and Welfare* [6], at 652-660). Not every activity or policy that is alleged to constitute "exclusion of women" will necessarily be classified, ultimately, as prohibited discrimination. We will already say that the reality of life in these contexts is complex, and does not allow for the adoption of a simplistic, radical approach to all its manifestations. This was discussed by Justice S. Joubran in HCJ 746/07 *Ragen v. Ministry of Transport* [3], who explained that the *context* of the practice of separation is likely to shed a different light on our view concerning constitutionality, having regard to the circumstances of each individual case, paraphrasing the words of Justice T. Marshall of the United States Supreme Court (*Cleburne v. Cleburne Living Ctr*. 473 U.S. 468-469 (1985)): "A sign that says 'Men Only' looks very different on a bathroom door than on the door of a bus." This, therefore, will be the starting point for examining suspected incidents of exclusion of women, including in our case.

25. As I mentioned, the general discussion of the phenomenon of exclusion of women from the public domain is merely an introduction to the main subject with which we are concerned, *viz*., the class action. However, I have decided to express at the outset my sense of revulsion and repugnance at this phenomenon, which seems

only to be increasing in those cases in which it amounts to prohibited discrimination. This is an illegitimate, unworthy phenomenon that has been describes as one that "delivers a mortal blow to human dignity" (HCJ 2671/98 *Israel Women's Network v. Minister of Labor and Welfare* [6], at 658-659), and it is a gross violation of the basic, fundamental rights of women. Moreover, the exclusion of women also has the potential of instilling a conception that the public domain belongs to "men only", and consequently, of perpetuating gender-driven gaps in status and behaviors that by their very nature humiliate, degrade and debase women. This is particularly evident when women are forced to turn to the authorities and the courts for a declaration that they are "permitted" to execute *basic* acts in the public sphere, and clearly the harm that this involves is not limited only to their individual matter, but involves injury to society as a whole (I had occasion to discuss a matter in this spirit, in a slightly different context, in LCA 8821/09 *Prozanski v. Layla Tov Productions Co. Ltd.* [7], paras. 17-30).

(B) *Class action on grounds of discrimination – the parameters*

26. Both in the District Court and in this Court, the arguments of the parties *did not focus* on the question of the suitability, in principle, of class actions for dealing with the general phenomenon of discrimination, and in that context, for dealing with the exclusion of women from the public domain. In my opinion, they were correct in not doing so. The absence of any disagreement on this point derives from the understanding that, in principle, *insofar as the alleged discrimination is prohibited under any of the sections of the Prohibition against Discrimination Law*, a class action can be employed as a means for realizing or protecting the rights that have been violated. This is the legislative desire, and it derives directly from a combination of the provisions of sec. 3(a) of the Class Action Law and item 7 of the Second Appendix to the Law, in which the possibility of filing a class action for a cause pursuant to the Prohibition against Discrimination Law is regulated. A different question, which might require consideration in the future, is whether it would be possible to file a class action for a discriminatory practice that is not regulated under the provisions of the Prohibition against Discrimination Law, and what (if any) might constitute the appropriate ground for basing such an action. In any case, consideration of this question is not required here, since in the present case, certification of the class action is based on the provisions of the Prohibition against Discrimination Law alone.

27. The above notwithstanding, and without taking a definitive stand on this matter, I will comment as an aside, that in the past, the professional literature raised the possibility that a class action might provide a possible device for addressing cases of collective harm, such as discrimination, and for repairing the damage it had caused, apparently even independently of the Prohibition against Discrimination Law (see, e.g., Guy Halfteck, *A General Theory Regarding the Social Value of Class Actions as a Means for Law Enforcement*, 3 MISHPAT VE-ASAKIM 247-331, note 31 (2005) (Hebrew); Yifat Bitton, *Bringing Power Relations within the Scope of Negligence*

Liability, 37 MISHPATIM 145, 212-213 (2008) (Hebrew); Yifat Bitton, *Dignity Aches: Compensating Constitutional Harms*, 9 MISHPAT UMIMSHAL 137, note 5 (2005) (Hebrew) (hereinafter: Bitton, *Dignity Aches*); Assaf Pink, *Class Actions as an Instrument of Social Change*, 6 MAASEI MISHPAT 157 (2014) (Hebrew) (hereinafter: Pink, *Class Actions*); and see, *mutatis mutandis*, Daphne Barak-Erez, *Constitutional Torts* 296 (1993)). Furthermore, quite apart from the discussion of class actions, recent judgments of the trial courts in "regular" – not class action – civil suits have granted recognition to the right of female injured parties to non-monetary compensation for distress, humiliation and violation of dignity caused by a policy of exclusion of women adopted in their regard (see: CC (Bet Shemesh Mag. Ct.) 41269-02-13 *Phillip v. Aboutbul* [33]; SC (Beer Sheva) 33424-02-12 *Michaeli v. Chevra Kadisha – Ofakim Religious Council* [34]; SC (Bet Shemesh) 2917-10-11 *Marsden v. Negdi* [35]).

28. The discussion below – except for a brief discussion regarding the "efficient and fair" way to conduct the proceedings – will not deal with the general argument that a class action should not be used in cases of discrimination because there would seem to be "more suitable" alternatives, such as seeking relief on the constitutional and administrative planes (see the discussion of this argument in Bitton, Dignity Aches, at 139. Bitton argues that in the case of collective harm to the dignity of women and their right to equality, the instrument of class action is, indeed, available, but it may be that "the relief of a court order is a more suitable remedy"). As stated, in our case there is no dispute that on the legal level, compensation for discrimination under the Prohibition against Discrimination Law can be sought in a class action procedure, even if other legal possibilities exist. Moreover, the possibility of being awarded relief on the administrative and constitutional planes does not necessarily rule out the possibility of receiving *parallel* relief by way of a class action. It must be borne in mind that a class action may include applications for relief of several kinds at once, and that sometimes, the actions on separate legal planes are addressed from the outset to different bodies. Furthermore, a class action sometimes constitutes a vital instrument of enforcement *precisely* when the administrative sanctions are insufficient (see, e.g.: CA 5378/11 *Frankl v. Allsale*, para. 34 [8]; LCA 9615/05 *Shemesh v. Fucacheta Ltd.*, para. 5 [9]).

29. In the absence if a need to discuss the questions mentioned above, our deliberations will focus on the question of whether the conditions for approving a class action are met in the present case. As we know, the Class Action Law states in secs. 3(a) and 8(a) that an applicant who seeks certification of a class action must prove several cumulative conditions: (a) *One condition* is that the cause of action must be one of the causes of actions for which a class action may be brought; (b) *A second condition* is that the action raises substantive questions of fact or law that are common to all members of the class, and that there is a reasonable possibility that they will be decided in favor of the class; (c) *A third condition* is that the class action is the most efficient and fair way in which to decide the dispute; (d) *The fourth and*

fifth conditions are that there are reasonable grounds to assume that the concerns of all the members of the class will be represented, and that the matter will be conducted in an appropriate way and in good faith. *Additional conditions* specified in sec. 4 of the Class Action Law require that the plaintiff in the class action be authorized in advance to bring and conduct the action; and that insofar as one of the causes of action is harm, the plaintiff in the class action proves *prima facie*, already at this procedural stage, that harm was caused to a member of the class or that there exists a reasonable possibility that harm was caused to the class (on the conditions, see: CA 9494/08 *Pan v. Israel Railways*, para. 5 [10]; CA 6887/03 *Resnik v. Nir Cooperative*, para. 24 [11]).

(C) *Interpretation of section 4(a)(3) of the Law – Is "Kolech" qualified to file the action?*

30. Section 4 of the Class Action Law treats of the question of who may apply for certification of a class action. The section specifies the said persons, and in particular, sec. 4(a)(3) of the Law provides that an "organization" (as defined in the Law) may also submit a class action, provided that the action concerns an area that is included in one of its public objectives, and provided that submission of the application by a plaintiff with a personal cause of action would prove difficult. The Law states as follows:

> *By whom and in whose name may an application for approval of a class action be brought*
>
> 4(a) The following are entitled to submit to the Court an application for approval of a class action as specified below:
>
> (1) A person who has cause for an action or matter specified in section 3(a), which raises substantive questions of fact or law common to all members of a class of persons – in the name of that class;
>
> (2) A public authority in an action or matter specified in section 3(a) that is within the sphere of one of the public purposes in which the public authority engages – in the name of a class of persons, if that action or matter raises substantive questions of fact or law common to all its members;
>
> (*Amendment no. 4*) 5768-2008
>
> (3) An organization in an action or matter specified in section 3(a) that is within the sphere of one of the public purposes in which the organization engages – in the name of a class of persons, if

that action or matter raises substantive questions of fact or law common to all its members, on condition that the Court is satisfied that – under the circumstances of the case – it would be difficult to submit the application in the name of a person specified in paragraph (1); however, the Israel Consumer Council, as defined in the Israel Consumer Council Law 5768-2008, may apply for approval of an action as a class action, even if it is not difficult for a person to submit the application as stated in paragraph (1).

The definitions section of the Law defines "organization" as follows:

Definitions

2. In this Law:

"Organization" – a body corporate, other than a body corporate set up by a law or a religious trust, which exists and operates in practice and in a regular manner and has done so for at least one year for the advancement of one or more public purposes, its assets and income being used only for the achievement of public purposes, on condition that its activity is not on behalf of a political party or of some other political body, or in connection with a party or aforesaid body or for the advancement of their purposes;

31. The interpretation of sec. 4(a)(3) of the Law has not yet been decided by this Court, but it has been addressed in the past by the Economic Department of the District Court (Judge C. Kabub) in Class Action (Econ.) 2484-09-12 *Hatzlacha, Consumer Movement for the Promotion of a Fair Economic Society and Economy v. Cohen* [31]). The District Court held that in order for an organization to qualify to bring a class action, it must prove that there are *prima facie* grounds, that there is a difficulty involved in locating a plaintiff with a personal cause of action, and that it is a suitable organization *per se*. With respect to interpretation of the word "difficult", the Court held that this requirement attests to the fact that the legislature did not wish to open too wide a portal through which organizations could bring class actions. However, at the same time, it was held that a narrow, pedantic approach should not be adopted, as it might divest the purpose of the law of content in that it would not be possible at all for organizations to file class actions. Against this background, it was

decided that the term "difficult" would be examined "*in accordance with each matter and its circumstances"* (para. 68), and in that particular case, the court added that "*the organization that is petitioning bears the burden of proving that it acted with due diligence to locate a person with a cause of action*" (para. 64), and that the attempt to locate such a person will be examined from a "*quantitative*" as well as a "*qualitative*" perspective (para. 77). The court also noted that "*[I]t must be recalled that a class action is indeed a collection of personal suits, but at the same time it has the status of a public action. Therefore, where there is a public interest in the action, this might lead to a certain leniency with respect to the procedural conditions for its submission*" (para. 34).

