LCA 8821/09

Pavel Prozansky Physicians for Human Rights

v.

Layla Tov Productions Ltd

The Supreme Court
[27 June 2011]

Before Justices (Ret) E.E. Levi, S. Joubran,Y. Danziger

Application for leave for appeal against the decision of the District Court in Central Region, in LSC 21939-06-09 on 19 October 2009 handed down by Hon. Judge A. Yaakov.

Facts:

Held:

Israeli Legislation Cited

Basic Law: Human Liberty and Dignity

Contracts (General Part) Law, 5733-1973, ss. 12,39

Defense Service Law [Consolidated Version] 5746-1986,

Equality of Opportunities in Labor Law, 5748-1988

Equality of Opportunities for Disabled Persons Law, 5758-1998,

Equal Retirement Age for Female and Male Employees Law, 5747-1987

Retirement Age Law, 5764 – 2004

Prohibition of Discrimination against Blind Persons Accompanied by Guide Dogs, 5753-1993

Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 5761-2000, ss. 1,2 (a) 3 (a),4, 5,6, 6(3)

Adjudication of Small Claims (Procedure) Regulations 5737-1976, r. 11

Civil Procedure Regulations, 5744-1984, rr. 97 (a), 157 (2)

Israeli Supreme Court cases cited:

[1] LCA 292/83 *Sergoz v. A. Ofek Ltd* ,IsrSC 48 (3) 177 (1994).

[2] CA 127/52 *Roznak v. Dauman*, IsrLR 6 722.

[3] CA 130/74 *Rahman Shaadi – Development and Building Company Ltd v. Hillel*, IsrLR 28(2) 399, 401.

[4] HCJ 68/69 *Bergman v. Minister of Finance*, IsrSC 23 (1) 693 (1969); **IsrSJ 8 13**

[5] *Peretz v. Kfar Shemarhyahu*, IsrSC 16, 2101, 2114 – 2115 (1962); **IsrSJ 4 191**

[6] HCJ 104/87 *Nevo v, National Labor Court*, IsrSC 44 (4) 749 (1990).

[7] HCJ 721/94/94 *El-Al Israel Airwayw Ltd v. Danielovitz* IsrSC 48 (5) 749 (1994); 1992-4] IsrLR 478.

[8] CA 239/92 *Egged, Cooperative Association in Israel Ltd v. Mashiah*, IsrSC 48 (2) 66, pp. 72-73 (1994)

[9] CA 294/91 *Hevra Kadisha Kehillat Yerushalayim v. Kestenbaum*, IsrSC 46(2) 464, 530 (1992)

[10] FH 22/82 *Beth Jules Ltd. v. Raviv Moshe and Co. [ ], p. 441*

[11] HCJ 4541/94 *Miller v. Minister of Defence* [1995] IsrSC 49(4) 94; [1995-6] IsrLR 178;

[12] 4948/03 *Elhanati v. Minister of Finance* (not reported, 15.6.2008.

[13] HCJ 5325/01 *Amutat L.B.N Promotion of Womens' Basketball v. Ramat Hasharon Local Council*, IsrSC 58(5) 70 (2004); and see comments

[14] AP 343/09 *Jerusalem Open House for Pride and Tolerance v. Jerusalem Municipality* [10], ss. 49-50 (not reported)

[15] HCJ 678/88 *Kfar Veradim v. Minister of Finance* [1989] IsrSC 43(2) 501

[16] HCJ 6051/95 *Recanat v. National Labor Court*, IsrSC 51(3) 289 (2002)

[17] FHHC *Recanat v. National Labor Court*, IsrSC 57 (1) 419 (2002) 330, 351-350

[18] HCJ 2458/01 *New Family Organization v. Surrogacy Agreements Approval. Committee* [17] [2003] IsrSC 57(1) 419

[19] HCJ 746/07 *Reagan v. Ministry of Transport* [ ] (5.1.2011)

[20] CA 3414/93 *On v. Diamond Stock Exchange Works Ltd , p. 196* (1995)

[21] CA *294/91 Kehillat Yerushalim Burial Society v. Kestenbaum* (1992)

'[22] C.A. 10064/02 "*Migdal Insurance Company Ltd v. Abu Hana* (not reported, 27.9.2005).

[23] HCJ 528/88 *Avitan v. Israel Lands Administration* IsrSC 43(4) 297 (1989)

[24] HCJ 6427/02 *Movement for the Quality of Government* (not reported, 11.5.2006)

[25] HCJ 3751/03 *Ilan v. Tel Aviv Municipality* at p. 828.

[26] HCJ 4124/00 *Arnon Yekutieli z"l v. Minister of Religions* (not reported, 14.6.2010 .

American Cases cited

[27] *Craig v. Boren, Governor of Oklahoma*, 429 U.S. 190 (1976)

[28] *Koire v. Metro Car Wash*, 40 Cal. 3d 24 (1985)

[29] *Pennsylvania Liquor Control Board v. Dobrinoff*, 80 Pa. Commw. 453 (1984) (Pennsylvania U.S.A)

[30] *Ladd v. Iowa West Racing Association*, 438 N.W. 2d 600 (1989) (Iowa, U.S.A)

English Cases Cited

[31] James v. Eastleigh Borough Council, [1990] 2 All ER

For the petitioners — A. Avidan.

For the respondent — B. Shamker, A. Afriat.

JUDGMENT

Justice Y. Danziger

This is an application for leave to appeal the judgment of the Central District Court (Judge A. Yaakov) in LSC 21939-06-09 of 19 October, 2009 which rejected the application for leave to appeal filed by the applicant against the decision of the Small Claims Court in Rehovot (Judge G. Barak) in SC 1274/09, of 16 June, 2009 in which the court dismissed the applicant's monetary claim against the respondent on the grounds of discrimination under the Prohibition of Discrimination in Products, Services and Entry into Public Places Law, 5761-2000 (hereinafter – Prohibition of Discrimination Law or the Law).

This application for leave to appeal raises two questions that require resolution. The *first* concerns the interpretation of Regulation 11 of the Adjudication of Small Claims (Procedure) Regulations 5737-1976 (hereinafter: the Adjudication Regulations), which provides that where the defendant fails to attend, "the court will render a decision based on the statement of claim"; the *second* pertains to the legitimacy of the distinction between men and women with respect to the minimal age for entry into places of entertainment. However, before entering the thick of the fray regarding these subjects, we will review the factual background which brought the applicant's claim before us and the pleadings of the parties.

Factual Background and Previous Proceedings

1. The respondent operates a clubhouse known as Truman Capote in Rehovot. As part of clubhouse policy, the respondent fixed the following minimal entry ages for visitors: for men – those born in 1982, and for women – those born in 1984. The applicant was born in 1984. On 25 April, 2008 the applicant came to the clubhouse operated by the respondent and by reason of his age was denied entry. On other occasions too the applicant was denied entry by reason of his age. Accordingly, the applicant filed a monetary claim in the Small Claims Court for the sum of NIS 30,000, claiming that he had been illegally discriminated against, in contravention of the Prohibition of Discrimination Law.

2. The respondent submitted a statement of defence and the plaintiff submitted a response, and a hearing date was scheduled. On the scheduled date however, the respondent failed to attend and the Small Claims court decided to examine the pleadings before giving its decision.

3. In its decision the Small Claims Court ruled that despite the non-attendance of a representative on the respondent's behalf, the claim should nonetheless be dismissed, for the reason that the Prohibition of Discrimination Law does not prohibit age-based discrimination with respect to entry into public places as defined in the Law.

The applicant filed an application for leave to appeal in the District Court against the decision of the Small Claims Court.

The Decision of the District Court

4. The District Court rejected the application. At the first stage, the District Court addressed the applicant's argument that under Regulation 11 of the Adjudication Regulations the Small Claims Court should have accepted the applicant's declaration affirming the truth of that which was alleged in the statement of claim, and given a decision that accepted the claim. The District Court ruled that under Regulation 11 of the Adjudication Regulations in the event that the defendant fails to attend, the plaintiff will affirm the truth of his claim before the Small Claims Court, and the court will then give a decision based on the statement of claim. However, this does not prevent the court from exercising its discretion to dismiss the claim in appropriate cases. The District Court ruled that upon fulfilment of the conditions in Regulation 11 of the Adjudication Regulations the Small Claims Court is obligated to rule on the basis of the facts in the statement of claim, but is not limited to the legal conclusions that the plaintiff draws from these facts.

5. The District Court then proceeded to address the applicant's claim that the Small Claims Court erred in deciding the question of whether or not there had been age-based discrimination when the applicant himself had made no claim to that effect as grounds for his

action. The applicant claimed that the discrimination in the case at hand was gender-based and that this had likewise been his claim in the Small Claims Court. The District Court ruled that on this point the applicant was correct and that the Small Claims Court erred in failing to address the question of gender-based discrimination. Nonetheless, it ruled that the application should be dismissed because the conclusion reached by the Small Claims Court was just and correct. In this context the District Court ruled that gender-based distinction is permitted under Israeli legislation in various matters, citing the example of variant ages of men and women for going on pension and [arguing] that in the present context too the distinction between men and woman was justified, for two reasons:

> "In places of entertainment there is a difference between men and women. These are places where they drink intoxicating beverages with the potential for wild behaviour as a result. Experience teaches that the lower the age of the participants is, the higher the probability that youths or young men who drink to a state of inebriation will conduct themselves inappropriately. This kind of inappropriate behaviour – again in accordance with experience – is more characteristic of men and less of women.
>
> Another aspect concerns the difference between men and woman in terms of mental maturity. Concededly, no expert opinions were furnished, but experience teaches that women reach mental maturity before men. On this point, note the age for the obligatory fulfilment of commandments for women and for men and their potentiality for sexual relations in accordance with the halakhah [p. 4 of the judgment].

In view of the above the District Court ruled that the distinction made by the respondent at the entry to the clubhouse was a permitted distinction and it therefore dismissed the application for leave to appeal. The applicant had difficulty in accepting this ruling, and hence the application for leave to appeal before us, and which in the wake of the hearing conducted on 27 June, 2011, we decided to allow, and to conduct a hearing of the appeal by way of written summations.

Arguments of the Parties

6 The Procedural Level – Interpretation of Regulation 11 of the Adjudication Regulations

The parties' dispute in this context concerned the interpretation of the provision whereby in the event of the defendant failing to attend "the court will render a decision based on the statement of claim". The applicant - by way of his attorney, Adv. Ayal Avidan – argues that this provision instructs the Small Claims Court to accept the claim in full "automatically". The applicant argues that this manner of interpretation equates the defendant's standing with that of the plaintiff, whose claim will be dismissed, according to the regulation, should he fail to attend the hearing of his claim; it realizes the goals of the institute of small claims, which is to provide the citizen with a prompt and efficient legal solution and it embodies an appropriate policy towards litigants who belittle the court.