32. My fundamental view is that a narrow, cautious approach should be adopted to the question of the interpretation of sec. 4(a)(3) of the Law. Careless removal of the procedural barriers, which would allow organizations to submit applications for approving class actions with no limitations, is liable to increase the extent of the phenomenon of submitting groundless claims, even in cases in which there is apparently no real problem in the applications being submitted by plaintiffs who have a personal cause of action (for a discussion of the general concern about groundless actions, see e.g., Alon Klement, Keren Weinshall-Margel, Ifat Taraboulous and Ronnie Avissar-Sadeh, *Class Actions in Israel – An Empirical Perspective* 9 (2014) (Hebrew) (hereinafter: *Class Actions – Empirical Perspective*). Another concern is that removing the barriers will motivate certain elements to unite for the sole purpose of facilitating class actions. As I shall explain below, the narrow approach is also the consequence of reading the provisions of the Class Action Law themselves. In this context, the provisions of sec. 4 of the Law present several significant hurdles which organizations must overcome in order that they be allowed to submit an application for certification of a class action, and which attest to the legislative desire to limit their power and to allow them to submit class actions only in cases which are indeed suitable. Moreover, this conclusion also derives from the legislative history of sec. 4 of the Law, it being evident that the legislature did, indeed, wish to allow organizations to bring class actions, but at the same time it did not totally abandon the model that had prevailed in Israeli law prior to the enactment of the Law, whereby the party that brought the class action had to be a member of the injured class (see: Steven Goldstein, *Comments on the Class Action Law, 5766-2006* 6 ALEI MISHPAT 7, 16-18 (2007) (Hebrew)).

33. The point of departure in the Law is that it is preferable if the person bringing the class action is "a plaintiff with a personal cause of action" or a "public authority" and not an "organization". This conclusion can be deduced from a reading of sec. 4 of the Class Action Law, in which the legislature established a clear hierarchy among the three bodies. First, sec. 4(a)(3) of the Law states that the application should not be made by an organization if the action can be brought by a plaintiff with a personal cause of action,. Secondly, it is evident that the legislature similarly prefers that the class action be brought by a "public authority" under sec. 4(a)(2) of the Law, as may be inferred from the broad authority granted to such authorities. And note that the

three bodies defined as a "public authority" are authorized to bring class actions in certain areas, in view of the recognition that in these areas, it may be difficult to file suit in other ways. The legislature deemed it advantageous to concentrate bringing class actions in these areas in the hands of public authorities, in view of their accumulated experience , their human resources and the fact that at times they have parallel administrative powers, so that they have a more varied means at their disposal for dealing with the wrongdoers. The legislative preference is evinced primarily from the *scope of the authority* conferred on public authorities, in that they are authorized to bring class actions without even being required to prove the difficulty involved in bringing the action in the name of a plaintiff with a personal cause of action. The language of the Law and the wide power given to the public authorities attest to a clear legislative preference that the plaintiff in class actions be "a plaintiff who has [personal] cause for an action" or a "public authority". This preference is significant also from the aspect of the qualification of the organization seeking to bring a class action.

I would incidentally note that I am aware of the argument that, in practice, the public authorities have yet to exercise their power (see: *Class Actions – Empirical Perspective*, at 15-16; *Appeal in Class Actions*, at 638). However, I do not think that this argument adds or detracts from the empirical analysis above.

34. Another point of departure is that the term "organization" must be interpreted narrowly, solely in accordance with its definition in the Class Action Law only, and not according to its definition in other laws. And note that in several laws enumerated in the Second Appendix to the Class Action Law, the status of an organization is recognized in various contexts, and they are sometimes vested with the power to sue. Thus, for example, sec. 7(a) of the Prohibition against Discrimination Law states that a corporate body that is engaged in the defense of rights may bring a civil action for a tort under the Law, even when the tort was perpetrated against an individual, as long as that individual has consented thereto. The legal question is whether the fact that an organization was accorded a status by means of an "external law" exempts it from the conditions pertaining to organizations in the Class Action Law. Apparently, it can be argued that putting the organization in the shoes of the plaintiff with a personal cause is effected by way of an external law, and not by means of sec. 4(a)(3) of the Class Action Law. According to this approach, the organization comes within the bounds of the Class Action Law as a "person with a cause" according to sec. 4(a)(1) of the Law, and it is therefore not required to overcome the hurdles placed before an organization under sec. 4(a)(3) of the Law (on this view, see Pink, *Class Actions*, at 166).

35. My position, as stated, is that no analogy can be drawn from the status accorded to an organization under external laws with respect to its status for the purpose of bringing a class action. When the provisions granting a status to organizations in external laws were enacted, no examination was conducted of all the aspects required to grant status to an organization as a *plaintiff in a class action*. Furthermore, the Class Action Law sets hurdles and conditions with respect to organizations that do not

exist in the external laws, such as the requirement of operating in practice and in a regular manner for the duration of at least one year. It may well be added that an understanding of the background to the enactment of the Class Action Law leads to a similar conclusion, bearing in mind that the legislature wished to concentrate all the procedural aspects connected to the filing of class actions under one law (see sec. 1 of the Class Action Law: "*The purpose of this law is to prescribe uniform rules on the submission and conduct of class actions, in order to improve the protection of rights* **…";** and the memorandum to the Class Action Law 5765-2005). Accordingly, it is clear that adoption of an interpretation that allows an organization to be accorded a status by virtue of external laws *for the purpose of* submitting a class action will lead, in effect, to the decentralization, contrary to the legislative intent, of those procedural aspects that were deliberately concentrated under the Class Action Law.

36. The first hurdle placed before an organization that seeks to submit a class action in place of a plaintiff with a personal cause of action appears in sec. 2 of the Law. This section defines the term "organization" for the purpose of sec. 4(a)(3) of the Law, and in so doing, establishes a number of conditions that must be met by the organization. In particular, the section prescribes that the organization must prove that it *operates in practice and in a regular manner*, and has done so *for at least a year*, that its activities serve *a public purpose*, and that *its assets and income are used only for achieving the public purpose*. As noted above, these preconditions prescribed in the definitions section of the Class Action Law demonstrate that the legislature sought to open the door to the bringing of class actions only to active organizations that have proven records in their clearly public area of activity, and which did not incorporate merely for the purpose of bringing a class action.

37. On the assumption that an organization that wishes to bring a class action has overcome the hurdle of sec. 2 of the Class Action Law, the next hurdle it faces is to prove compliance with the two central conditions for qualification, namely, the conditions prescribed in sec. 4(a)(3) of the Law. *First*, the applicant organization must prove that *the action is within the area of one of its public purposes*. This limitation, too, attests to the legislative desire to allow class actions to be brought by organizations only sparingly, in a manner that will ensure that the organization is in fact fit to conduct the class action in the name of the class, *inter alia*, due to its expertise in and knowledge of that area. *Secondly* – and this condition apparently constitutes the main obstacle placed before an applicant organization – the organization must convince the court *that it would be difficult to submit the application in the name of a person with a personal cause of action*. This condition reveals a clear preference of the legislature that class actions not be pursued by organizations, but by a plaintiff with a personal cause of action, who has been directly harmed, based on an understanding of the importance that a direct victim insists on his rights.

38. With respect to the statutory requirement of proving that it would be difficult to locate a plaintiff with a personal cause of action, in principle I accept the

interpretative approach whereby the word "difficult" must be understood in accordance with the circumstances of each case. Nevertheless, and without making a categorical statement, one can conceive of several indications that would indicate the existence of such a difficulty. Thus, one can imagine that a *lack of financial means* among potential plaintiffs may indicate a difficulty. Clearly, the higher the anticipated cost of submitting an application for certification of a class action, the greater the concern that a plaintiff with a personal cause of action who would agree to institute the proceeding will not be found. This concern is relevant, for example, in situations in which the class of victims is from a "weak" sector whose members lack sufficient economic means, particularly when the application for certification of the class action must be accompanied by a costly expert opinion. One can also imagine areas or situations in which the direct victims are not aware of the harm done to them due to *gaps in knowledge or the absence of the ability to comprehend the harm*. In such situations, when the direct victims have difficulty in assessing the damage done to them, it is liable to be difficult to convince them to submit a class action in their own names. *Cultural barriers* are also liable to make it difficult, at times, to find a plaintiff with a personal cause of action. These are relevant to situations characterized by the existence of a culture gap that deters plaintiffs with a personal cause of action from turning to the courts (see, *mutatis mutandis*, Yuval Elbashan *Access to Justice of Underpowered Communities in Israel* 3 ALEI MISHPAT 497, 510 (2004) (Hebrew)).

39. It should be emphasized that the burden of proving the difficulty in finding a plaintiff with a personal cause of action lies with the petitioning organization. In this context, I accept the basic approach of the District Court in *Hatzlacha v. Cohen* [31] according to which the organization must prove that it acted "*with due diligence*" to locate a plaintiff with a personal cause of action, both in the "*quantitative*" and in the *"qualitative*" sense. My view, too, is that there is no reason to accept the argument that it is difficult to find a plaintiff with a personal cause of action where the said argument has not been supported by a true attempt to find one. The basic assumption is that the organization must prove that it tried to find a plaintiff who would meet the conditions of sec. 4(a)(1) of the Law, even though there should be no automatic dismissal of the possibility that there may be *exceptional* situations in which the court may be convinced that it is difficult to find a plaintiff with a personal cause of action, even where no attempt has been made to approach potential plaintiffs directly. In this context it is possible that the court may be convinced that there is an *inherent difficulty* or that there are *other special, substantial and convincing* circumstances which suffice to lead to the conclusion that it is difficult to find a plaintiff under sec. 4(a)(1) of the Law.

40. Finally, it should be noted that even if the organization does not overcome the hurdles prescribed in sec. 4(a)(3) of the Law, this does not necessarily mean that the application for certification must be dismissed or denied. It should be recalled that the Class Action Law states that insofar as the application for certification of the class action meets the requirement criteria, the court may approve it even in cases in which the applicant party does not meet the conditions prescribed in sec. 4 of the Law. Thus,

sec. 8(c)(1) of the Class Action Law states that the Court may approve the action "*if it concludes that those conditions can be assured by the addition or replacement of a representative plaintiff or of a representative attorney, or in some other manner*," and sec. 8(c)(2) of the Law states that "*...if the Court concludes that all the said conditions in subsection (a) have been met, but that the conditions in section 4(a)(1) to (3), as the case may be, are not complied with in respect of the application, then the Court shall approve the class action but in its Order it shall order the representative plaintiff to be replaced*." In other words, a finding that the organization does not meet the conditions prescribed in sec. 4(a)(3) of the Law does not automatically preclude the action itself, and it is possible to proceed with it by replacing the plaintiff. Thus, for example, if the organization does not meet the conditions of the Law because there is a plaintiff with a personal cause of action, it is possible to replace the organization with that plaintiff and to proceed to adjudicate the case. In the same manner, if the organization does not meet the conditions of the Law in that, for example, its public purpose is different from that of the subject of the action – it is possible to replace it with another organization whose objectives are consistent with the subject of the action (for a more extensive discussion of this matter, see para. 32 in *Hatzlacha v. Cohen* [31]).

41. To sum up this chapter, an organization that wishes to bring a class action in place of a plaintiff with a personal cause of action must meet the following **cumulative** conditions:

a. First, the organization must prove compliance with the conditions of sec. 2 of the Class Action Law, including that it is a *proven, active* corporation, and that it has operated in *practice and in a regular manner* for *at least one year*, and that the objective of its activity is a patently *public purpose*;

b. Secondly, the organization must prove that the action *is within the area of one of its public objectives*;

c. And thirdly, the organization must prove that *it is difficult to bring an action in the name of a person who has a personal cause of action*, where the term "difficult" will be interpreted in accordance with the case and its circumstances, and having regard to a number of indicators as mentioned above, which is not a closed list. As a rule, proving this condition will require that data be presented showing that the organization acted "*with due diligence*" to find a plaintiff with a personal interest, both in the *quantitative* and in the *qualitative* sense, subject to the possibility of exceptional situations in which the court will be convinced that there is an *inherent difficulty* or that there are *other special, substantial and convincing circumstances* which suffice, *per se*, to demonstrate the difficulty in finding a plaintiff with a personal cause of action.

42. In our case, the District Court held that the Kolech Organization meets the above conditions, and it is therefore a "qualified organization" to bring the class action. My impression is that this conclusion is justified and that there is no basis for

intervention. First, it will be noted that the radio station does not dispute the existence of the first condition, which relates to the organization meeting the condition in sec. 2 of the Class Action Law, as it does not object to the factual findings of the District Court that Kolech is "*an organization that has operated for several years"* (para. 46 of the decision), its activity is carried out in a *regular and actual manner*, and its declared objective is primarily the public objective of *"promotion of the status of women in religious Jewish society and in Israeli society"* (*ibid.*). As opposed to this, the radio station's arguments focus on challenging Kolech's compliance with the two conditions prescribed in sec. 4(a)(3) of the Class Action Law, namely, the second and third conditions. According to the radio station, Kolech did not prove that the action deals with an area in which it operates in practice, and primarily, that Kolech did not prove that it is difficult to bring the action in the name of a plaintiff with a personal cause of action.

43. I will first note that I see no cause to intervene in the determination that Kolech proved that the action is within the area of its public objectives. The District Court based this determination on evidence that was presented to it, and held that the condition is factually met – a determination in which the appeal court does not customarily intervene. Moreover, the radio station's argument in this context relies on its opinion that the objectives of Kolech are apparently inconsistent with the class that it purports and seeks to represent. According to the radio station, "*the purpose of the organization must be identical to that of the class*" (para. 42 of the application for leave to appeal). With all due respect, this argument is baseless. As pointed out in the decision of the District Court, sec. 4(a)(3) of the Class Action Law does not include a condition of identity or congruence in the world view of the organization with each plaintiff in the class that was injured. Section 4(a)(3) of the Law concentrates on the question of whether the action addresses the public aims of the *organization*, and in the present case it may clearly be said that Kolech has set as its objective, promotion of the status of women in the religious community and in Israeli society. The fact that the action also involves women who belong to the ultra-Orthodox community does not indicate a departure from the area of the objectives of the organization in a way that would negate the qualification of Kolech. This is even more true in view of the court's determination that in fact, Kolech is *also active in the ultra-Orthodox sector*; that in any case the concession that was given to the radio station was not defined as being for the ultra-Orthodox community only, but "*to establish a 'Torani-traditional-Sephardic radio,' i.e. to establish a radio station intended for the religiously observant public and not only for the ultra-Orthodox*"; and that the radio station itself declared that its listening public is not limited only to ultra-Orthodox listeners (for elaboration, see para. 46 of the judgment of the District Court).

44. After giving careful thought to the matter, my conclusion is that we should not intervene in the determination that Kolech proved that it was difficult to submit the application in the name of a plaintiff with a personal cause of action. I am not unaware of the fact that Kolech confined itself to noting that "*there is an inherent difficulty*" in the circumstances of the case, without having tried to prove that

difficulty by presenting any facts showing that it acted "with due diligence" to find a plaintiff with a personal cause of action. Similarly, as the radio station contends, with a good deal of justification, it is possible that an approach on the part of Kolech to potential plaintiffs who had been directly harmed by the policy of the radio station would not have been pointless. The argument of the radio station whereby from the findings of the survey that Kolech submitted, it emerges that 2.4% of the women who were asked said that they are prepared to take legal action to change the situation, shows that there are women – albeit only a few – who could and would have been prepared to be plaintiffs in a class action under sec. 4(a)(1) of the Law. However, the District Court found, on the basis of *other justified, convincing reasons*, that in the circumstances of the case, it is difficult to bring the class action in the name of a plaintiff with a personal cause of action, basing this finding on many logical arguments. I concur with the District Court on this point.

45. The main reason supporting the conclusion that it would hav been difficult to find a plaintiff with a personal cause of action in the present case is that there is a reluctance on the part of ultra-Orthodox women to stand at the forefront of the battle to promote gender equality in the ultra-Orthodox community, due to their concern that their position in the community will suffer. This conclusion was supported by the testimony of Dr. Hannah Kehat, Director General of Kolech, which was found to be reliable, and I see no cause for intervention. This reason is also consistent with the declaration of the radio station according to which some of the female listeners of the station are accustomed to abiding by the religious code of conduct, such that it is reasonable to assume that they would not rush to initiate a class action, even if they felt degraded and that their dignity had been offended. We encountered a similar phenomenon when we considered the matter of the "Mehadrin bus lines", when the picture that emerged in relation to gender separation in that case was that "*women who did not immediately conform to the new arrangement were subjected to harassment, insults, pressure and threats, and matters reached the point of actual physical violence*" (Rimalt, at 117), and that "*many of those who objected expressed this position anonymously … for fear of reprisals*" (Triger, at 726). Against this backdrop, my conclusion is that indeed, the weight of the *cultural aspect* in the present case is decisive, and it is of sufficient import to justify the concern that if the Kolech organization had not submitted the application to certify the class action, it would not have been submitted. Moreover – and this is very important in our context – even if I were convinced of the correctness of the argument of the radio station that it would have been possible to find a plaintiff with a personal cause of action who could have submitted the application herself, I do not believe that it would have been right to order that the action be dismissed *in limine* or denied. At most, an order could have been given to substitute that plaintiff for the organization. For these reasons, my conclusion is that there is no reason to intervene in the determination of the District Court, based on the particular circumstances of the case, that Kolech proved to the extent required that it would be difficult to find a plaintiff with a personal cause of action, within the meaning of sec. 4(a)(3) of the Law.

46. Hence, the first argument of the radio station whereby Kolech is not "qualified" to bring the class action is rejected. As explained, even though as a rule, a interpretation should be adopted in relation to sec. 4(a)(3) of the Law, in the present case, the conditions for compliance with the section have been proven. Therefore, I recommend to my colleagues that we not intervene in the determination of the District Court in this regard.

(D) *Cause of Action*

47. A discussion of the subject of the cause of action must begin with the question of whether the Prohibition against Discrimination Law applies in the circumstances of the case. Insofar as it is found that the Law does indeed apply, and insofar as the policy adopted by the station indeed constitutes prohibited discrimination under the Law, there is no dispute that cause exists for bringing a class action on the basis of a combination of the provisions of sec. 3(a) and item 7 of the Second Appendix of the Class Action Law. The relevant sections for the purpose of analyzing the argument concerning the application of the Prohibition against Discrimination Law are secs. 2(a), 3(a), 3(d)(1), 3(d)(3) and 5(a) of the Law, which state as follows:

Definitions	2(a) In this law -
	"Public service" – Transportation Services, communications, energy, education, culture entertainment, tourism and financial services, intended to serve the public.
	[…]
Prohibition against discrimination (Amendment no. 1) 5765-2005 (Amendment no. 3)5774-2014	3(a) A person who deals in the provision of a product or a public service or in operating a public venue, will not discriminate in the provision of the product or the public service, in allowing access to the public venue or in providing a service in the public venue, for reason of race, religion or religious affiliation nationality country of origin gender, sexual orientation, outlook, political affiliation, age, personal status or parenthood. […]
	(d) The following shall not be deemed discrimination under this section —
	(1) If the act is required by the nature or the essence of the product, the public service or the public venue;
	(2) […];

(3) In the establishment of separate frameworks for men and women, in the event that non-separation will prevent the provision of the product or the public service, or access to the public venue, or provision of the service in the public venue, to part of the public, provided that the separation is justified considering, *inter alia*, the nature of the product, the public service or the public venue, the extent to which it is essential, the existence of a reasonable alternative, and the needs of the public which is liable to be harmed by the separation.

[…]

Civil wrong

5(a) An act or omission contrary to sections 3 and 4 constitutes a civil wrong, and the provisions of the Civil Wrongs Ordinance [New Version] will apply thereto, subject to the provisions of this Law.

48. As stated, the first question on the subject of the cause is whether the Prohibition against Discrimination Law applies. The District Court answered in the affirmative, dismissing the narrow interpretation urged by the radio station to the effect that the Prohibition against Discrimination Law deals only with *access* to the service or product. The court held that this interpretation is not consistent with the language of the Law or its purpose, and that the prohibition against discrimination in the provision of a "public service" applies not only to *access* to the broadcasts of the radio station, but to *the entire range of services* that it provides to its listeners, including newscasts, commentary and programs in which listeners express themselves on the air.

49. I completely accept the approach of the District Court in this regard, and I see no need to expand at length upon its decision. First, it will be noted that the court discussed the subject of the cause in depth, even though at this procedural stage, an *prima facie* examination would have sufficed (*cf.* my opinion in LCA 3814/14 *Hogla Kimberley Marketing Ltd. v. Mastei*, para. 11 [12]). On the merits, the interpretation presented by the District Court is compatible with earlier rulings of this Court with respect to the scope of the Prohibition against Discrimination Law, according to which the Law reflects a long-standing trend of extending the scope of application of the principle of equality to areas of private law as well, and that the purpose of the law requires that an interpretation which leaves instances of discrimination in place must be rejected (see, LCA 8821/09 *Prozanski v. Layla Tov Productions* [7], para. 29; HCJ 746/07 *Ragen v. Ministry of Transport* [3], *per* Justice E. Rubinstein, para. 34). An examination of the various legislative proceedings, too, reveals the legislative intent to extend the reach of the Law widely to instances of discrimination, and in particular to phenomena of generic discrimination on the basis of gender (cf., e.g., the

Prohibition against Discrimination in Products, Services and Access to Places of Entertainment and Public Places (Amendment no. 4) (Prohibition against Humiliation or Degradation due to Discrimination) Bill, 5774-2013). It is worth noting that the position taken by the District Court on the question of the *prima facie* application of the Prohibition against Discrimination Law is also consistent with the position expressed in the report of the Departmental Team, which stated: *Section 3(a) of the Prohibition on Discrimination in Products, Services and Entry to Places of Entertainment and Public Places Law 5761-2000 provides that communications services constitute a "public service". Therefore it is prohibited for the station to discriminate in the provision of the public service due to gender*" (para. 179). This position is also compatible with the approaches that support a narrow interpretation in relation to the application of the Prohibition against Discrimination Law (see: Moshe Cohen-Elia, *Liberty and Equality in the Prohibition of Discrimination in Products and Services Law*, 3 ALEI MISHPAT 15, 35 (2003) (Hebrew) (hereinafter: Cohen-Elia)).