On the other hand, the respondent argues - by way of his attorney,Adv. Boris Shamkar and Adv. Asher Apriat - that Regulation 11 of the Adjudication Regulations only states that where the defendant fails to attend, and assuming the fulfillment of the additional condition prescribed by Regulation 11, the Small Claims court is permitted to render judgment based on the *facts* of the statement of claim, but by no means is it restricted to the *legal* arguments of the plaintiff. This being so, argues the respondent, a situation may arise in which despite the defendant's non-attendance at the hearing, his claim will be dismissed because the facts of the statement of claim do not reveal any legal grounds that could entitle the plaintiff to a remedy. On the merits, the respondent claims that in the first place there was no real factual dispute, and the central

question was of a legal nature, and that his non-attendance at the hearing was exclusively the result of a mishap and not of a belittling of the court.

7. *The Substantive Level – The Claim of Discrimination in Entry into a Public Place.*

The applicant claims that the Magistrates Court and the District Court erred when ruling in contravention of the Prohibition of Discrimination Law which prohibits gender-based discrimination in the entry to public places. As for the respondent's claim and District Court's holding that the distinction between men and women in the entrance into clubhouses is relevant in view of the fact that men are more prone to unruly behavior than women, the applicant argues that this is a generalization with no scientific basis and is tainted by prejudice. The applicant also disputes the holding that women mature faster than men, claiming that the physiological differences between women and men referred to by the respondent have no relevance for the distinction it adopted in the entry into the clubhouse under its management. The applicant argues that the respondent has cynically enlisted these differences between genders in order to legitimate its adoption of an illegal policy of discrimination.

On the other hand, the respondent argues that the fact of its being a private business which enjoys freedom of occupation, the right to property and freedom of contract, confers it the right to fix a minimum age threshold for those entering the gates of the clubhouse under his management, intended to give it an "adult, orderly character". The respondent cites examples indicating the ubiquity of minimum age limits in our lives, inter alia citing the minimum age for taking out a license, the age of criminal responsibility the minimal marriage age, the legal capacity age and more. The respondent further claims that one cannot view men in general and men under the age of 26 as a "group" to whom the Prohibition of Discrimination Law applies, and whom it is intended to protect. The respondent's argument in this context pertains to the interpretation of the Law, which in its view was not intended to protect powerful groups do not suffer historical discrimination and whose discrimination is not accompanied by elements of humiliation and violation of autonomy.

On the merits, the respondent denies that the applicant suffered from any humiliation, referring to the holding of the Small Claims Court that the applicant's repeated visits to the clubhouse were for the purpose of establishing grounds for claim. The respondent further claims that the distinction between men and women is marginal and temporary, and that the case is not one of discrimination solely based on gender, such as would justify strict treatment, given that men over age 26 are permitted to enter the clubhouse. As for the relevance of the distinction between men and women, the respondent affirms the decision of the District Court, and argues that the distinction is relevant and legitimate given the fact that statistically, among many couples the man is older than the woman. As such – so claims the respondent – there is a commercial justification for determining a lower minimal entrance age for women so as not to lose many potential couples. Finally, the respondent points out that even the legislature distinguished between women and men for specific purposes, referring to the Retirement Age Law, 5764 – 2004 (hereinafter – Retirement Age Law), and the Defense Service Law [Consolidated Version] 5746-1986, from which he deduces *a fortiori* his prerogative, as a private dealer, to distinguish between women and men.

Deliberation and Decision

8. Having examined the application for leave to appeal, the response thereto and the parties' summations and having heard the parties' argumentations during the hearing conducted before us, my view is that the respondent's policy of distinction is a policy of discrimination that is prohibited under the Prohibition of Discrimination Law. This being so, I propose to my colleagues that we should allow the appeal and we should rule that respondent wronged the applicant when it discriminated against him in contravention of the law prohibiting discrimination and that we obligate him to compensate the applicant. However, before discussing this matter, I wish to devote the following paragraphs to the subject of the interpretation of Regulation 11 of the Adjudication Regulations, regarding which I concur with

the view of the District Court.

Interpretation of Regulation 11 of the Adjudication Regulations.

9. In the dispute between the parties on this matter my view is that the respondent is right and that the wording and the purpose of Regulation 11 of the Adjudication Regulations support the conclusion that the Small Claims Court was authorized and even obligated to dismiss the claim even when the defendant did not attend the hearing on the matter, even if it considers that the facts described in the statement of claim and affirmed in the plaintiff's declaration, do not establish a grounds of claim.

10. Regulation 11 of the Adjudication Regulations, the heading of which is "Failure to Attend Trial"

> "Where the plaintiff attended and the defendant did not attend – the court will decide *on the basis of the statement of claim*, provided that the plaintiff declared the truth of that which is stated in his statement of claim before the court (emphasis not in source – Y.D.)

11. The purpose of this provision is to alter the burden of proof which is imposed on the plaintiff in a regular claim, given the circumstances of the defendant's failure to attend. In a regular civil claim, in similar circumstances in which the defendant fails to attend the hearing on his matter, Regulation 157 (2) of the Civil Procedure Regulations, 5744-1984 (hereinafter: Civil Procedure Regulations) prescribes that the plaintiff must "prove his claim to the extent that he bears the burden of proof and he will then be entitled to the requested remedy and any other appropriate remedy". Clearly, the legislator sought to be accommodating with the plaintiff in a small claim in a similar situation, and sufficed with a declaration affirming the contents of the statement of claim. This arrangement reflects an appropriate balance that has consideration for the values of prompt and efficient resolution of civil disputes, which become particularly important in the context of the small claim, and the fact that disputes adjudicated in the Small Claims Court are monetary disputes involving limited sums of money (See: LCA 292/83 *Sergoz v. A. Ofek Ltd*, IsrSC [1] at pp. 189 – 191; see also in general, Sinai Deutch, "The Small Claims Court as the Protector of the Consumer", *Tel-Aviv Law Review* 8 (1981) 345)

12. As I see it, the applicant is arguing for an interpretation that attempts to effectively impose upon the court the legal conclusions and the remedies that he seeks in this claim. This approach is at variance with the wording of Regulation 11 of the Adjudication Regulations, nor is it consistent with the basic principles according to which the resolution of the question of whether a particular set of facts establishes legal grounds, and entitles the plaintiff to the remedies he requests is reserved for the court and lies at the heart of the judicial decision. The presumption is that had the legislator sought to limit the court's discretion with respect to the judicial decision, he would have used explicit and unequivocal language, whereby in the event of the defendant's non-attendance, the court would "accept the claim", or some other similar wording which could have attested to the automatic acceptance of the claim with its remedies

13. Furthermore, comparison to Regulation 97 (a) of the Civil Procedure Regulations similarly teaches us that the District Court's interpretation of Regulation 11 of the Adjudication Regulations is correct. Similar to the Adjudication Regulations, Regulation 97 (a) of the Civil Procedure Regulations determines that in the event of the defendant's failure to defend himself (in the current case - by failing to submit a statement of defense within the prescribed period), the "court or the registrar will issue a judgment in his absence, *based on the statement of claim alone*". For a long time already, even before the enactment of the Civil Procedure Regulations, this rule has been interpreted in a manner that leaves the court discretion to refuse to grant that

which was requested in the statement of claim, inter alia, if it deems that the statement of claim does not show grounds for claim. In this context Justice Yoel Sussman wrote the following valuable comments in *Civil Procedure Regulations* (2009) (Tenth Edition) 343:

> Indeed there may be other cases in which the plaintiff will not be given a judgment *ex parte*, either with or without proof, such as when the statement of claim does not show grounds…[*ibid*, p. 263. in this context see also CA 127/52 *Roznak v. Dauman*[2]; and compare: CA 130/74 *Rahman Shaadi – Development and Building Company Ltd v. Hillel* [3] 401); Moshe Keshet, *Procedual Rights and Civil Procedure* ,Vol. 1 (2007) 468); Uri Goren, *Subjects in Civil Procedure* (2009),343.

14. In view of the above, it is not surprising that the Small Claims Court has full discretion in determining the legal conclusions and remedies stemming from the facts of the statement of claim, even when the conditions prescribed in Regulation 11 of the Adjudication Regulations are satisfied. I should mention that in the absence of a factual dispute between the parties, I was not required to address the question of the extent to which the Small Claims Court is "bound" by the facts set forth in the statement of claim when ruling "on the basis of the statement of claim" under Regulation 11 of the Adjudication Regulations. The legal arrangement under Regulation 11 differs from the arrangement prescribed for ruling "on the basis of the statement of claim" in a regular claim, and the question will be resolved at the appropriate time.

Prohibited Discrimination or Permitted Distinction in the Entry into the Respondent's Clubhouse

15. First, I should mention that in the case before us there is no dispute regarding the applicability of the Prohibition of Discrimination Law to the respondent. Under s. 2 (a) of the Prohibition of Discrimination Law, a "public place" is "any place intended for public use, including a "discothèque". As such, it is not, nor can it be disputed that the respondent's occupation is the operation of a public place. The inevitable conclusion is that the respondent is not permitted to discriminate between men and women in the matter of "allowing entry" into the clubhouse that it operates.

16. I will further mention that I see no reason to address the respondent's claims regarding the legitimacy of establishing a minimal age for entering the clubhouse, because, as determined in the District Court's ruling, the applicant did not allege *age-based* discrimination, but rather *gender-based* discrimination. In other words, the applicant did not contest the establishment of a minimum entry age to the clubhouse *per se*, but rather the fact that the respondent prescribed a different entry age for men as distinct from women. This being the case, the respondent's claims regarding its prerogative to determine a minimal entry age and to that end, its references to laws that prescribe age levels for various goals, such as the minimum age for taking out a license, and the minimal age for marriage, all miss the principal issue, which I will proceed to discuss. The main question relates to the legitimacy of the respondent's practice, that distinguishes between men and women for purposes of the minimal entry age into the clubhouse that it operates.

The Scope of the Prohibition of Discrimination Law

17. First, before I address the relevant provisions of the Prohibition of Discrimination Law, I wish to preface with some comments on the application of the principle of equality in private law, which will provide the basis for the task of interpreting the Law. It is well known that the right to equality was already recognized as part of the Declaration of the Establishment of the State of Israel, which promised that "the State of Israel….. will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex". Israeli

law similarly recognized the importance of the right to equality, and conferred it the status of a basic right that must guide the activities of the sovereign authorities. In this context it is impossible not to cite HCJ 68/69 *Bergman v. Minister of Finance*, { }[4], and the comment of Justice M. Landau, frequently cited in the decisions of the courts, that:

> 'We do not have such an express provision, neither in a written constitution nor in an "entrenched" provision of a basic law. Nevertheless this unwritten principle is the soul of our entire constitutional regime.'

See also in the Equal Rights for Women Law, 5711-1951, which was enacted soon after the establishment of the state, and which guaranteed that "Women and men shall be equal for purposes of every legal act" [section 1A (a)].