50. I will briefly state that the radio station's focus on the question of *access* to the radio broadcasts is not clear to me. The fact that women are permitted to listen to the radio station like men does not negate the argument that, at the same time, discrimination was practiced against them in the provision of other services. Moreover, the argument raised by the radio station displays signs of a practice whereby "entry is permitted – but participation is forbidden." This is similar, therefore, to a club which allows entry to all those who arrive on its doorstep, but which permits only some of those arrivals to take part in the *activity* going on inside. Even if women could listen to the broadcasts of the station, they were not permitted to take part in the activity included in the broadcast. Can it be said that this practice does not constitute apparent discrimination? It is clear to me that the answer to this question is negative. There is no doubt that some of the services provided by the radio station to its listeners include the possibility of the listeners participating in the programs and expressing their opinions: this is an "activity" ("service") that the station offers. Therefore, preventing women from invoking this possibility because they are women – to the extent that such prevention is proved – is certainly liable to amount to discrimination to which the Prohibition against Discrimination Law applies. Therefore, the argument of the radio station that the women have no "vested right" to come on air and express their position must be dismissed. The question is not the right of women to participate in the radio broadcasts – and in any case, we are not concerned here with that question – but the right of women to be treated *equally*, in a manner in which possibilities will not be closed off to them when they are open and accessible to men.

On this matter, it would not be superfluous to mention that a recent case before the courts concerend the refusal of an ultra-Orthodox newspaper to *publish* the election propaganda of an electoral list of female ultra-Orthodox candidates to the 20th Knesset, based on the fact that they were women. The District Court expressed its position that this practice, *per se*, constitutes prohibited discrimination within the

meaning of the Prohibition against Discrimination Law, although the application for leave to appeal was granted for other reasons (see: CF (Center-Lod District Ct.) 25435-03-15 *Kolian v. Yetedot T.S.M.V. Publishing and Advertising Ltd*. [32], *per* Judge Y. Spasser; LCA 1868/15 *Yetedot T.S.M.V. Publishing and Advertising Ltd* .[13], *per* Justice N. Hendel).

51. In view of my ruling that rejects the narrow interpretation of the radio station in principle, I will now proceed to address the question of whether the policy adopted by the radio station indeed constitutes apparent discrimination for the purposes of sec. 3(a) of the Law, and to the extent that it does so, whether the exceptions specified in secs. 3(d)(1) and 3(d)(3) of the Law apply – exceptions according to which a case will not be deemed discriminatory where "*the act is required by the nature or the essence of the product*" and in addition that it is possible to establish "*separate frameworks for men and women … provided that the separation is justified…*". The argument of the radio station in this context is, as will be recalled, that gender distinction is required due to the traditional, religious character of the radio station, and due to the halakhic position of the rabbinical council, and therefore there is no discrimination, and alternatively, that the exceptions specified in the Prohibition against Discrimination Law apply, and therefore it cannot be sued in respect of that policy.

52. With respect to sec. 3(a) of the Law, there would seem to be no doubt that the basic assumption is that the policy of the station constitutes discrimination against women in the sense of the Law. As may already be understood from the general discussion above concerning exclusion of women, a norm that prevents women from taking part in an activity in the public sphere only because they are women is presumed *ab initio* to be a breach of the women's right to equality, even if at the end of an investigation that assumption is rebutted, and it is found that the gender discrimination is permitted due to a "relevant difference" or for some other justified reasons (on this assumption, see also sec. 6(2) of the Prohibition against Discrimination Law). In our context, to the extent that it transpires that women were not permitted to participate in the broadcasts of the station, whereas men were permitted to do so, it is not inconceivable that the activity of the station will fall within the bounds of sec. 3(a) of the Prohibition against Discrimination Law. The question which must now be addressed is whether this assumption is apparently rebutted by proof of a "relevant difference" that justified differential treatment of men and women in the circumstances of the case. This question must be examined in the framework of a discussion of the applicability of the exceptions specified in the Law.

53. With respect to the exceptions, there is no dispute that the balancing formula that appear in secs. 3(d)(1) and 3(d)(3) of the Law allows for recognition of practices involving gender separation between men and women for religious reasons. The legislature explicitly expressed its opinion on this matter in the framework of the sections, and even included a concrete provision in sec. 3(d)(3) of the Law in the matter of arrangements for separation between men and women. However, in order for one of the above two exceptions to apply, it must be proven that the religious

norm indeed *mandates* or at least *justifies* the adoption of a differential policy towards women. In the professional literature, we find that in order to reach such a conclusion, an examination must be made, *inter alia*, of the *weight* of the religious norm amongst the relevant population in view of its culture, and also whether the weight is so great as to tip the balance in its favor, despite the violation of the rights of the individual. It has also been said that one important distinction that might help in weighing the conflicting interests in the matter is the distinction between norms that the religion *requires* and those that the religion *permits*. To the extent that the religious practice of separation between women and men is based on a religious precept (commandment), and to the extent that this requirement is found at the halakhic or cultural core, the scales tip in the direction of applying the exceptions, and vice versa. Professor Amnon Rubinstein discussed this at length in his article *The Decline, but Not the Death, of Multi-Culturalism*, 49(1) HAPRAKLIT 47, 89-90 (2006) (Hebrew):

> Another distinction is that made by the Israeli Supreme Court between *norms that the religion mandates and norms that the religion permits*. Thus for example, Islam does not mandate polygamy, but merely permits it, and therefore the prohibition against bigamy does not violate a religious norm or freedom of religion.
>
> A question of this type arose in the Knesset in its deliberations on the subject of the Prohibition against Discrimination in Products, Services and Entry to Places of Entertainment and Public Places Law, 5761-2000. The purpose of the Law is "to promote equality and to prevent discrimination in entry to public venues." The prohibition against discrimination also applies to a person's gender. *The question arose: What is the law in relation to venues that serve ultra-Orthodox Jews or orthodox Muslims in which separation between men and women is required by their culture and their heritage*, and without which the women and the men will not use the service or the place? In the Constitution, Law and Justice Committee, which dealt with this subject in a series of sessions in which arguments abounded, opinions were divided. The women's organizations – which represent those dedicated to equality between the sexes – asked that separation be banned, whereas the ultra-Orthodox representatives, who spoke in the name of multi-culturalism, pointed out that if there is no separation, the ultra-Orthodox community will refrain from using the service or the venue. Ultimately the Constitution, Law and Justice Committee adopted a compromise, which found expression in sec. 3(d)(3) of the Law …
>
> This compromise is problematic in its reference to separation between the sexes, and even more problematic with respect to separation between religions and ethnicities. However, every case must be judged on its merits in accordance with the particular circumstances, and with the criteria for balancing that were proposed above. *This, for example, is the case with the Jewish-Haredi or the Muslim community, in relation to which we are concerned with norms that are mandated (and not only permitted) by the religion, and the weight of the religious prohibition is so great and significant that non-separation can prevent use of the service or the product …*. It is also necessary to consider the balancing criteria that were proposed above – in relation to the magnitude of the harm to the religious-traditional norm in particular**,** *the weight of the religious norm* in the

culture, and the question of *whether it is a matter of a religious precept or a religious possibility* [emphasis partly added – Y.D.].

For a similar approach attesting to the importance of the distinction between an "enabling" religious norm and a religious "prohibition", see HCJ 153/87 *Shakdiel v. Minister of Religion* [4], para. 22; HCJ 6111/94 *Committee for the Preservers of Tradition v. Chief Rabbinical Council of Israel* [14], at 101-102; HCJ 1514 *Gur Aryeh v. Second Authority for Television and Radio* [15], at 282, in which it was said, for example in the dissenting opinion of Justice D. Dorner, that the criterion is "whether the prohibited action is forced upon those who are observant or whether they are prevented from performing a *religious obligation*"; and Menachem Elon, THE STATUS OF WOMEN – LAW AND JURISDICTION, TRADITION AND TRANSITION: THE VALUES OF A JEWISH AND DEMOCRATIC STATE 53 (2005) (Hebrew). For criteria that differ slightly from those proposed by Prof. Amnon Rubinstein in his above article, see Harel & Schnarch, at 75; for reservations about the criteria proposed by Harel & Schnarch, see Rimalt, at 127.

54. In the present case, it cannot be said that religious practice *mandates* or *justifies* the application of the exceptions in the Prohibition against Discrimination Law. I find it difficult to accept the position of the radio station whereby its policy is justified by virtue of halakhic norms and the instructions it received, and I certainly do not think that the *weight* of this norm in the ultra-Orthodox community justifies the apparently severe harm to the basic rights of women. It should be emphasized that even according to the approach of the radio station, the religious norm that underlies the gender distinction in the broadcasts is not a *binding* norm; rather it is an *enabling* norm, and the halakhic opinion upon which the station relies – that of the late Rabbi Ovadia Yosef – stated explicitly that the prohibition on women being heard *does not constitute a halakhic prohibition* but rather, it is in the category of *enhancing the precept* (see: para. 62 of the judgment of the District Court; para. 181 of the Report of the Departmental Team). Moreover, the data relating to the present case shows that the cultural and religious character of the radio station has been preserved even after the alleged practice of excluding women from the broadcasts of the station was stopped in the framework of the regulatory processes, and what is more, the scope of the activity of the station has only grown. In these circumstances, it was not proven that the religious norm *mandates* or *justifies* adopting a differential attitude towards women, and it is even difficult to argue that ceasing to abide by that norm caused real harm to the radio station. From here it is but a small step to the conclusion that at this *prima facie* stage, the two exceptions to the Prohibition against Discrimination Law do not seem to apply.

55. Furthermore, the exception that appears in sec. 3(d)(3) of the Law apparently does not apply in our case, also for the reason that it refers to the existence of "separate frameworks" between men and women, i.e., an arrangement of *separation*, similar, for example, to the circumstances in HCJ 746/07 *Ragen v. Ministry of Transport* [3]. However, our case does not involve an arrangement of *separation*, but an arrangement which apparently prevented women, *and only women*, from

participating in the broadcasts of the radio station. For this reason, too, it would appear that the section does not apply in view of its language and its purpose.