18. However, the right to equality was not restricted to public law, and in an ongoing process gradually penetrated into private law as well, specifically into Contracts Law. This development reflected a broader transition in private law in general and specifically in contracts law, from individualism to collectivism; from conceptions of pure market economy, in which each individual promotes his own affairs, disregarding the concerns of others, to conceptions that encourage cooperation, recognizing the extra power that certain parties have and seeking to restrict it to prevent its abuse in a manner that violates the freedom of others, in the understanding that freedom without equality is not freedom [see Nili Cohen, "Equality v. Freedom of Contract" *HaMishpat* 1 (1993), 131-132, 134-135 (hereinafter: Cohen, *Equality versus Freedom of Contract*); Nili Cohen, "Status, Contract, and Causing the Breach of Contract, *HaPraklit* 39, 304,304-308 (1990).

Initially, the principle of equality was applied to the actions of the public authority in the private sphere [see HCJ 262/62 *Peretz v. Kfar Shemarhyahu*, [5] 191; Daniel Friedman, "The Application of Obligations from Public Law to Apartment Public Authority Operating in the Private Sector" *Mishpatim* 5 (1975) 598 (hereinafter- Friedman). Later on, it was also applied to private bodies performing public functions of a public or quasi public status, and was also recognized in labor law and in the law of cooperative associations [see e.g. HCJ 104/87 *Nevo v, National Labor Court*, [6] (hereinafter: the *Nevo* case); HCJ 721/94/94 *El-Al Israel Airwayw Ltd v. Danielovitz*

[7]; and also compare with the application of other norms from public law, in the realm of civil law: CA 239/92 *Egged, Cooperative Association in Israel Ltd v. Mashiah*, IsrSC 48 (2) 66, [8] pp. 72-73 (1994); CA 294/91 *Hevra Kadisha Kehillat Yerushalayim v. Kestenbaum* [9] p. 530 ; in this context also see Peter Benson, *Equality of Opportunity and Private Law*, *in* Human Rights in Private Law 201 (Daniel Friedmann & Daphne Barak-Erez eds., 2001), according to which the judicial application of the principle of equality in the private law must be limited to those cases in which the private body has quasi public characteristics, or where it offered an asset for public use.] Finally, there were also some who argued that the principle of equality should also be applied to tenders between totally private bodies, even when the tenderor explicitly released himself from accepting the cheapest bid or any bid at all [see minority opinion of Judge (former title) A. Barak in FH 22/82 *Bet Jules Ltd. v. Raviv Moshe Ltd* [10] at pp. 479 – 485; for critique of this approach, see Gabriella Shalev "The Influence of Basic Law: Human Dignity and Liberty on Contracts Law", *Kiryat Hamishpat* 1, 41 (2001); Gabriella Shalev, *Contracts and Tenders of a Public Authority* (1991) 253-254].

These developments were made possible, inter alia, by the provisions of ss. 12 and 39 of the Contracts (General Part) Law, 5733-1973 (hereinafter: The Contracts Law), which absorbed the doctrine of good faith in Israeli law, and the provision of s. 30 of the Contracts Law which enables the invalidation of a contract the making, contents, or purpose are contrary to "public policy". Alongside the general legislation, specific legislation too, devoted to specific subjects,

found it proper to absorb the values of equality as part of the private law. In the framework of this legislation one can enumerate the Equality of Opportunities in Labor Law, 5748-1988, the Equality of Opportunities for Disabled Persons Law, 5758-1998, the Prohibition of Discrimination against Blind Persons Accompanied by Guide Dogs, 5753-1993, and the Prohibition of Discrimination Law – the focus of the hearing before us, the purpose of which is "to promote equality and prevent discrimination in the entry to public places and the supply of products and services" [s.1 of the Law].

19. All the same, privacy is not a fundamental value in the private law. On the contrary, in the private sphere freedom is the rule, and equality is the exception – an exception that is usually applied when there is a significant gap between the parties or when one of the parties occupies a quasi public position (see Cohen, *Equality versus Freedom of Contract*, at p. 137]. This is exemplified by a person's freedom to enter into a contract with whomever he pleases, for reasons that may be arbitrary and which need not be consistent with the principle of equality. The distinction between the rule and the exception in this context was admirably articulated by Prof. Daniel Friedman as follows:

> 'The law of contracts is based on "the autonomy of the will". The general principal is that a person is under no obligation to enter into a contract, and a person wishing to enter into a contract is free to choose his partner from among all those who are prepared to contract with him. Accordingly, a person cannot complain that another person refused to enter into a contract with him, to sell him an asset, to rent him an apartment, or to accept him for work. This principle is subject to a small number of exceptions. For example, according to the common law, a person occupied in a "Public calling" such as a public transporter, must serve all those who come to him. There may also be legislative intervention in the freedom of contract, which may restrict or annul a person's ability to refuse to enter into a certain category of contract. This category may also include the laws, which have been enacted in various states, that prohibit discrimination for reasons of race, gender or religion. This prohibition may apply to various activities in the realm of private law, such as the renting or sale of assets." (Friedman, p. 605-606); in this context and with regard to the Prohibition of Discrimination Law, see Moshe Cohen-Alyah "Liberty and Equality from the Perspective of the Prohibition of Discrimination in Products and Services", *Alei Mishpat* 3, (2003) 15)].

20 The importance of the value of liberty private law, is beyond dispute [see: Daniel Friedman and Nili Cohen, *Contracts*, Vol. 1 (1991) ss. 3.18 – 3.19; Gabriela Shalev, *The Law of Contracts – General Part* (2005) pp. 82-94; for discussion of the tight connection between freedom of contract and human dignity, see Roger Brownsword, *Freedom of Contract, Human Rights and Human Dignity, in* Human Rights in Private Law 181 (Daniel Friedmann & Daphne Barak-Erez eds., 2001). However, I do not think that in our case one can agree to the narrow interpretation which the respondent argues for regarding the application of the Prohibition of Discrimination Law. The case before us is unique in the sense that the group discriminated against, *at first blush*, is supposedly the stronger group which does not suffer from historical discrimination. Naturally, most of the cases in which the court has dealt with discrimination were cases of discrimination against a group in respect of which there is historical ongoing discrimination. All the same, I think that the language of the law, the legislative intention at the time of its enactment, which can be inferred from the explanatory note of the draft bill, and the goal of the Law, all support an approach whereby the applicatory

scope of Prohibition of Discrimination Law, proscribes all kinds of discrimination deriving from the reasons mentioned therein, regardless of whether it is directed against a group that suffers from ongoing discrimination, or against a "powerful" group, and regardless of whether it involves elements of humiliation and violation of autonomy or not. I will elaborate.

21. The *Wording of the Prohibition of Discrimination Law.* Section 3 (a) of the Law establishes the prohibition of discrimination, and states, inter alia, that a person occupied in the operation of a public place is not permitted to discriminate in granting entry into a public place by reason of sex, and in the words of the Law:

> Any person whose business is the supply of products or of public services, or who operates a public place, shall not – in the supply of products or of public services, in admitting to a public place or in providing a service in a public place – discriminate because of race, religion of religious group, nationality, country of origin, sex, sexual inclination, opinion, political allegiance, personal status, or parenthood.

The language of s. 3 is unequivocal, and makes no distinction between the groups against whom there is a history of discrimination and groups who have not suffered historical discrimination. The word "group" is used primarily in s. 6 which determines that where it is proved that "a group characterized by one of the grounds for discrimination enumerated in section 3" was discriminated against in the ways enumerated in ss. 2 – 4, a presumption of prohibited discrimination arises. These sections too make no distinction between groups that suffered from historical discrimination and others, and this indicates that the silence of s. 3 with respect to the identity of the "group" that was illegally discriminated against is not incidental and that the legislator's view was that any discrimination based on the reasons enumerated in s. 3 is illegal.

22. *The Draft Bill of the Prohibition of Discrimination Law and its Explanatory Note.* From the explanatory note of the draft bill it is evident that the legislator did not intend to limit the Prohibition of Discrimination Law exclusively to the protection of groups that had suffered from historical discrimination. Hence, the introduction to the Draft Bill of the Prohibition of Discrimination in Products, Services and Entry into Public Places, 5760-2000, *Hatz'ot Hok* 370 states the following:

> "A refusal to allow a person to enter a public place or to provide him with a service or a produce purely by dint of his association with a group, and especially a group with a history of discrimination, gives rise to a grave violation of human dignity [*ibid.*, p.370]'

Indeed, the Explanatory Note points out that discrimination based on affiliation with a group that has a history of discrimination is particularly offensive, but it notes that discrimination against a person "purely by reason of his affiliation with a group" by definition, impairs his dignity. This makes it clear that the legislator did not intend to limit the coverage of the Prohibition of Discrimination Law strictly to the protection of those groups who had and continue to suffer from ongoing discrimination.

23. *The Purpose of the Prohibition of Discrimination Law.* The realization of the purposes of the Law – prevention of discrimination in entry into public places and in the provision of products and services, and the promotion of equality between individuals belonging to different groups in the society, and the protection of their dignity – necessitates the rejection of the construction for which the respondent argues. Disqualification of discrimination of men serves

the purposes of the Law and contributes to the promotion of equality in a manner that benefits the entire society.

24. Discrimination based on a person's affiliation with a particular group carries a message of rejection of a characteristic embedded in that person and as such violates his dignity. In this context incisive comments were made by Justice D.Dorner in HCJ 4541 *Miller v. Minister of Defense* [11], which discussed women's participation in pilot's course in the I.D.F and she noted that not every violation of liberty involves human humiliation, but ruled that:.

> This is not the case with respect to certain types of discrimination against the background of group affiliation, including against groups, including sex discrimination, and also racial discrimination. Such discrimination is based on attributing an inferior status to the victim of discrimination, a status that is a consequence of his supposedly inferior nature (*ibid.*, p. 132)

In this context also see the comments of Justice (former title) A. Barak in HCJ 953/87 *Poraz v. Shlomo Lahat Mayor of Tel-Aviv*, 309 (1988) [8]:

> The need to guarantee equality is natural to man. It is based on considerations of justice and fairness. One who seeks recognition of his right must recognize the right of the other in order demand a similar recognition. The need to maintain equality is critical for a society and for the communal consensus upon which it is based. Equality protects the government from arbitrariness. Indeed, there is no factor more destructive to society than when its sons and daughters feel that they are being treated unequally. A sense of inequality is one of most unbearable of feelings; It undermines the forces that consolidate society. It erodes people's self-identity (*ibid.*, p.332)

It is clear that the results of discrimination on the basis of affiliation to any particular group, the feeling of exclusion and the erosion of self-identity also gravely violate human dignity. The humiliation and the violation of autonomy is the foreseeable result of the discrimination of the kind under discussion, and contrary to the respondent's claim, proof of this is not a condition for realization of the right that the Law confers upon the discrimination victim. The violation of human dignity will be particularly severe when the discrimination is based on a stereotype. Stereotypes also exist with respect to those who are included in a group that does not suffer from historical discrimination, and as we will elaborate below, our case in which the discrimination was justified by a stereotype that was imputed to the group of men, is a striking example of this. Offenses of this kind are not consistent with the basic values of the State of Israel as a democratic state, and which the legislator intended to eliminate, inter alia, by the Prohibition of Discrimination Law, under discussion here.

25. Moreover, interpretation of the Law so that it prohibits any discrimination for the reasons enumerated therein regardless of whether the party discriminated against belongs to "strong" side or to the side that was historically discriminated against, may specifically bring about the uprooting of the phenomenon of historical discrimination motivated by different social stigmas. In this context, and in relation to discrimination between men and women the following pertinent comments were made by Leo Kanowitz, one of the pioneers in the research field of women and law in his book *Women and the Law: The Unfinished Revolution:*

> As long as organized legal systems, at once the most respected and most feared of social institutions, continue to differentiate sharply, in treatment or in words, between men and women on the basis of irrelevant and artificially created distinctions, the

> likelihood of men and women coming to regard one another primarily as fellow human beings and only secondarily as representatives of another sex will continue to be remote. When men and women are prevented from recognizing one another's essential humanity by sexual prejudices, nourished by legal as well as social institutions, society as a whole remains less than it could otherwise become." [Leo Kanowitz, *Women and the Law: The Unfinished Revolution* 4 (1969)].

These comments have retained their force. In order to uproot the phenomenon of historical discrimination, any attempt to distinguish between men and women on irrelevant grounds must be rejected. Any such distinction not only offends the dignity of the party discriminated against and perpetuates the existing stereotype, but also sharpens and preserves irrelevant differences or differences that rely on those stereotypes. This being so, even if in a particular case, such as the one before us, the discrimination is not directed against party that is historically discriminated against, it will ultimately perpetuate that historical discrimination and above all else be harmful specifically to that group.

25. A similar case in which the direct victim of the discrimination was a man, and where the discrimination actually reflected the stereotypic approaches to women arose in the HCJ 4948/03 *Elhanati v. Minister of Finance* [12] (hereinafter: *Elahanti*), in the framework of which a number of petitions were heard concerning the policies of the veteran pension funds that awarded a widower less rights in the pension accumulated by his deceased female spouse than it gave to a widow in similar circumstances of the death of her male spouse. Inter alia, the Funds claimed that the distinction between widows and widowers among parties insured by pensions is justified in view of the relevant difference that stems from the reality of life in which women earn less than men, leave the work market earlier, and have longer life expectancy than men, in a manner that justifies increased support for widows over widowers. Justice E. Hayut rejected this claim, establishing the following holdings:

> No reasonable explanation was given by the Funds for this discrimination, apart from stereotypic approaches which view the women as the secondary supporter and as having inferior status in the labor market in terms of the salary that she receives; the willingness to employ her; and in terms of the duration of her employment. Even though, regrettably, some of these approaches still have a foothold in the Israeli labor market it seems indisputable that this is an undesirable reality the total uprooting of which should be pursued unrelentingly. This being so, any arrangement that relies on these stereotypes to justify discrimination between men and women regarding the rate of the survivors pension can only be regarded as an arrangement that violates the dignity of women as workers and as members of the Fund and the dignity of widowers, because it unjustifiably reduces their standard of living after the death of their wives. In that sense this is discrimination that is tightly and substantively connected to human dignity, and the harm occasioned thereby constitutes a violation of the fundamental right of the widowers and their deceased wives to dignity in accordance with the model endorsed by this court…" (*ibid.*, s. 26 of Justice Hayut's decision).

27. Foreign case law too provides ample evidence of the negation of gender-based discrimination against men, and specifically age discrimination, while stressing the imperative of neutralizing the irrelevant distinctions and stereotypes that perpetuate the historical

discrimination. See for example, in the famous case of *Craig v. Boren, Governor of Oklahoma*, 429 U.S. 190 (1976) [27] (hereinafter: *Craig*) which considered a petition to strike down a law enacted in the State of Oklahoma in the U.S.A. which provided that women would be entitled to purchase a particular alcoholic beverage upon reaching the age of 18 whereas men would not be able to purchase that beverage until reaching the age of 21. The Supreme Court of the U.S.A. rejected the respondents' arguments that relied on surveys showing that young men are more prone to drunken driving than young women and it struck down the law as being in violation of the 14th Amendment of the U.S.A. constitution. Of special significance is the comment that the stereotypes upon which the law was based also influenced the statistics that the respondent relied upon in that particular case [*ibid.*, note 14 of Justice Brennan's decision].

Further regarding the *Craig* [27] decision, pertinent comments were made by Prof. Katherin Mackinnon, who relates to the arguments of Justice Ruth Bader Ginsburg, who at the time was the attorney who represented one of the *amicus curie* and who currently serves as a justice on the U.S.A Supreme Court. The comments concern the covert discrimination against women underlying the discrimination against men:

> "…in Craig v. Boren, which adjudicated men not being allowed to drink and drive as young as women - that fundamental grinding issue of women's everyday lives that created the leading doctrine under all our claims are now adjudicated - Ruth argued that this rule is 'part of the myriad signals and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions.'… We are just along for the ride. She shows here how discrimination against men discriminates against them, which is real, while hiding deeper discrimination against women at the same time. "[Catharine A. MacKinnon, *Symposium Presentation: Rutgers School of Law – Newark and the History of Women and The Law: A Love Letter to Ruth Bader Ginsburg*, 31 Women's Rights L. Rep. 177, 182 (2010); *see also*: Catharine A. MacKinnon, *Sex Equality* 228-29 (2nd ed., 2007)].

In another case James v. Eastleigh Borough Council [28] (hereinafter: *James*) which was heard by the House of Lords in Britain, the matter discussed was similar to the case before us, based on discrimination against men against the background of a determining different ages for the receiving of benefits. In that case, the appellant and his wife, a 61 year old couple, visited a swimming pool that exempted pensioners from paying entrance fee. The significance of the exemption was that women above 60 were exempted from entrance fee whereas men would only be exempted upon reaching the pension age determined for men in England, which is 65. The House of Lords accepted the appeal, declaring that this policy constitutes prohibited discrimination in accordance with the Sex Discrimination Act 1975, which is essentially similar to the Prohibition of Discrimination Law forming the subject of our discussion. Lord Gold pointed out that the policy of the law was to promote equal treatment of men and women [*ibid.*, p. 617[

In other cases too, that adjudicated state laws that are essentially similar to the Prohibition of Discrimination Law forming the subject of our discussion, it was held that discrimination against men in private businesses by reason of their sex is prohibited. For example, in the case of *Koire v. Metro Car Wash* [28] at p. 24, it was held that granting discounts to women in business for washing cars and for entry into a clubhouse constituted prohibited discrimination

in contravention of the Unruh Civil Rights Act (Civil Code § 51). In that case the Californian Supreme Court disqualified a practice known as "Ladies Day" or "Ladies Night" as the case may be, ruling that:

> "…differential pricing based on sex may be generally detrimental to both men and women, because it reinforces harmful stereotypes." [p. 34].

> [see also: *Pennsylvania Liquor Control Board v. Dobrinoff* [29] at 453 the disqualification of a practice whereby women received an exemption from entrance fee to a bar, being in contravention of the prohibition of discrimination law prescribed in the state law); *Ladd v. Iowa West Racing Association* [30] at 600 – disqualification of policy that grants women discounts in a sprinting installation, in view of the prohibition of the discrimination prescribed in the state law)]

We can thus see that also in the states that influenced Israeli law, which enacted laws similar to the Prohibition of Discrimination Law many years prior to its enactment here, they recognized the need to eliminate all forms of discrimination, even in the cases in which it was directed at affiliates of a group that had not suffered from historical discrimination. The rationale for the approaches taken by the courts in the U.S.A. and England is the same rationale that underlay the Prohibition of Discrimination law that I addressed above; promotion of equality by way of uprooting stigmas and stereotypes that provide justification for the distinction between different groups and specifically been men and women.

28. I will note that a ruling whereby the Prohibition of Discrimination Law also prohibits discrimination against groups that have not suffered historical discrimination, does not preclude the possibility of preferring a particular group in order to totally eliminate discrepancies and to promote substantive equality. Indeed, both in the private sector and in the third sector, to which the Law likewise applies, the promotion of social goals is occasionally permitted in the form of affirmative action. Preference of this kind is not considered as discrimination within the meaning of the Law. On the contrary: Affirmative action is intended for the realization of equality in the substantive sense, in the recognition that certain groups are separated by primal differences that can only be bridged by way of giving preference, whether in the allocation of resources or by other means, to the group that suffers from discrimination as a result of prolonged discrimination [compare: HCJ 5325/01 *Amutat L.B.N Promotion of Womens' Basketball v. Ramat Hasharon Local Council* [13]; and see comments of Justice Y. Amit in AP 343/09 *Jerusalem Open House for Pride and Tolerance v. Jerusalem Municipality* [14], ss. 49-50 (not reported). All the same, in a case in which the claim of affirmative action is made, it should be examined whether it is really affirmative action or whether the claim is nothing but a smoke screen to conceal statutorily prohibited discrimination. At all events, in our case, this issue does not arise since the respondent did not claim that the discrimination it had adopted was actually affirmative action and under the circumstances at all events there would have been no basis for such an argument had it been raised.

29. Summing up this point, the realization of the purpose of the Prohibition of Discrimination Law compels the negation of discrimination based on one of the reasons enumerated therein, even if the discriminated party does not specifically belong to a group that has suffered from historical discrimination, and it is not necessary to prove that in the concrete case the discriminated party suffered from humiliation or the violation of his autonomy. The negation of all ungrounded discrimination will contribute to the maintenance of the dignity of those included in each one of the groups and will contribute to the overall elimination of

discrimination. These comments are consistent with our comments above, as well with the language of the Law and the legislative intention, as it received expression in the draft bill.

Illegitimate Discrimination or Permitted Distinction – the Question of the Relevancy of the Distinction

30. Having concluded that the Prohibition of Discrimination Law also applies to cases such as ours, it remains for us to examine whether there is any basis for the respondent's claim that our concern is with a permitted *distinction* based on a relevant difference, or whether it is a case of illegitimate *discrimination*, as claimed by the applicant.

Indeed, discrimination between persons becomes illegitimate only where it is not based upon a substantive and relevant difference between them. It has been ruled more than once that discrimination "means an arbitrary practice of unequal treatment, which has no justification due to the absence of a logical and significant difference under the circumstances between one and the other (comments of Justice T. Or in HCJ 678/88 *Kfar Veradim v. Minister of Finance* [15] at p.501

31. As mentioned, the respondent claims that the distinction it adopted was substantively justified in view of the reality of life, in which with most couples the woman is younger than the man. The respondent learned of this reality from the data of the Central Bureau of Statistics, which indicate that statistically, among most of the heterosexual married couples, the man is slightly older than the woman. This claim is supplemented by the difference found by the District Court regarding the actual reality in which there is a "greater likelihood that youths or young men who drank to a state of inebriation would behave inappropriately" and the "different mental maturity of men and women".