56. It may and should be added with respect to the above two exceptions that despite the fact that the Prohibition against Discrimination Law recognizes them, in any case "*not every cultural class practice must be accorded recognition, and the free 'will' of a member of a particular cultural class need not always be acknowledged as free will, and not all 'free will' need be respected*" (*per* Justice E. Rubinstein in HCJ 746/07 *Ragen v. Ministry of Transport* [3], para. 10), and clearly in certain cases, in which the harm to the individual is critical, the religious or cultural practice may be ruled out even if it is based on religious precepts and apparently lies at the core of the culture or the religion. This approach has been expressed several times by this Court, which has said, *inter alia*, that most of the theoretical approaches justify almost categorical subjection of the cultural and religious practices to certain basic criteria, such as that of the right to human dignity in its core sense (*cf*. the opinion of Justice H. Melcer in HCJ 1067/08 *Noar KeHalacha Assoc. v. Ministry of Education*, para. 6 [16], and the sources cited there). In this sense, it may be assumed that the exceptions to the Prohibition against Discrimination Law will not apply in those cases in which these criteria are not maintained. In any case, this is over and above what is necessary, for as stated, my conclusion is that there is no apparent ground to invoke the exceptions to the Prohibition against Discrimination Law for the reason explained above, and therefore there was no flaw in the conclusion of the District Court in this context.

57. I also find no flaw that would justify intervention in the decision of the District Court on the question of immunity by virtue of sec. 6 of the Civil Wrongs Ordinance. On this matter I accept the distinction drawn by the District Court between the period prior to the commencement of regulatory proceedings and the period subsequent thereto. To be precise, there is no dispute that as long as the radio station was subject to close oversight and conducted an ongoing dialogue with the Second Authority, and as long as it operated in accordance with the directives that were addressed directly to it, it had immunity. This determination is also solidly grounded in the case law of this Court (CLA 8014/09 *Dikla Insurance Co. Ltd. v. Friedman*, para. 5 [17]; CLA 729/04 *State of Israel v. Kav Mahshava Ltd.*, paras. 12-13 [18]). As opposed to this, immunity should not apply to anything pertaining to the period in which the activity of the station was apparently not conducted in accordance with the said directives. In this context, the argument of the station whereby it also enjoyed immunity prior to the commencement of the regulatory process, because in that period it relied on the directives of the Spiritual Committee in the reasonable and good faith belief that this Committee had legal authority by virtue of the terms of the license, cannot be accepted. Even if the terms of the concession recognized the status of the Spiritual Committee, this clearly does not mean that this Committee had the *legal authority* to confer "legal license" on the radio station to operate in apparent contradiction to the Law. The Spiritual Committee cannot permit an act that is contrary to the terms of the license or unlawful. Moreover, as we have said, the opinion of the Spiritual Committee in our regard did not state that there is *a halakhic prohibition* on women

being heard on air, and therefore the decision to prevent women from participating in the broadcasts was, to a great extent, that of the radio station itself. In these circumstances, and having regard for the *prima facie* nature of our hearing, the argument of the radio station that its activities were conducted in good faith in the belief that they were legally authorized, in reliance on the position of the Spiritual Committee, must be dismissed.

58. To conclude the discussion of the issue of cause, I propose to my colleagues that we decide that at this procedural stage, that there are no grounds for our intervention in the determinations of the District Court on this point. As I explained above, no fault can be found in the determination that the Prohibition against Discrimination Law applies, *prima facie*, in the circumstances of the case. The *prima facie* determination that the policy of the radio station constitutes "discrimination" within the meaning of sec. 3(a) of the Law is correct, as well. As was further explained, in the circumstances of the case the exceptions found in the Prohibition against Discrimination Law do not pertain, and neither is there room to change the determination of the District Court with respect to the scope of immunity as prescribed in sec. 6 of the Civil Wrongs Ordinance. Hence, the determination of the District Court, namely, that cause by virtue of sec. 3(a) of the Class Action Law has been proved to the extent necessary at this stage, should stand.

(E) *The damage and calculation of the compensation*

59. As stated, a large part of the arguments of the radio station deals with the issue of the harm and calculation of the compensation. In this context, the radio station argues that no "harm" was caused to the members of the defined class, and alternatively that the only women who were harmed are the women who asked to be heard and were turned away. It was also argued that calculating the damage is problematic, and that the District Court erred in its ruling with respect to the possibility of awarding compensation "without proof of harm." First I will note that I have seen fit to address these arguments immediately following the discussion of the question of cause since, in our case, the two matters are related, as will be explained. On the substantive level, even though I believe that some of the arguments raised by the radio station regarding the harm are correct, my conclusion is that this element was proven to the extent required at this procedural stage, and there is therefore no reason to depart from the final conclusion of the District Court in this regard.

60. Section 4(b)(2) of the Class Action Law states that in the case of an application for certification of a class action submitted by an organization, the organization must show "*that prima facie, harm was caused to a member of the class, or that it is reasonably possible that harm was caused to the class, in whose name the application was submitted*." Clearly, the burden of proof in relation to the element of harm at the stage of approving the application for a class action is not an onerous one. The applying organization is not required to prove the harm to the members of the class in full or a precise manner, but only *prima facie*; the exact harm will be calculated and

assessed in the main procedure. Moreover, the leniency regarding the burden of proof of the harm at the stage of certifying the class action is also expressed in the fact that at this procedural stage, it is already possible to rely on the possibility that ultimately, *collective* relief will be awarded for the benefit of the class (see: Yuval Procaccia and Alon Klement, *Reliance, Causation and Harm in Consumer Class Actions*, 37 TEL AVIV U. L.REV. 7, 33-34 (2014)(Hebrew).

61. The main question, therefore, is whether Kolech proved, at the *prima facie* level required at this stage, that *harm was caused* to the members of the class or to the class itself. This question must be answered in the affirmative. Recognition of the existence of harm and the legal right to receive compensation for it emanate in the circumstances of the case from within the Prohibition against Discrimination Law, even without recourse to other legal frameworks to support the conclusion. The Prohibition against Discrimination Law assumes, as a working assumption, that when there is discrimination within the meaning of its provisions, harm is caused by that discrimination, and that harm is compensable. A basic conception embodied in the provisions of the Law is that "the refusal to allow a person access to a public venue or to supply him with a service or a product, merely because of his affiliation to a class, and particularly a class in respect of which there is a history of past discrimination, constitutes a grave violation of human dignity" (Prohibition against Discrimination in Products, Services and Access to Places of Entertainment and Public Places Bill, 5760-2000). Moreover, the legislature even suggests, in the Prohibition against Discrimination Law, devices for receiving compensation and a ceiling on the amount of compensation that can be awarded without proof of harm.

62. Prof. Barak Medina adds on this matter as follows:

> *The psychological harm involved here is in addition to the direct harm caused to a person who is discriminated against due to the low wages that he earns or due to the inability to purchase some product or service*. In terms of economic theory, the psychological harm is calculated according to the sum that the individual would have been willing to pay in order not to incur discrimination. Apparently, the fact that in the absence of legislation, those belonging to the victimized class do not "purchase" their right not to suffer discrimination demonstrates that the monetary value of the harm done to them is less than the utility that the owner of the business derives by virtue of the discrimination, and therefore the efficient consequence is actually to refrain from imposing a prohibition on discrimination.
>
> However, this difficulty can be resolved. First, the special nature of the harm involved here – the feeling of humiliation that derives from the discrimination – rules out a "market solution" to the problem, i.e., it rules out the possibility of preventing discrimination by way of "purchasing" the right not to be discriminated against. As Donohue noted, payment to a business owner in order that he refrain from practicing discrimination creates, of itself, harm and emotional damage of the type that is caused as a result of discrimination (Barak Medina, *Prohibition against Discrimination in the Private Sector from the Point of View of Economic Theory*, 3 ALEI MISHPAT

> 37, 55-56 (2003) (Hebrew) (hereinafter: Barak Medina); emphasis added – Y.D.).

And see also Cohen-Elia:

> Israeli law requires individuals to act in accordance with the value of equality, in the sense of discrimination being prohibited. It prohibits discrimination on the basis of race, nationality, sexual orientation and for other analogous reasons, and thereby it realizes a value regarding which there is relatively wide consensus; *a value the breach of which is liable to cause acute harm to people and to decrease their autonomy* (p. 22, emphasis added – Y.D.).

63. Another, no less important question that merges with additional questions, particularly with the definition of the class, is: *to whom was the harm caused*? One could argue that in our case, harm was caused only to women who took active steps and asked to come on air but were refused. However, I think that the discriminatory policy adopted by the station caused harm to additional women as well, even though they did not attempt to participate in the broadcasts, but simply listened to them. The harm to these women is, first of all, the *psychological harm* inherent in the very knowledge that only because they are women, they are not permitted to participate in the broadcasts of the station. This knowledge is harmful, degrading and humiliating, and it suffices in order to indicate that harm has been incurred by those women. Moreover, harm is also caused in the sense that women refrain from the outset from attempting to be heard on air due to their knowledge that their request would anyway be refused, i.e., there is *effective harm* to the possibility of access of women to the public service that is being offered. Therefore, it is difficult to accept – at this preliminary stage – the argument that no harm at all was caused to women who "only" listened to the station, even if one may wonder whether a distinction should be made between these women and those who took active steps to be heard on air at the station, on the basis of reasons such as the magnitude of the harm, the degree of distance from the humiliating event and so forth.

What Barak Medina writes later in his article is very apt in this context:

> *It must be recalled that adopting a discriminatory policy usually has a negative effect on third parties as well, mainly those who belong to the class against which there was discrimination.* This is a matter of psychological harm that is caused in light of the knowledge of the existence of the discrimination. These are "external effects", i.e., the effect of the discriminatory policy on a person who is not party to the transaction between the business owner and the worker or the potential customer …
>
> The negative external effect of adopting a discriminatory policy is significant mainly in the case of supplying a product in the course of "business", *and certainly with respect to providing a public service or operating a public venue*. In these cases, even if the business owner does not have a monopoly, and even if he is not supplying an essential product, the policy he adopts is liable to have a negative impact on third parties, beyond the harm to the potential customer of the business owner. In such cases, the assumption is

> that the extent of the activity of the business – and hence, also, the number of cases in which its potential customers will encounter a discriminatory policy – is relatively high, and so, too, the extent of the "distribution" of the negative impact of its policy**.** *It is thus possible to explain the application of the Prohibition against Discrimination Law with respect to these cases* (*ibid*., at 56-58. Emphasis added – Y.D.).

64. With respect to the station's arguments regarding the question of *calculation of the harm*, it is not necessary that we delve deeply into these arguments at this procedural stage. The entire array of aspects relevant to the issue will be discussed in detail in the framework of the principal proceedings. One cannot deny that, indeed, the task of calculating the value of the compensation in the present case raises complex questions, particularly since the alleged harm deals with subjective, individual feelings of humiliation and violation of dignity. It has been said, in relation to a slightly different issue, that calculation of the damage in cases such as these is liable to be a difficult task, particularly in the case of a class action lawsuit (see, *mutatis mutandis*, the opinion of my colleague E. Hayut in CA 10085/08 *Tnuva Central Cooperative for the Marketing of Agricultural Produce in Israel v. Estate of Tufik Raabi* [19]). Without expressing any position, I do not rule out the possibility that possible models for awarding compensation will be examined as the need arises, including those contained in secs. 20(a)(3) and 20(c) of the Class Action Law, in the framework of which the possibility of awarding comprehensive monetary relief and relief for the benefit of the class or the public is regulated. It may also be assumed that in examining the question of compensation, the arguments concerning the difference between the injured parties and the extent of the harm they have incurred will be considered in depth, as will the arguments concerning the possibility of invoking models for calculating harm which are used in cases of discrimination in other areas of law.