32. It will be recalled that s. 6 of the Prohibition of Discrimination Law establishes presumptions of prohibited discrimination, including the presumption under subsection (3) which arises when the defendant conditions entry into a public place for "a group characterized by one of the grounds for discrimination enumerated in section 3 on compliance with conditions that are not required of persons who do not belong to that group". This is the case confronting us. The respondent conditioned the entry of men into the clubhouse that it operated upon the fulfillment of a particular condition, namely - being 26 or older – this being a condition which is stricter than the one required of women seeking to enter the very same clubhouse, and which was not required of them. Accordingly there arises an automatic presumption of discrimination in contravention of section 3 of the Law.

33. According to my approach, the respondent's claim that relies on the different age of marriage for men and women cannot justify the distinction made by the respondent in the context of entry into the clubhouse that it operates. Presumably the people coming to the clubhouse are not only couples and certainly not only married couples, to whom the statistics relied upon by the respondent relate. This being the case, it would seem that *a priori*, under the circumstances of the case the difference pointed to by the respondent cannot be classified as a "*logical and significant difference*" in the words of Justice Or in the *Kfar Veradim* case [15] case. The respondent did not demonstrate that this data is reflective of its clients, nor did she show that the discrepancy in minimal entry ages into the clubhouse that she operated was derived from these statistics. As such, the respondent has not succeeded in its attempts to refute the presumption of discrimination that arises by force of section 6 (3) of the Prohibition of Discrimination Law.

34. In my view, the distinctions relied upon by the District Court cannot justify the discrimination in the case at hand. These determinations, which relied upon "life experience" of the court, do not belong to the category of matters that are part of judicial knowledge and no evidence was brought to prove them. Moreover, even if these determinations contain a grain of truth, it may be presumed that it would be limited and narrow and does not reflect the rule, and as such cannot justify the stigmatizing of all men of the relevant age and the discrimination against them. In this context valuable comments were made by Justice Y. Zamir in HCJ

6051/95 *Recanat v. National Labor Court*, [12], p. 289 (hereinafter: *Recanat* case):

> The social norm is the ground from which social discrimination grows: discrimination based on race, religion, country of birth, gender and others. The stereotype is the enemy of equality. It creates a vicious circle that perpetuates discrimination (*ibid.* p. 355; see also FHHC 4191/97 *Recanat v. National Labor Court*, [16]

In this context it similarly relevant comments were made by Justice M. Cheshin in HCJ 2458/01 HCJ 2458/01 *New Family Organization v. Surrogacy Agreements Approval. Committee* [17] p. 419:

> At the end of the day, we all live in a particular social milieu, and we assimilate the accepted societal views that enter our bodies and minds through social osmosis. But we must not confuse reality with values, as indeed, the test requiring equality – like the prohibition upon discrimination – were created, and both exist, precisely in order to combat "accepted societal views". … These and other laws were intended to uproot "accepted societal views" – accepted although improper – and the Court and the legislature will be vigilant and will act to instill in society values of equality that are built upon the abilities of the individual, and not upon a stereotype associated with a group to which a person belongs.[*ibid.*, p. 451].

Were we to agree with the reasoning of the District Court we would find ourselves in a "vicious circle" that perpetuates the discrimination, in the words of Justice Y. Zamir in the Recanat [16] case. To break out of that vicious circle a distinction must be made between a permitted distinction that accurately reflects the members of the group under discussion claiming discrimination, and the stereotype that is attached to that group but which is not reflective of its members. In the case before us, I have no doubt that the determination that 25 year old men, who are not permitted to enter the clubhouse operated by the respondent, are less mentally mature and more prone to wild behavior and inebriation than women of the same age, whose entrance to the clubhouse is permitted - is not reflective of a general rule. This being the case, a claim to that effect cannot serve as a basis for a distinction between men and women

35. I will further add that I found no substance in the respondent's reference to legislation that makes an age-based distinction between men and women. *First*, the justification of the distinction depends upon the legislative goal and the question of whether in terms of that goal there is a relevant difference between men and women, and it is clear that the law applying to the matters referred to by the respondent does not apply to the case before us. *Second*, legislation may be discriminatory and yet retain its validity, whether because of the fact that the discrimination therein does not amount to a violation of constitutional basic rights, or because of other competing interests, or in view of the fact that it preceded the Basic Law. One way or another, the respondent will not be allowed to rely on the statutory distinction between men and women with respect to retirement ages regarding which it has already been held that this Court views it with disfavor [see e.g. *Elhanati* [12], s. 25 of Justice Hayut's ruling; the case of *Nevo* [6], at p. 770; and compare to the comments of Lord Bridge in the James case [31], p. 611 where he rejected the claim that a distinction between men and women with respect to the age for granting an exemption from an entrance fee to a public swimming pool is justified in view of its reliance on the statutory retirement age. I will further add that neither did I find any substance in the claim that the distinction in this case warrants lenient treatment because of its "temporary" character, given that the degree of the offence caused by discrimination is not derived from its temporary nature, and at all events not exclusively so. Rather, it derives

primarily from the message it conveys to the party discriminated against and to his environment regarding the characteristics of that party. I dwelt upon the negative messages of discrimination of this nature in my comments above, and there is no need to repeat them.

36. After the opinion of my colleague Justice S. Joubran was placed upon my table and having examined it in depth, I find it appropriate to clarify and to make the following comments.

Based on my final conclusion regarding the interpretation of the Prohibition of Discrimination Law, according to which the Law prohibits in principle any gender-based discrimination, both against men and against women, my colleague concludes that I adopted an approach which is "gender blind". However, this is not the case. In my opinion I did not adopt any particular model, and I certainly did not adopt the "gender blind" model. Rather, it is based on a number of different reasons, all of which lead to the conclusion that the applicatory scope of the Prohibition of Discrimination Law was intended to prohibit in principle any kind of gender-based discrimination, whether of men or of women. Accordingly, among my reasons I clarified that discrimination against men frequently involves a discriminative and stereotypic approach specifically towards women [see sections 25 – 27 of my opinion). Conclusions of this kind are explicitly expressed in the comments of Justice E. Hayut, in the case of *Alhanati* [12] and of Prof. Mackinnon, which inter alia I relied upon. As I explained, discrimination against men often perpetuates, specifically, discrimination against women. This being so, there is need for a clear rule in order to realize the purpose of the Law in an effective manner; a rule that can ensure the prevention of discrimination as such, and which obviates the need to examine the roots of the discrimination in each and every case. As explained in my opinion, this conclusion is also consistent with the language of the Law and the legislative intention in its enactment as indicated in the Explanatory Note of the Draft Bill. The normative approach, according to which discrimination against men is prohibited in the same way as discrimination against women, within the defined scope of the Law, is intended to serve an instrumental need and does not rely on the world view that my colleague ascribes to me.

Nor can I agree with my colleague's determination that the case at hand does not necessitate a decision on the applicatory scope of the principle of equality in those cases in which the victim is the member of a dominant social group – i.e. the group of men, because at all events the offense in this case is mainly against women. I should emphasize that while I agree that the clubhouse policy is also offensive to woman, in the case at hand one cannot ignore the simple fact that the applicant is a man and not a woman and he cannot request a remedy for discrimination that does not offend him. Any other determination would pave the way for claims filed by those who are not directly affected by the discrimination and this would contradict first principles concerning the requirement that the plaintiff must demonstrate personal grounds of claim. My opinion therefore focuses on the offense caused to the applicant, whereas the considerations pertaining to the discriminatory policies against women were adduced, as stated in order to support an interpretation that, in terms of the defined scope of the Law, disqualifies gender-based discrimination as such.

On the merits too, I feel that a real difficulty attaches to the analogy drawn by my colleague between the manner in which the principle of equality was anchored in the constitutional law, and specifically the manner in which this principle was derived from the right to dignity in Basic Law: Human Dignity and Liberty, and my colleague's determination that "its uniqueness [of the Prohibition of Discrimination Law – Y.D) lies in its formulation of operative tools placed at the disposal of the victim of discrimination when requesting a remedy from the court."

First, the material is entirely different. The Prohibition of Discrimination Law deals with the relations between the person who offers his asset for the use of the public at large or provides a service to the public at large in a defined area of services, and the consumer public. The constitutional principle of equality, on the other hand, as long interpreted in this Court's case law, is intended to apply in the relations between the individual and government, or quasi-

governmental entities. As I explained in my own opinion, the application of the principle of equality in the situation of relations between individuals involves weighty considerations, which do not necessarily exist when the duty of equal treatment devolves on a public authority.

Second, and most importantly – the legislative arrangement in the Prohibition of Discrimination Law is absolutely different from the legislative arrangements that anchor the principle of equality in the public law. In particular, there are striking differences between the arrangement in the Prohibition of Discrimination Law, and the arrangement under Basic Law: Human Dignity and Liberty. Thus, for example, Basic Law: Human Dignity and Liberty did not explicitly anchor the principle of equality, and the principle is derived from the right to dignity, in a manner that also outlines its scope of application [in this context see the comments of Justice Dorner in the *Miller* case [11], at pp. 131 – 132, where she explains that the right to equality was omitted during the process of enacting Basic Law: Human Dignity and Liberty, and the scope of application of the principle of equality derived from this law will be limited to the those cases in which the violation has an element of humiliation that involves the violation of the right to dignity]. Moreover, the balancing mechanisms established in these legislative acts are entirely different. Hence, whereas Basic Law: Human Dignity and Liberty includes a limitations clause in the framework of which it must be considered whether the violation of a protected right is consistent with the values of the State of Israel, is intended for an appropriate goal, and is proportionate, the Prohibition of Discrimination Law establishes a different, more detailed mechanism, that is anchored in s. 3 (d) of the Law. According to that section, for example, discrimination will be permitted when the discrimination is necessitated by the essence and the nature of the product or when failure to distinguish will result in product or the service being denied to part of the public, having consideration for the nature of the product. Concededly, in the circumstances I did not find it necessary to address the balances that are established in the Prohibition of Discrimination Law. However, I do not believe that one can draw direct conclusions from the manner in which the principle of equality was interpreted when derived from the right to dignity in the Basic Law: Human Dignity and Liberty, without having given the appropriate weight to the different legislative arrangements. However, inasmuch as the case before us does not raise these issues, I have not found it necessary to rule definitively on the differences between the various legislative acts, and these matters can be left for another time.

Another point which I found problematic in my colleague's opinion was its determination that the principle of equality and the principle of freedom are on the same level of the hierarchy in the private sphere, and that they must be balanced in cases in which they conflict "in light of a complex perspective of property on the one hand, and of state responsibility for the functioning of the civil sector on the other hand." According to my approach, as expressed in my ruling, the starting principle, which is the underlying basis of private law, is the principle of freedom. Indeed, as my colleague correctly points out the contemporary regulations subject numerous private entities to the norms of equality. Nonetheless, even if the principle of equality in private law is subject to many exceptions that extend from the actions of public bodies acting as private bodies, to the activities of quasi public bodies, and finally in the actions of private bodies that have tremendous significance for the broad public, this does not mean that the principle of equality has the same status as the principle of freedom and that each case should be balanced in the light of its unique circumstances. In private law, the principle of equality should only be applied to cases in which private bodies fulfill public functions or when the public authority functions in the private sphere, and to the extent that the issue concerns entirely private bodies, i.e. such as do not have any public or quasi public standing, the principle of equality should be applied pursuant to explicit legislation. I am aware of the considerable difficulty in distinguishing between the private and public sphere, but this difficulty should not affect the basic rule, which is that in commercial contexts, the principle of freedom is the rule, whereas equality is the exception. In this context incisive comments were made by Prof. Cohen in her article that was cited in the beginning of my opinion, according to which:

> The distinction between private and public [for determining the scope of the duty of equality – Y.D.] runs like a silver thread through the considerations. This distinction is difficult to demarcate. A public authority is prohibited from discriminating both in the realm of private and public law. But what about the case of the supplier who operates under a standard contract in the private law, as well as in accordance with a license from the authority, and who serves the public in its entirety?
>
> It seems that it is easier to determine when the obligation of equality is obligatory than to determine when the duty does not apply. Accordingly, in a classically commercial context between two "private" contracting parties the court will be wary of imposing a sweeping duty of equality. Such a duty could well impinge upon the important value of competition, which underlies the principle of freedom of contract [Cohen, *Equality versus Freedom of Contract*, p. 147].

Furthermore, I believe that despite the differences between myself and my colleague on this matter, one cannot ignore the fact that this question has effectively been ruled upon, when the majority ruled in the further hearing in *Beth Jules* [10] case that:

> The public authority's duty to conduct itself based on equality and in the absence of discrimination in the private sphere as well does not mean that inequality and discrimination in economic competition, as such, constitute a lack of integrity and good faith. On the contrary – according to our legal and social conception competition is acceptable, honest, and even desirable. Inequality and discrimination are illegal in a tender of a public authority, because as a public authority it is obligated to serve the public on the basis of equality, and it is forewarned not to abuse its authority when dealing with the less powerful individual. The introduction of the obligatory principle of equality into the principle of good faith – as though its absence violates the principle of good faith – is an attempt to give the concept of good faith a meaning that the legislature never considered, and which has no legal and moral justification. Precisely because the principle of good faith is one of the most important and unique value-based norms in our legal system, expressing the additional soul of this system, we must be wary of conferring it a meaning which is remote from its content and which in itself has no justification (*ibid*, p. 471-472)

These words are certainly applicable to the dispute between my colleague and myself. However, since in the case at hand there is specific legislation and it is not disputed that the principle of equality applies to the respondent, then in this subject too it is not necessary to give a definitive ruling

Final Word

37. In closing I again wish to stress the obligation incumbent upon all who engage in providing services to the public to grant equal treatment to both genders in relating to all of the sectors of society (compare to the rulings in HCJ 746/07 *Reagan v. Ministry of Transport* [19] in paragraphs EE and HH of Justice E. Rubinstein's decision, in section 8 of Justice S.

Joubran's decision, and in section 1 of my decision. Conduct of this kind will contribute to the elimination of stereotypes and will encourage integration, and in doing so will promote a more equal and just society for all sectors of society.

38. Having concluded that the Prohibition of Discrimination Law also protects men who suffer from unlawful discrimination, and that in the case at hand our concern is with unlawful discrimination given the failure to prove any relevant difference, I would propose to my colleagues to overrule the decision of the District Court and to rule that the respondent discriminated against the applicant, in contravention of the prohibition of discrimination prescribed in s. 3 of the Prohibition of Discrimination Law, and in a manner that constitutes a civil wrong pursuant to s.5 of the Prohibition of Discrimination Law.

39. Since the determination of compensation pursuant to s.5 of the Law does not require proof of damage, I would suggest to my colleagues to award the applicant compensation for the sum of NIS 20,000 and NIS 10,000 for court expenses and attorneys fees, for his expenses in all three instances.

Judge

Justice (Ret.) E.E. Halevi

I agree

Judge (Ret)

Justice S. Joubran

There are two questions before us in this case. The first is of a procedural nature, and concerns the appropriate interpretation of Regulation 11 of the Regulation 11 of the Adjudication of Small Claims (Procedure) Regulations 5737-1976 (hereinafter: the Regulations).The second question is a substantive one, going to the very heart of the Prohibition of Discrimination in Products, Services and Entry into Public Places Law, 5761-2000 (hereinafter – Prohibition of Discrimination Law).

In the opinion of my colleague, Justice Y. Danziger, it was held that Regulation 11 of the Regulations should be interpreted in a manner that authorizes and even obligates the court to dismiss the plaintiff's claims even when the defendant does not attend the hearing, if it finds that the facts described in the statement of claim do not establish a grounds of claim. I concur with this holding of my colleague.

Regarding the application of the Prohibition of Discrimination Law, my colleague held that the Law should be interpreted as applying to any kind of discrimination, irrespective of whether the group is a weak or dominant group in society (s. 11 of the decision of Justice Y. Danziger). In doing so, Justice Y. Danziger endorsed what is known as the "difference blind" model for the purpose of interpreting the Prohibition of Discrimination Law. While I too believe that the necessary result of this decision must be the acceptance of the applicant's appeal, I wish to take a different path than the path taken by my colleague.

The Applicatory Scope of the Prohibition of Discrimination Law

The application for leave to appeal before us invites the court to interpret the Prohibition of Discrimination Law, in a manner that would prohibit any distinction based on sex, gender, sexual identity etc. In effect, this interpretation asks the court to formulate the application of the Prohibition of Discrimination Law independently of the general rules that prohibit discrimination, which are based on Basic Law: Human Dignity and Liberty (paragraph 43(a) of the application for leave to appeal).

In my understanding, an examination of the Law and the Explanatory Note does not lead to the conclusion that there is a difference between the constitutional conception of equality in our law and the conception of equality embedded in the Prohibition of Distinction Law. The interpretation given to a specific law, especially when the law is worded in constitutional language such as in the case before us, should be consistent with the general constitutional framework of Israeli Law. President (Ret) A. Barak made the following pertinent comments on this matter:

> A statute is not a one-time act of a transient legislature operating in a legislative vacuum. A statute is a single link in the legislative chain of a permanent legislature. The statutes taken together create the legal system's legislative project. This project is the environment surrounding every statute. The legislative environment influences the interpretation of the statute […] *The assumption should be that legislative harmony should be maintained within the legislative system*, so that the interpretation to be given to one statute should "seamlessly blend into the texture of the legislation so that they become a unified, single whole" (Aharon Barak, *Interpretation in Law* (Part 11),Nevo, 5753, 320 328, my emphasis – S.J).

Clearly, this does not mean that the particular law becomes redundant. The particular law creates a legal framework that reflects the manner deemed appropriate by the legislator to confront a constitutional violation in a given context. Hence, the Prohibition of Assimilation Law structures the operation of the right to equality in the civil realm on two levels – the applicatory scope of the right, and the nature of the remedy granted where the right is violated.

First, the Law determines the applicatory scope of the principle of equality in the business sector. The question of balance in the business sector, between equality on the one hand, and freedom to discriminate on the other hand, is a complex question, which this Court has addressed on a number of occasions in the past (see for example: FH 22/82 *Beth Jules Ltd. v. Raviv Moshe and Co.* [10], p. 441. In that sense, the Law reflects the clear legislative intention to prohibit discrimination even when practiced by privately owned institutes that serve the public at large. But note: the Law does not impose a blanket prohibition on discrimination. Rather, the legal conception embedded in the Law is that institutes that serve the public at large cannot be regarded as belonging in full to the private sphere inasmuch as their activity takes place in the public sphere. As such, newspapers, clubhouses, service providers etc, are obligated to operate in a manner that upholds the principle of equality. The conception that privately owned bodies operating in the public sphere are governed by the human rights discourse is deeply rooted in the Israeli legal system, and finds expression in the numerous obligations imposed on these bodies, such as the Stock Exchange, transport companies etc (see for example CA 3414/93 *On v. Diamond Stock Exchange Works Ltd* [20], p. 196; *CA* 294/91 *Kehillat Yerushalim Burial Society v. Kestenbaum* [21]. From a theoretical perspective too, the Law reflects the understanding that in a reality in which significant parts of the individual's every day life are affected by civil institutions, a demarcation of the right to equality exclusively with respect to institutions owned by the State would perpetuate a discriminatory reality. Against this background the Law establishes a particular normative framework that defines the constitutional obligations that apply to the activity of a privately owned business. In that context, the following comments of Justice Zamir are pertinent:

> It is a mistake to make a sharp distinction between private property and public property. Not all assets can be classified as either "private apartment" or "public building". Reality is more complex, featuring shades and variations thereof. It also acknowledges assets that combine foundations of private property mixed with varying concentrations of foundations of

> public property. For example, how should one define a university campus, a sports stadium, or a supermarket?
>
> Property cannot be sharply divided into public and private property, and the same is true for the law applying to property. Private property, while belonging to the realm of private law, is does not exist outside the sphere of public law. For example, it is subject to planning and building laws. And, there are categories of private property that are governed by the fundamental principles of public law, as if they were public property. Indeed, in the law of property and in other areas too there is no sharp distinction between private law and public law. Public law spills over into the private law (*On v. Diamond Stock Exchange Works Ltd* [20], 203-204)

What emerges from all of this is that in numerous contexts the principle of equality is an integral component of the activity of business bodies in the civil realm, and should not be viewed as an exception to the right of an individual operating in the civil realm, to freedom and to owners' caprice. The relationship between these two values – when in conflict – should be examined in accordance with the specific normative context, and in light of a complex perspective of property on the one hand, and of state responsibility for the functioning of the civil sector on the other hand (on social values as being a substantive part property, see Hanoch Dagan, *Property at a Crossroads (2005) (Ramot, Tel-Aviv University) 27- 65*. At all events, in our case, given the existence of the Prohibition of Discrimination Law, consideration of the general balance between these two values is not required for purposes of a decision.

Second, the Law establishes a practical mechanism that enables the individual victim of discrimination to receive a financial remedy for the harm he incurred. Section 5 of the Law determines that:

> **Civil wrong**
>
> 5. (a) An act or an omission in violation of sections 3 and 4 constitutes a civil wrong and the provisions of the Civil Wrongs Ordinance [New Version] shall apply to them, subject to the provisions of this Law
>
> (b) In respect of a wrong under this Law the Court may, without proof of damage, adjudge compensation that shall not exceed NS 50,000;

The question of the compensation for a constitutional tort has been the subject of serious and profound debate in legal writing, but has yet to find expression in the case-law of the Court, and it is doubtful whether from an institutional perspective this Court should be the one to formulate the remedies available to victims of constitutional torts (for the institutional advantage of the legislative authority in the formulation of constitutional remedies, see Daphne Barak Erez, *Constitutional Torts*, Borsi, 5754, 175-178). At all events, in a number of contexts such as violation of privacy and the tort of defamation, the legislators formulated specific arrangements that provide a remedy for the victim of a constitutional tort. This also holds true for the case before us.