65. In any case, I believe it appropriate to make two comments already at this stage about calculation of the harm and the compensation. One is that the radio station is correct in its argument against the ruling of the District Court with respect to the possibility of awarding compensation "without proof of harm." In this context, the Class Action Law provides in sec. 20(e) that: "*The Court will not, in a class action, award exemplary damages, and it will not award damages without proof of harm, except in an action as specified in item 9 of the Second Appendix; however this will not prevent the award of compensation for damage that is not financial damage…*" (cf. also *Tnuva v. Tufik Raabi* [19], para. 39). Hence, it is not possible to award compensation without proof of harm in the circumstances of the case, notwithstanding the possibility of doing so under the Prohibition against Discrimination Law when the suit is not brought by way of a class action.

66. Another comment relates to the relief that is being sought. Apparently, and without taking a categorical stand, it appears that the relief that is sought in the present case – Kolech is asking for compensation in the amount of NIS 104,000,000 – raises questions about the appropriate method of calculating the harm in the

circumstances of the case. We need not put the cart before the horse. Suffice it to say that the question arises as to whether in determining the compensation it would be correct – also due to the complexity of the circumstances – to attribute weight to the change that the radio station has undergone in the framework of the regulatory process. Even though awarding compensation in the framework of a class action "looks to the past", weight should, perhaps, be attributed to the fact that the radio station changed its practice and mended its ways through dialogue and with openness, in a manner that actually renders the requested declaratory relief unnecessary. Of course, this issue, too, will be examined and elucidated in the principal process by the District Court.

67. My conclusion as to the question of the damage is that it has been proven to the degree required at this procedural stage that the members of the class incurred harm due to the policy of the station. As I mentioned above, even though there is justification for our intervention in certain determinations of the District Court in this context, such as the determination with regard to the possibility of awarding damages in the action "without proof of harm", there is no reason to depart from the final conclusion that the element of harm indeed exists.

(F) *Does the action raise substantive questions of fact or law that are common to all members of the class, and is there a reasonable possibility that they will be decided in their favor?*

68. The first condition specified in sec. 8(a)(1) of the Class Action Law requires that there be "common questions" vis-à-vis the members of the class. Difficulty in proving that this condition has been met is especially liable to arise when the action does not deal with a single instance of tortious conduct on the part of the wrongdoer that caused harm to a large number of victims, but rather with a series of behaviors in relation to which the "connecting thread" is not clear. Indeed, it is natural that when several separate instances of tortious conduct are involved, there may be a need to examine different factual and economic data, and various issues may arise in relation to each separate case that will not necessarily be relevant to all members of the class (see: Alon Klement, *Guidelines for Interpretation of the Class Action Law, 5767-2006*, 49 HAPRAKLIT 131, 140-179 (2007) (Hebrew) (hereinafter: Klement, *Guidelines for Interpretation*)). In the present case, the radio station contends that "common questions" do not arise amongst the members of the class, since there are differences among the members. It claims, for example, that there are differences between women who sought to be heard on air and were refused, and women who simply listened to the radio broadcasts. Similarly, according to the radio station, there are differences between women whose world view is similar to its own and women whose world view differs. Moreover, there are differences among the various women in the class due to the fact that each one's experience of harm is individual, as explained above. It was further argued in relation to two specific instances of discrimination that allegedly occurred during the regulatory period, that they, too, do

not raise questions that are "common" to all members of the class, but only to the specific women who were harmed.

69. The arguments that were raised by the radio station in this context disregard the fact that the discrimination in the case before us was a matter of *policy,* and that *it is this fact* that underlies the common questions of the members of the class. To be precise, where it is a matter of discriminatory policy, the "connecting thread" between the members of the class is the policy itself that was adopted in relation to them. This is different from discrimination that occurred in various factual situations, in departure from the customary practice of the wrongdoer. It must be recalled that the questions common to a class are usually connected to the liability of the defendant (Klement, *Guidelines for Interpretation,* at 141). Where the matter is one involving the defendant's policy, the question of liability for the harm caused by that policy is indeed common to all those harmed, even if the compensation awarded to each of them is different (*ibid.*: "The difference in the relief cannot, of itself, stand in the way of an action being certified as a class action").

70. The United States Supreme Court, too, discussed this distinction in the case of *Wal-Mart Stores, Inc. v. Dukes et al*. [36], noting that in proving a *pattern or practice*, and certainly in proving discriminatory policy adopted by the wrongdoer, a rebuttable quasi-presumption arises whereby *all* the members of the class suffered from that discriminatory pattern, and therefore they share "common questions" that are connected to the liability of the defendant in relation to this pattern:

> In a *pattern-or-practice* case, the plaintiff tries to "establish by a preponderance of the evidence that … discrimination was the company's standard operating procedure [,] the regular rather than the unusual practice" … *If he succeeds, that showing will support a rebuttable inference that all class members were victims of the discriminatory practice* …
>
> (See *ibid*., note 7 of the opinion of Justice Scalia. See also p. 7 of the opinion of Justice Ginsburg. Emphasis added – Y.D.).

I would stress that in the *Wal-Mart* case, it was ruled that the "pattern or practice" were not proved, and I am also aware that the subject of that case was discrimination in employment, which of course has somewhat different aspects from those of our case. In addition, needless to say, the American case must be read with due caution in view of possible differences between the legal systems, *inter alia*, regarding the question of causes of action and relief. Nevertheless, it may be said with respect to the determination on principle to the effect that discriminatory *policy* establishes questions that are common to members of the discriminated class, that what was said there is also applicable in our case.

71. In other words, even if there are, indeed, certain differences in our case among the women who make up the class of victims in its entirety, such as the differences relating to the magnitude and extent of the harm, common questions of fact or law arise in relation to them all. In the circumstances of the present case, the spotlight, from the point of view of the common questions, is focused more on the conduct of

the station, and less on the differences that there may be among the women who were harmed. The "common questions" in our case concern the lawfulness of the policy that was adopted by the radio station, and the extent of its legal liability for this policy. Thus, for example, the question of whether the policy of the station even constitutes a tort for which compensation could be claimed is certainly a question common to all members of the class. A "connecting thread" exists with respect to these and similar questions among all the plaintiffs in the class. This is so even if it is possible to conclude that not all of them were exposed to the activity of the station in an identical fashion, or that they were all harmed equally. Therefore, I do not think that there is reason to intervene in the first determination of the District Court that there exists a substantive question common to all members of the class and it is "*whether the station acted in a prohibited discriminatory manner against the members of the class in that it prevented women from being heard on air from the time it began operating and until Nov. 6, 2011*…" (para. 102 of the judgment of the District Court).

72. The above reason is, of course, not valid in relation to the period in which the discrimination perpetrated by the radio station was not a matter of *policy***.** In this context, the radio station's argument that the two particular instances of discrimination that occurred during the period of time in which regulatory procedures were under way do not give rise to questions that are "common" to all members of the class, but rather they are individual and specific in nature with respect to each case, is sound. I tend to agree with this argument due to the change in the set of factual and legal circumstances in relation of the period of time in which the particular instances of violation occurred. To be precise, the policy of the radio station in relation to first period constituted prohibited discrimination within the meaning of the Prohibition against Discrimination Law, which does not enjoy immunity under sec. 6 of the Civil Wrongs Ordinance. The situation is different in relation to the period in which the particular instances of discrimination occurred, that is, in the period from Nov. 6, 2011 until Aug. 28, 2012. Owing to the fact that regulatory procedures were under way during this period, it was correctly found that the activity of the radio station in this period is covered by the immunity granted under sec. 6 of the Civil Wrongs Ordinance. Similarly, the instances of violation that were perpetrated during this period are bound by time and place, and they constitute a *departure from the practice* at that time. In view of the above, I am of the opinion that due to the possible factual and legal disparities between the periods of time, *different questions* are liable to arise with respect to the tortious conduct of the radio station during the period subsequent to the beginning of the regulatory processes. Moreover, even were I prepared to assume that these cases give rise to the same "common questions", it is possible that they are better suited to being adjudicated other than in the framework of a class action, and more will be said about this below.

73. The second condition prescribed by sec. 8(a)(1) of the Class Action Law requires proof of a "reasonable possibility" that the common questions will be decided in favor of the members of the class, the main objective being to prevent situations in which

applications are submitted for certification of class actions even though their chances are slim, thus preventing an unjustified risk to defendants (see: LCA 2128/09 *Phoenix Insurance Co. Ltd. v. Amossi* [20]; Klement, *Guidelines for Interpretation*, at 142). I do not think that the case before us is of the type that gives rise to such a concern, in that the various determinations until now lead me to the conclusion that the questions arising here reveal, at the very least, a "reasonable possibility" of ultimately being decided in favor of the members of the class.

74. To summarize: I do not think that there are grounds for intervention in the determination of the District Court that a question common to all the members of the class exists, and it is "*whether the station acted in a prohibited discriminatory manner against the members of the class in that it prevented women from being heard on air from the time it began operating and until Nov. 6, 2011*…", with the main focus in relation to the issue of the common question being on the tortious conduct of the radio station during the period of the *declared policy*. I would recommend to my colleagues that this question be the focus of the lawsuit, and that the District Court not address questions that relate to the period of time after the beginning of the regulatory process, in which the two concrete instances of discrimination occurred. I would also recommend to my colleagues that we not intervene in the determination of the District Court that a "reasonable possibility" exists that the above question will be decided in favor of the members of the class.

(G) *Is a class action the efficient and fair means of deciding the dispute?*

75. As mentioned in the section dealing with the parameters of the discussion (paras. 26-29 above), I do not think that this decision is the appropriate place for a fundamental discussion of the extent to which class actions are appropriate for dealing with the range of cases of discrimination, particularly when the parties raised no arguments on point. The examination required, in accordance with the provisions of sec. 8(a)(2) of the Class Action Law, is whether under the circumstances, when deciding the case relies on the provisions of the Prohibition against Discrimination Law, "the efficient and fair means of deciding the dispute" is a class action. The case law has held that for the purpose of responding to this question it is possible to consider, *inter alia*, factors such as the size of the class and the extent to which deciding the questions common to all the members will help resolve the individual dispute between each of the members and the defendant. It is also possible to bring into the equation the advantages and the disadvantages of conducting a lawsuit by way of class action, as compared to the conducting of personal actions – "cost versus utility" (see LCA 2128/09 *Phoenix Insurance Co. Ltd. v. Amossi* [20], para. 19; Klement, *Guidelines for Interpretation*, at 125-146; Eran Taussig, *Appeals in Class Actions*, in Hemi Ben-Nun and Tal Havkin, CIVIL APPEALS (3rd ed.) 632 (Hebrew) (hereinafter: *Appeals in Class Actions*)).