The uniqueness of the Prohibition of Discrimination Law is not, therefore, in its creation of a new conception of equality that goes beyond the general conception of equality that applies to constitutional law. Its uniqueness lies rather in its conferral of operative rules to the victim of discrimination seeking a remedy from the court. Justice D. Dorner aptly determined that:

> I agree with the result reached by the Vice-President. However, in my opinion, the respondent's right does not derive only from the Equal Opportunities Law, but also derives from the general principle of equality that has, for some time, been a part of our labor law.
>
> In my view, the original version of the Equal Opportunities Law reflected the principle of equality but did not establish it. Thus, for instance, in *Nevo v.National Labour Court* [6], a provision that provided a different retirement age for men and women was disqualified on the basis of the principle of equality. This disqualification was based on the legal position prior to the Equal Retirement Age for Female and Male Employees Law, 5747-1987, which made the retirement age the same for women and men, while preserving the right of women employees to early retirement […]
> Similarly, the amending law did not change the existing law concerning equal rights for homosexuals, but merely gave expression to it [7]
>
> (HCJ 721/94 *El-Al Israel Airway Ltd v. Danielovitz* [6] pp. 778-779, emphasis mine – S.J).

Were my opinion to be accepted, that the concept of equality in the Law should be construed in the light of the general concept of equality in Israeli law, it would not be possible to give a "difference blind" interpretation of equality, as I will presently explain.

Two Levels of the Right to Equality

As mentioned, my colleague, Justice Y. Danziger endorsed the "difference blind" model of equality in his opinion. According to his approach, the language and the purpose of the law lead to the conclusion that any distinction based on the identity of the individual, as anchored in the Law, is a prohibited distinction. In this context my colleague elaborated on the fact that stereotypic conceptions also exist with respect to the stronger groups in society, and the Law likewise seeks to eliminate them. Furthermore, my colleague opines that the elimination of the stereotypic conceptions will ultimately lead to the elimination of the stereotypic conceptions of the weaker groups of the population. Finally, my colleague's opinion reiterates first principles, to the effect that affirmative action aimed at promoting substantive equality in society, should not be regarded as discrimination. On the merits, my colleague dwelt on the fact that the respondent failed to prove the existence of factual basis for drawing a distinction between men and women and hence the case is one of discrimination proscribed by law.

It is well known that the court will recognized the existence of discrimination where those who are equal are treated differently. To do this, the court must first determine which equality group to relate to. One way of proving discrimination is to show that two groups that are equal to each other are treated differently. This path was taken by my colleague. The respondent did not prove any basis for its claims that men are more violent or more dangerous and hence failed to discharge the onus imposed on one who seeks to distinguish between a group of men and a group of women.

In my view, the discrimination tainting the respondent's policy is more profound. This kind discrimination arises where the categorization *per se* reflects a discriminatory point of departure. This point of departure assumes homogeneity between the male and female members of each category, even in the absence of any reason for assuming such homogeneity. The deconstruction of the point of departure whereby the categories are "natural" exposes the substantive question pertaining to the manner in which the categories are formulated. In this way, feminist researchers demonstrated how "objective" science that identifies biological differences between men and women is actually biased science that assumes that which it seeks

to prove (see Sandra G. Harding, *Whose science? Whose knowledge? Thinking from Women's Lives*, Cornell U. Press. 1991). Similar critiques have been made regarding the characterization of a group in accordance with its sexual inclination (see inter alia, Michel Foucault, *The History of Sexuality: The Will to Knowledge*, and in the Israeli context see Hedi Viterbo**,**The Crisis of Heterosexuality: The Construction of Sexual Identities in the Israeli Defamation Law" *Tel-Aviv Law Review* 33 (2010) To be precise - this does not mean that categories are meaningless in an individual or social context. The necessarily artificial nature of any particular category does not lead to the conclusion that these categories are of no significance in the lives of individuals in a society. Individuals are created and world views are formulated in the light of these social categories or in opposition to them. Simone de Beauvoir's famous statement "One is not born, but becomes a woman. No biological, psychological, or economic fate determines the figure that the human female presents in society: *it is civilization as a whole that produces this creature, intermediate between,* male and eunuch, which is described as feminine" (*The Second Sex,* vol. 2, p. – emphasis mine S.J.) does not mean that each person is free to choose any position on the gender continuum. Rather, its meaning is only that the manner in which the gender identity is conceived is artificial. This being the case, we must be cognizant of the manner in which we establish societal identities and conceptions. In this context, the human rights discourse, and specifically of the right to human dignity and equality is not only meaningful on the level of examination of the equality between groups, but on a deeper level too, relating to the manner in which groups are constituted in a society. A situation in which a particular group is characterized by homogeneity, so that a negative value is ascribed to each member of the group (even if only statistically) is one that does not respect the individual and which violates the right to equality of the individuals of the group. Regarding this the scholar Orit Kamir made the following valuable comment:

> "This paper shows that both the equality of liberty (negative) and the Aristotelian formula of equality, are conceptions that are socially conservative; they do not promote – nor even allow – a serious critique of the current societal reality, or the exposure of the deep categories of discrimination on which it based, and which it both establishes and perpetuates. Both of them perpetuate the division of resources and power in the society and only enable the identification and the rectification of mistakes and domestic injustices in the framework of the governing status quo which is taken for granted.

It should be noted that this conception has also struck roots in our legal system. Hence in the *Abu Hanna* [22] case, which discussed the propriety of considering statistical data concerning the earning of various population groups, in determining compensation for a minor's loss of her earning capacity, Deputy President E. Rivlin, held that:

> The use of statistical data relies on gender, racial or ethnic affiliation of the victim, giving effect to the resource allocation practiced in a society. *It weighs up the past but does not reflect a reality that anticipates the future. It is not normatively appropriate* (C.A. 10064/02 "*Migdal" Insurance Company Ltd v. Abu Hana* [22].

Obviously, this does not mean that this kind of distinction will be disqualified in each and every case. A distinction between groups based on statistical characteristics may be recognized as a permitted distinction, just as a violation of equality may be found to be permitted. In these cases the offending party will have to prove not only that the different treatment of equal groups complied with the requirements of statute and case law, but also that the actual division into groups and their perception as a relevant reference point complies with these requirements.

Identification of the Equality Group

In this appeal the respondent's attorney claims that men under the age of 26 are not a homogenous group featuring a defined interest that entitles it to protection under the Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places, 5761-2000. His approach is that the appropriate interpretation of the Law leads to the conclusion that the Law's purpose is to protect weaker populations and not to prevent "arbitrary" discrimination against individuals who belong to socially dominant groups.

The respondent's approach is therefore that the point of departure for the discussion in this case is the harm caused to men by reason of the distinction regarding the entry to the clubhouses. The question of the application of the Law to the majority population is a complex one. Clearly, any person, even if he belongs to the dominant population of the society, will feel discomfort if he merits treatment that differs from others purely by future of his being part of the dominant population. This is the logic that was the foundation of a long series of decisions from all around the world that prohibited racial preference for blacks in the universities and in professional tests, for women's only parties, and others. This is also the basis of the opinion of my learned colleague, Justice Y. Danziger. All the same, this approach, which is blind to origin, gender etc, has merited a variety of approaches in legal writing. For example, the scholar Catherine Mackinnon pointed out that the combination of a reality not based on equality and the disregard of basic conditions of inequality in the legal system is a combination that perpetuates the power based relationships and the gender subordination:

> I will also concede that there are many differences between women and men. I mean, can you imagine elevating one half of a population and denigrating the other half and producing a population in which everyone is the same? What the sameness standard fails to notice is that men's differences from women are equal to women's differences from men. There is an *equality* there. Yet the sexes are not socially equal. The difference approach misses the fact that hierarchy of power produces real as well as fantasized differ- ences, differences that are also inequalities. What is missing in the difference approach is what Aristotle missed in his empiricist notion that equality means treating likes alike and unlikes unlike, and nobody has questioned it since. Why should you have to be the same as a man to get what a man gets simply because he is one? (Catherine Mckinnon, "Difference and Dominance" in *Legal Feminism in Theory and Practice*, Resling Pub. 2005 (Eds. Daphne Barak-Erez, translated into Hebrew - Idit Shorer, pp. 29-30)

And further on:

> If sameness is your standard for equality, if my critique of hierarchy looks like a request for special protection in disguise. It's not. It envisions a change that would make possible a simple equal chance for the first time. To define the reality of sex as difference and the warrant of equality as sameness is wrong on both counts. Sex, in nature, is not a bipolarity; it is a continuum. In society it is made into a bipolarity. Once this is done, to require that one be the same as those who set the standard—those which one is already socially defined as different from— simply means that *sex equality is conceptually designed never to be achieved.*[...] Doctrinally speaking, the deepest problems of sex inequality will not find women "similarly situated" to men. Far less will practices of sex inequality require that acts be intentionally discriminatory. *All*

> *that is required is that the status quo be maintained. As a strategy for maintaining social power first structure reality unequally, then require that entitlement to alter it be grounded on a lack of distinction in situation*; first structure perception so that different equals inferior, then require that discrimination be activated by evil minds who *know* they are treating equals as less (*ibid*, p.34, emphasis mine – S.J.)

For a survey that demonstrates how the laws of the prohibition of discrimination actually operate in the U.S.A. to maintain the societal status quo and provide a remedy primarily to the powerful groups of society, see inter alia: Ruth Colker, Whores, Fags, Dumb-Ass Women, Surly Black and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine, **7 Yale J.L. & Feminism** 195 (1995) ; Janice C. Janice C. Title VII and Reverse Discrimination: The Prima Facie Case, **31 Ind. L. Rev. 413** (1998).