76. The District Court was of the opinion that in the present case, the advantages of conducting the lawsuit as a class action outweighed the disadvantages involved. It

was mentioned, *inter alia*, that precisely because we are dealing with an "*action the main cause of which is unlawful gender discrimination, on the basis of declared policy, and not on the basis of individual cases … there is an advantage to conducting it by way of a class action*" (para. 103)**.** It was added that the advantage of conducting the lawsuit as a class action in the circumstances of the case is particularly relevant "*where there is a concern about various constraints on members of the class bringing a personal action*" (*ibid.*), and that approving the lawsuit as a class action can realize the whole range of objectives that appear in the Class Action Law, *inter alia* because this will promote the interest of "*enforcement of the law and deterrence against its breach*" (*ibid*.), and because in this way, those women who were harmed will be able "*to realize the right of access to the court, including those who find it difficult or who are afraid to turn to the court as individuals*" (*ibid*.).

77. I concur with the reasons of the District Court in their entirety, and I will further add that I did not find substance in the arguments raised by the radio station regarding its determinations. Thus, for example, the argument that the apparent "difference" among the members of the class means that there is no use in conducting a class action must be dismissed for, as stated, the spotlight in our matter must be turned primarily on the tortious conduct of the radio station. In this sense, the utility in adjudicating this tortious conduct in the framework of a class action far outweighs the utility of individual adjudications through personal lawsuits. In addition, I believe that in the present case, bringing a class action will prevent "erosion" of the rights of the potential plaintiffs in relation to some who, it may reasonably be assumed, would not turn to the courts for relief, so that by approving the class action the goals of deterrence and compensation will be achieved in a better manner than by other procedural means (See Alon Klement, *Overcoming the Advantages of a Single Defendant over Multiple Plaintiffs – The Class Action Device*, 21 MEHKEREI MISHPAT 387, 401 (2004) (Hebrew)). Moreover, as stated in the decision of the District Court, it is possible that it is the actual conduct of the lawsuit as a class action that allows for means of proof and relief that are not possible in personal actions (see a discussion in this context, although dealing with discrimination in the field of employment, in Alon Klement and Sharon Rabin-Margaliot, *Employment Class Actions – Did the Rules of the Game Change?* 31 IYUNEI MISHPAT 369, 410-415(2009) (Hebrew)).

78. From between the lines of the application for leave to appeal, the argument emerges that apparently the class action is not appropriate in the circumstances of the matter due to the fact that the Second Authority acted on the regulatory plane. The uncertainty in relation to this point increases in view of the fact that the regulatory procedures indeed were productive. The answer to this argument is that the fact that the radio station mended its ways is indeed commendable, however, this does not constitute a barrier to an action for compensation relating to past wrongdoing. The fact that the radio station has made positive progress in the framework of the process of regulation, and that it (so it seems) is conducting itself lawfully at this time, does not immunize it from a suit for the wrongs it perpetrated in the past, even though, as

stated, this may be taken into consideration in relation to the compensation. Moreover, as explained above, in the circumstances of the present case there is no dispute that on the legal plane, compensation for discrimination by virtue of the Prohibition against Discrimination Law may be claimed in the process of a class action, and the possibility that these and other bodies have of acting in different frameworks does not negate the possibility of receiving *parallel* relief in the framework of class actions (as an aside, one may mention that in the United States, recourse has been made to class actions by plaintiffs who were harmed as a result of gender or racial discrimination – see *Appeals in Class Actions*, at 636; *Brown v. Board of Education* [37] – where the United States Supreme Court expressed its opinion that these cases of discriminatory policy, in the area of labor, for example, are *clear examples* of cases that are inherently suited to being heard in the procedural framework of a class action: *Amchem Products, Inc. v. Windsor* [38]).

79. My conclusion, therefore, is that there are no grounds for intervention in the determination of the District Court that the class action is the appropriate means for conducting the present dispute, insofar as the period prior to the beginning of the regulatory process is concerned. As opposed to this, and as I explained above, with respect to the period of the particular instances of discrimination, I do not think that a class action is necessarily the efficient means of adjudicating the individual disagreements. As stated, these are two instances of concrete violations which, even if it is ultimately decided to litigate them, should not be adjudicated in the framework of a class action, but rather in the framework of personal actions brought by the women who were allegedly harmed, if they wish to do so. In summary, I shall recommend to my colleagues that even in view of the condition prescribed in sec. 8(a)(2) of the Law, there are no grounds for our intervention in the determinations of the District Court, except for the determination concerning the period of the particular instances of violation.

(H) *There are reasonable grounds to assume that the interests of all members of the class will be represented and conducted in an appropriate manner and in good faith*

80. Examination of compliance with these conditions, prescribed in secs. 8(a)(3) and 8(a)(4) of the Class Action Law, is marginal in the circumstances of the case, also in view of the fact that the parties hardly argued the point. In any case, in order to complete the picture I will mention that these conditions, too, have been met in the present case. In my opinion, Kolech has the required tools to conduct the class action in a manner that is suited to the needs of the members of the class, *inter alia*, in view of its professional familiarity with the field, and having regard also to the conclusion of the District Court which conducted the certification hearing. In addition, I do not think that the case before us gives rise to any concern about the action not being conducted in good faith (*cf*: CA 4534/14 *Daniel v. Direct Teva Ltd.*, para. 5 [21]).

Conclusion

81. No grounds have been found to intervene in the majority of the determinations of the District Court, nor in its final conclusion whereby the lawsuit is suited to being adjudicated as a class action both in its substance and in the manner in which it was submitted. In particular, no grounds have been found to intervene in the two central determinations according to which Kolech is an organization that is qualified to bring the class action by virtue of sec. 4(a)(3) of the Class Action Law, and there is apparent cause for bringing a class action under sec. 3(a) of the Class Action Law and item 7 of the Second Appendix to that Law.

82. In view of what I have written above, I propose to my colleagues that we dismiss the appeal, subject to my comments in the framework of the discussion of the question of the harm and calculation of the compensation, and subject to my determination in the framework of the discussion of the issue of the questions common to the class, whereby in adjudicating the action, the District Court will not discuss the violations that occurred in the period of time after the commencement of the process of regulation (from Nov. 6, 2011 until Aug. 28, 2012). Consequently, the decision of the District Court will stand, except for the changes required by virtue of the above.

83. I also recommend to my colleagues that we decide that the radio station bear the costs of the proceeding and the legal fees of the Kolech Organization, in the amount of NIS 50,000.

Justice E. Hayut

I concur in the conclusions reached by my colleague Justice Y. Danziger as stated in para. 82 of his opinion, and I would like to add a few comments.

1. My colleague concluded that the respondent organization complies with the requirements of sec. 4(a)(3) of the Class Action Law in that it is an organization within the meaning of sec. 2 of the Law that engages, *inter alia*, in a public purpose that is central to the action, in the name of the class of women who have been harmed by the conduct of the appellant radio station. Justice Y. Danziger is of the opinion that, as a rule, narrow and cautious interpretation should be employed in removing the procedural barriers placed by the said sec. 4(a)(3) in the path of organizations that wish to submit applications to approve class actions, for fear that lack of caution in this context is liable to increase both the scope of the phenomenon of groundless actions being brought, even in cases in which, *prima facie*, there is no difficulty in applications being submitted in the name of plaintiffs with personal causes of action (para. 32 of the opinion of Justice Danziger). However, in the particular circumstances of this case, Justice Danziger found that the Respondent proved to the extent required that it would be difficult to find a plaintiff who had a personal cause of action against the Appellant, and he therefore held that the Respondent met the

conditions of sec. 4(a)(3) of the Law, even according to the narrow interpretation that he supports (paras. 45-46 of his opinion).

2. I, like my colleague, am of the opinion that the Respondent complied with all the threshold conditions specified in sec. 4(a)(3) of the Law, and I would add that there is no small measure of symbolism in the fact that an organization by the name of "Kolech" [translator's note: "Kolech" means "your (female) voice"] should be the one standing in the front line of the class action on grounds of exclusion and silencing of the women of the religious community who are among the listeners of the appellant radio station. With respect to symbolism, it should be mentioned that the name of the organization, like the name of the appellant radio station [translator's note: "Kol BaRamah" means "A voice in Ramah"], are taken from our Jewish sources, and in both of these sources, the voice is that of a woman, the power and Jewish significance of which is indeed great. Thus we find in the Book of Isaiah 40:9: "O Zion, that bringest good tidings, get thee up into the high mountain; O Jerusalem, that bringest good tidings, lift up thy voice [*kolech*] with strength; lift it up, be not afraid"; and in the Book of Jeremiah 31:14, the voice in Rama is the voice of our matriarch Rachel who is weeping for her children, as it is written: Thus saith the Lord: "A voice was heard in Ramah [*kol b'ramah nishma*], lamentation and bitter weeping; Rachel, weeping for her children…".

3. The central objective that the respondent organization has inscribed on its banner, and which my colleague Justice Danziger discussed, is to pioneer a social and cognitive change on the subject of gender equality in the religious community in Israel. This objective is indeed consistent with the matter for which the Respondent sought certification of the class action, and therefore the District Court correctly found Kolech to be qualified as an organization, from this aspect, to serve as a voice for the class of women who are apparently harmed by the silencing policy adopted by the Appellant. I will further mention that on the level of principle, and unlike my colleague, I tend to the opinion that too narrow an approach in interpreting the threshold requirements of sec. 4(a)(3) of the Class Action Law is liable to detract from the power of the class action as an instrument for promoting public interests. The explanatory notes to the Class Action Bill noted that the law was being enacted in "recognition of the public role of the instrument of the class action for enforcing the law and … the desire to encourage the bringing of class actions which are of public importance" (Explanatory Notes to the Bill). One means that the legislature found for promoting the said objective is the flexibility that it adopted, *inter alia*, in the area of the laws of standing, in that, similar to the standing accorded to public petitioners in the High Court of Justice (HCJ 428/86 *Barzilai v. Government of Israel* [22]; HCJ 910/86 *Maj.(ret.) Ressler v. Minister of Defense* [23]), and to a person who does not have a personal cause in the laws of tenders (CA 8416/99 *E.I.M. Electronics and Computers (1999) Ltd. v. Mifal Hapayis* [24]; CA 7699/00 *Tamgash Management and Project Development Co. Ltd. v. Kishon River Authority* [25], at 883), in the Class Action Law, too, standing is accorded to a wide range of bodies that are active in the promotion of public purposes, allowing them to submit applications for certification

of class actions; these include public authorities (some of which, like the Israel Consumer Council, achieved a similar status by way of concrete legislation that preceded the Class Action Law. See: Chap. 6.1 of the Consumer Protection Law, 5741-1981, which was repealed in sec. 33 of the Class Action Law), and organizations as defined in sec. 2 of the Law.

4. The flexibility in relation to formal-procedural requirements that the legislature adopted in this area of class actions as opposed to regular actions, emphasizing the substantive analytical criteria, also finds expression in sec. 8(c) of the Law, according to which it is possible to replace the representative plaintiff, and in secs. 20(a)(3) and 20(c) of the Law in which the legislature departed from the normal rules of damages in torts. All this was for the purpose of realizing the rationales and the objectives underlying the institution of the class action as an effective instrument of civil-public enforcement (on this, see my article, *The Class Action as a Means of Civil-Public Enforcement* 19 MISHPAT VE-ASAKIM (forthcoming, 2016).)

Justice D. Barak-Erez

1. I concur in the judgment of my colleague Justice Y. Danziger, and with the comments of my colleague Justice E. Hayut. Nevertheless, I would like to relate briefly both to the procedural question of bringing a class action by means of an organization, and to the substantive issue of the exclusion of women that underlies it all, in general, and in this case, with its special characteristics, in particular.

Bringing a Class Action by Means of an Organization and the Special Difficulties of Action within the Community

2. Under the Class Action Law, bringing an action by an organization whose objectives comport with those of the action is made conditional, *inter alia*, on the Court being "satisfied that – under the circumstances of the case – it would be difficult to submit the application in the name of a person…". Here, the Law expresses its known preference for a specific injured party standing before the court in order to enable the court to form an unmediated impression of the injury. Nevertheless, it is important to note that the Law makes do with it being "difficult" in to bring the action in the name of a person. The bar that the Law sets on this matter is not low, but neither should it be too high. Indeed, it is normally to be expected that an organization that seeks to sue will show in a concrete manner that attempts were made to bring the action in the names of individuals. At the same time, there may be exceptions to this rule, and in any case its implementation must take into consideration the context and the concrete circumstances of the matter. As a rule, recognition of the power of organizations to bring class actions is one of the innovations of the Class Action Law (see: Steven Goldstein, *Comments on the Class Action Law, 5766-2006* 6 ALEI MISHPAT 7, 17-18 (2007) (Hebrew)), and overly-high

barriers that would cause a reversion to the approach that prevailed prior to the passage of the Class Action Law ought not to be erected in this context.

3. More specifically, I am of the opinion that weight should be attributed to the legislative recognition of the fact that bringing an action for discrimination against the members of a weak class involves, by its very nature, a "difficulty". Several of Israel's laws dealing with equality, and particularly the Prohibition against Discrimination Law, recognize the right of action of an organization that deals with protection of the rights of a person against whom it is prohibited to discriminate. These constitute exceptions to the regular tort laws. Section 7(a) of the Prohibition against Discrimination Law prescribes as follows on this matter:

> An action in tort under this Law may be brought by a corporate body that engages in the protection of the rights of a person against whom it is prohibited to discriminate under this Law, provided that if the cause of action is discrimination against a particular person, that person has agreed thereto.

Similar provisions may be found in additional laws that are concerned with equality (see, e.g.: sec. 19(53) of the Equal Rights for Persons with Disabilities Law, 5758-1998). These provisions are powerful witnesses to the statutory assumption as to the existence of a difficulty in bringing an action for discrimination when the potential plaintiff belongs to a class that suffers from social weakness.

4. The above applies with even greater force *when already at the preliminary stage of submitting the application for approval of the action as a class action, confrontation is expected between the plaintiff and the social/communal class with which s/he is affiliated*. This does not come out of nowhere. In effect, the position adopted by the Respondent regarding the fact that its spiritual leadership supported not putting women on the air, i.e., that this is a policy that had the support of the rabbis – the leaders of the community – attests in itself to the difficulty inherent in an identified representative plaintiff coming forward. In such a situation, the accompanying social barriers are in the category of *res ipsa loquitur*. Moreover, this is not the first time that this Court has been called upon to consider situations of separation between men and women in the public domain. After the commencement of the deliberations in the petition against the separation on the "Mehadrin bus lines" in HCJ 746/07 *Ragen v. Ministry of Transport* [3], a public committee was convened to discuss the matter (The Committee to Examine Transportation Arrangements on Public Transport on Lines that Serve the Haredi Sector – Concluding Report (2009)). In its report, the Committee discussed women who objected to separation, while careful to preserve their anonymity (they were referred to as G. and H.). As opposed to this, religious women who supported the separation appeared before the Committee and were identified by their personal and family names (pp. 25-26 of the Report). As such, it is precisely when the subject under discussion is the voice that is not given to women within the community that the path to their being given a voice should not be blocked, even if that path is being paved by an organization. More generally, the justification for allowing the action to

be brought by means of an organization, for the purpose of protecting rights, increases when such an action helps in giving a voice to all the members of the class. In other words, bringing a class action by means of an organization in order to help those who belong to the community and are interested in remaining affiliated with it is a means of giving a voice to those whose voices are not heard.

5. On a more general level, it seems that the "bar" that the organization must reach in order to satisfy the Court that it took sufficient steps to ascertain that there is a difficulty in bringing the action by means of a flesh and blood person must also take into account the costs involved in taking such steps, in order not to place obstacles that are too great in the path of the representative plaintiffs, having regard to the context of the particular action. The application for approval of a class action must, in any case, meet a certain level of requirements, which is not marginal (see: LCA 3489/09 *Migdal Insurance Co. Ltd. v. Zevulun Valley Metal Plating Ltd.*, para. 13 of my judgment [26]; AA 980/08 *Menirav v. State of Israel – Ministry of Finance* para. 13 [27]). These are joined by additional conditions with which an organization that wishes to act as a representative plaintiff must comply (see para. 41 of the judgment of my colleague). Against the background of all these, I agree with the comments of my colleague Justice Hayut that it is not appropriate to overburden the organization that seeks to act as a representative plaintiff. One might add that at the stage following certification of the class action, too, the Respondents still have the opportunity to try to prove that – as they contend – the number of women who in fact identify with the claim of discrimination on which this action is based is not large. This question ought to be decided at the stage of adjudicating the action itself.

The Characteristics of Exclusion of Women in the Present Case: Discrimination and Silencing

6. I agree wholeheartedly with the apt and incisive words of my colleague Justice Danziger regarding the harm done by the exclusion of women, and in fact, of any class, from the public domain. Such exclusion is by its very nature a type of discrimination. To this it must be added that the present case is particularly grave due to the fact that the exclusion also involves silencing. As my colleague explained, full participation in the modern world of communications includes the element of active involvement in the opportunity to "be heard" and not only the passive component of "hearing", just as full participation in the democratic process means not only the right to vote but also the right to be elected. In this sense, the discrimination in this case is harmful not only to equality, but also to freedom of expression in its full sense, having regard to its various objectives (both from the aspect of self-realization of women who are prevented from expressing themselves in the public arena, and from the aspect of their potential contribution to the public discourse).

7. On a wider view, the "shock waves" of exclusion such as in the present case potentially impact not only the women who listen to the broadcasts of Kol BaRamah

and those among them whose path to participation in the broadcasts is blocked. Prevention of participation of women in the broadcasts contributes to impressing and "transcribing" a constitutive world view upon all the listeners of the radio station, both men and women, and there may well be even wider ramifications. This acquires even greater significance in view of the fact that the modern communications reality has a significant role in the way in which we perceive the world (see: Mike Feintuck and Mike Varney, MEDIA REGULATION, PUBLIC INTEREST AND THE LAW 1 (2nd ed., 2006).

8. The exclusion of a particular class from the public discourse harms not only the excluded class, but also the discourse itself. The "marketplace of ideas", which is so important, will not express all the positions and the different variations in society when participation in this marketplace is limited in advance, or when the effective means of participation is blocked. Society as a whole loses as a result. In view of these undesirable ramifications of exclusion for other classes – over and above the class included in the class action – as well, it would appear that recourse to the device of class action is especially suitable here. It is well known that recourse to this procedural device, not only in the context of the concrete case before us, creates positive externalities for the wider public, and not merely for the class represented by the representative plaintiff (see: Guy Halfteck, *A General Theory Regarding the Social Value of Class Actions as a Means for Law Enforcement*, 3 MISHPAT VEASAKIM 247, 269, 287-289 (2005) (Hebrew); William B. Rubenstein, *Why Enable Litigation? A Positive Externalities Theory of the Small Claims Class Action*, 74 UNKC L. REV. 709, 720, 723-725 (2006)).

9. Finally, the harm involved in excluding women in this case is even more marked in view of the special purpose of granting concessions to specialized television channels and radio stations: the encouragement of pluralism, and to hear and make heard the variety of opinions and classes in the population (see: HCJ 7200/02 *D.B.S. Satellite Services (1998) Ltd. v. Council for Cable and Satellite Broadcasts* [28], at 37, 47); HCJ 6792/10 *D.B.S. Satellite Services (1998) Ltd. v. Israel Knesset*, para. 58 [29]).

Extent and Weight of the Obligation Involved in Exclusion

10. My colleague Justice Danziger discussed the distinction between the religious norm that mandates or justifies adopting differential treatment of women and a religious norm that merely allows this, and he added that since in what is involved our case is not a binding norm but the enhancement of a precept, the weight of the religious argument here is reduced. My colleague did not base his decision on this distinction (as explained in para. 55 of his opinion). Nevertheless, I wish to address this distinction, due to its extensive discussion in my colleague's opinion, even if it was over and above what was required. I will begin by saying that I agree that the distinction between a binding norm and an enabling norm is important, but I would

add that in cases similar to that before us, it is better not to base a decision on it. First, the answer to the question of whether the practice of separation is an "obligation" or an "enhancement" is liable to be controversial, and the Court ought not to be the arbiter on this question. Second, and more importantly, we must bear in mind the possibility that there may be strict religious approaches that view separation or total exclusion of women from the public sphere as a real obligation. In my view, even if this were the case, it would not be right to accord this consideration precedence in those cases in which the violation touches the core of the right to equality (in the spirit of para. 56 of my colleague's opinion).

11. In effect, the matter may be presented as follows: when the practice of separation and exclusion does not stem from a binding religious norm, but from a desire to enhance a precept, the weight that must be attributed to following this practice as against protection of the right to equality should be relatively low. However, the opposite conclusion should not be derived from this, namely, that when the practice of separation and exclusion stems from a binding religious law, it ought to take precedence over the right to equality for that reason alone.

Between the Private and the Public

12. I wish to address an additional aspect relating to the "placement" of the present case on the continuum between the private and the public. The cause of action is grounded in the Prohibition against Discrimination Law, which also applies to use of resources, for which there is no formal limitation as to number or extent beyond the constraints resulting from market conditions (such as businesses of various types). At the same time, the cause of action acquires added power and gravity when the exclusion involves activity to which access is limited from the outset, and which is therefore monitored and regulated by the state. In such cases, in which the activity belongs to some extent or another in the "public" arena as well, the weight of the claim of exclusion is even greater, as is the harm. An example of use of a resource of this type is found in the area of public transport (see: HCJ 746/07 *Ragen v. Ministry of Transport* [3]). Similarly, a broadcast on a radio frequency constitutes a clear use of a public resource which is even subject to quantitative limitations (see: HCJ 1030/99 *Oron v. Speaker of the Knesset* [30], at 651). It is therefore important to emphasize that this case does not involve intervention in an internal communal area, but rather, it involves fashioning the face of the public sphere – a fact that adds to the justification for certifying the class action.

A Final Word

13. "A voice is heard in Ramah" – may that also be the voice of Rachel.

Decided as per the judgment of Justice Y. Danziger

27 Kislev 5776

9 December 2015