This Court too recognized that there are places in which a minority group can exclude members of the majority group without that exclusion being viewed as prohibited discrimination (HCJ 528/88 *Avitan v. Israel Lands Administration* [23] .The qeustion arose in particularly sharp terms in the *Movement for Quality of Government* case (HCJ 6427/02 *Movement for Quality of Government v. Knesset* [24] (hereinafter: *Movement for Quality of Government* case). That case concerned the constitutionality of the Deferral of Military Service for Yeshiva Students Law, 5762-2002 and in an expanded panel of seven justices a profound dispute emerged regarding precisely this issue. Justice A. Grunis handed down a ruling that rejected the applicability of the principle of equality to the majority group with respect to the judicial review of legislation, ruling that

> In my view there is no grounds for this court to invalidate the law. The reason for this is that there is no justification for this court to exercise judicial review of the law, which is a law that grants a privilege, and where the majority claims a violation of equality. In other words when a majority acts by democratic means and adopts a law which confers preference to a minority, the court should not become the patron of the majority. A ruling that the act of the majority is illegitimate on the grounds of inequality constitutes an act of patronage that has no place in circumstances such as these (para. 1 of Justice A. Grunis' opinion)

Justice Cheshin, on the other hand, ruled that in his view the principle of equality should be applied to all of the individuals in society, and not only to minority groups:

> The principle of equality is not alien to us. We encounter it quite frequently except that always – to be precise – almost always – it arises in the context of human rights. Equality however (justice, fairness) is not confined to the definitions of human rights; it is also an operative principle in the realm of government and society. *These two conceptions of equality – equality in the realm of the individual and equality in the general public realm – are two sides of the same coin.* A society that has chosen a democratic regime to direct its conventions and lifestyle must at all times subscribe to the principle of equality as the principle that regulates relatons between the state, the society, and every individual of that society (*ibid,* para. 12 of Justice M.Cheshin's opinion, emphasis mine – S.J.)

The approach taken by President A. Barak, concurred with by the majority of the justices on the panel, attempted to formulate an interim model, which extended the application of equality to any case involving a violation of individual autonomy, but did not frame a broad rule that

would apply the right to equality to all distinctions between individuals in a society. The President ruled as follows:

> The interim model does not limit human digntity exclusively to matters of degradation and humiliation, but neither does it extend it to all human rights. Accordingly, human dignity includes those aspects of human dignity that in various constitutions find expression in the form of specific human rights, but which in our view are characterized by their tight and substantive connection to human dignity (whether to its nucleus or its periphery). According to our approach the definition of human dignity would also include discrimination that does not involve humiliation, provided that it is tightly related to human dignity in the sense of expressing the autonomy of individual will, free choice and freedom of action, and other similar aspects of human dignity as a constitutional right" (para. 38 of President Barak's opinion).

Regarding the approach taken by Justice A.Grunis he wrote the following:

> According to the approach of my colleague, Justice A. Grunis, one must distinguish between protection of the majority and protection of the minority; one must distinguish a between protection of the substance of the democracy and protection of its decision making process. My colleague does not explain the parameters for these distinctions. How are we to distinguish between the majority and the minority and how are we to distinguish between substance and process? For example, in a multiparty parliamentary regime, based on coalitions – who is the majority and who is the minority? A small party that holds the balance of power in the coalition – do its supporters belong to the majority or the minority? Is a violation of the freedom of speech a violation of the substance of democracy, or of a democratic process? Does strict adherence to equality in the right to elect and to be elected protect the substantive values of democracy or perhaps it protects the democratic process?" (para. 76 of President A. Barak's opinion).

The question of the border between the legitimate exclusion of members of the majority group by the minority group, and exclusion which constitutes discrimination, does not admit of a simple solution. Clearly, both cases should be assessed in a different manner in different circumstances. Hence, a case in which the majority is discriminated against by force of Knesset legislation, such as in the *Movement for Quality of Government* case [24] differs from a case in which the majority is discriminated against by privately owned businesses (in this context, see also Justice M Cheshin's decision in HCJ 3751/03 *Ilan v. Tel Aviv Municipality* [25] at p. 828'; compare also to: [26] HCJ 4124/00 *Arnon Yekutieli z"l v. Minister of Religions* (not reported, 14.6.2010 and references).

Even so, in my view, guidelines may be drawn for examining this question as it relates to the discrimination of an individual belonging to a dominant social group, by civil entities. The court must weigh up the scope of the infringement on the ability of the weaker group of maintaining its culture and lifestyle if the exclusion is prohibited. As opposed to this, the court must examine the alternatives available to the dominant population and the harm sustained by members of the majority group by reason of the exclusion. At all events, as I will presently explain, even though the overt harm in our case is caused to men, the clubhouse's policy involves harm of a more fundamental nature to women. As such, I am not required to decide the question of the applicatory scope of the principle of equality in cases in which the victim is

the member of a dominant social group, and my recommendation to my colleagues is to leave the matter pending.

The Respondent's Policy as a Policy that Discriminates Against Women

In another case the Jerusalem Magistrates Court considered the question of whether granting a discount for entry into a clubhouse is permitted affirmative action (SC (Jer) 3043/09 *Givon v. Timor* (not reported, 5.5.2010). The owners of the clubhouse claimed that the discount granted to women us actually of benefit to men, since men generally pay for their partners and alternatively they claimed that the clubhouse's policy should be viewed as affirmative action. In his decision, Judge A. Tenenbaum rules that granting a discount to women at the entry to the clubhouse (in that case under the slogan of "Women free and Sushi free") is illegal. The reason is not because it harms the man, but rather because a policy of this kind both assumes and perpetuates the image of the woman as the weaker party, lacking economic capacity, and thus generates a distinction based on stereotypic presumptions.

The question of a distinction between man and women, and whether it is by discriminatory by definition, came before this Court in the context of separation on public transport (HCJ 746/07 *Naomi Reagan v. Ministry of Transport* [27]. Two values competed for preference in that case – the freedom of religion and conscience of the populations who preferred segregation of sexes in public transport and the right of woman to equality and dignity. The court ruled unanimously, based on the policy of the Ministry of Transport, that forced segregation of men or women who do not want it is prohibited. The question remaining for the court's resolution was whether to allow segregation of the sexes on a voluntary basis and how to ensure that the segregation was indeed voluntary and not coerced. Against this background the court established a trial period to examine the ability of the Transport Ministry to operate an exclusively voluntary segregation system. It added that should the reality on the ground reflect a reality of forced segregation, this would be weighty consideration for the disqualification of the practice in its entirety (para. 1 in the decision of Justice Y. Danziger).

In the case before us, the respondent wants to preserve a policy of gender-based distinction, forced upon all those who enter his gates, regardless of whether they desire it or not. The respondent seeks to maintain a distinction that lacks anchorage in cultural or religious values, nor does it seek the aegis of the right to cultural autonomy. In fact, even though the respondent aspires to present his policy as motivated by the desire to create a place with a particular atmosphere, the particular atmosphere to which the respondent aspires emits a pungent odor of a gender-based hierarchy. Presumably, the age-based distinction between men and women creates a reality in the clubhouse that is structured on the basis of a stronger and weaker party. The man, who is older and hence, on the average, has the most education, the most money and the mental and emotional maturity that accompany physical maturity, stands in contrast to the woman whose principal relevant feature is the fact of her being younger. This structure reflects a customary social code governing men-women relationships, one which is frequently reinforced by images generated in the theatre, in literature and other forums that perpetuate built in relationships based on power. Even more precisely, whereas various cultural products generate the preservation of the gender-based hierarchy by presenting it as "natural", the respondent forcefully ensures its preservation by obliging those entering the gates of the clubhouse to act in accordance with this patriarchal framework. Clearly, this is not an exceptional or rare phenomenon. The respondent's policy is practiced openly in many places of entertainment. An equally large number of entertainment venues adopt a practice of selection among those coming into its gates, granting entry to women who are younger than the "formal" minimal age for visitors and by doing so maintain a gender-based distinction even without its overt trappings.

The policy of distinction practiced by the respondent is implicitly based on essentialist assumptions concerning the connection between sex and gender. According to this approach, men tend to be more violent that women of the same age. These notions are the reverse side of the stereotypic notion that views women as delicate and fragile. Even if the respondent adduced

evidence in support of its claims (and the respondent did not bring any support of this kind), it would not have justified the discrimination. Data of this kind could only have justified a situation whereby a greater number of men of certain ages were denied entry in view of their personal behavior and the fear of violent behavior on their part. Just as the clubhouse conducts a check of man above 26 and of women above age 24, when entering the clubhouse, it could likewise conduct a check of men between age 24 and age 26.

In this context is bears note that the conclusion of this analysis would not change even against the background of the claim that many women prefer the said arrangement. One of the fathers of liberalism, J.S. Mill points out in his book *The Subjugation of Women*, that it is impossible to assess the existence of autonomy and free choice in an environment of gender repression. In the preface to the Hebrew edition, the scholars Yofi Tirosh and Zohan Kochabi wrote the following:

> He (Mill – S.J.) warns men not to delude themselves that they perfectly understand women because they have had romantic relations with them. The romantic and sexual interaction confers very specific roles to women, from which one may learn something about women's femininity but not much about their humanity […] hence the yearning that men should appropriately develop is the yearning for social conditions that enable them to encounter women as people, absent the barriers and limitations of power relations.
>
> This understanding is to a large degree pertinent for our times too. Today too little girls, young lasses and women repeatedly receive the message that they are measured and evaluated by virtue of their body and beauty, their success in getting married and maternity, along with their attentiveness, consideration and support for those who surround them, while giving up on their own desires to accommodate the desires of others. Today too we read the columns that advise the woman "to give" even when she is not interested, or that recommend that the learn to dance like a stripper in order to maintain the vitality of sexual relations with her spouse. In other words, we assume that had Mill been writing today he would have inveighed against excessive enthusiasm about idea such as freedom of occupation in contexts such women engaged in prostitution, or simplistic reliance on the notion of respecting women's autonomy when attempting to understand, explain and struggle against the physical, mental and financial damage that women do themselves by way of operations and diets. The conclusion is that there is a need to focus on the creation and reinforcement of alternative life paths for women, through which they can earn evaluation, recognition and satisfaction even without being physically captivating or having to offer their sexuality as a consumer product (John Stewart Mill: "Subjugation of Women"- Translation [into Hebrew] – Shunamit Lifshitz, Resling, 2009, pp. 23 – 24).

These comments are relevant for our purposes too. We still live in a social structure that repeatedly conveys a message to women that their central power and the basis of their definition is their external appearance. Our discourse still abounds with images that define the woman based on her age. In the framework of that discourse real equality is not possible. This kind of real equality will be attained on the day that we succeed, as a society and as individuals,

in learning to recognize the humanity of every male or female that we meet, irrespective of biological gender, and without interspersing the existing hierarchy among these categories.

Against this background the policy of discrimination according to which the respondent operates cannot continue, not because of the harm caused to men, but rather because of the grave harm embedded the respondent's policy, which is the harm to women.

Epilogue

The phenomenon of selection at the entrances to clubhouses based on prohibited criteria such as gender, origin, and race are first and foremost evidence that discrimination has yet to be eliminated from our country. The very existence of men and women selectors whose entire role is to screen out those coming for entertainment, and to choose those who are considered "suitable", based for the most part on stereotypes (in contrast to security guards who prevent entry exclusively on the basis of fear of obstreperousness) is a disturbing phenomenon, and I am doubtful as to whether any justification can be found for it, except for in rare cases. The legislators were aware of this phenomenon in their deliberations over the law at the time of its enactment. Hence, M.K. Eli Ben-Menachem explained that: "Clubhouse owners, honored chairman, prove that not only do they not give a damn about human morality, which is basic Jewish morality – *they continue along the path of discrimination, racism and hatred of the other, intentionally disregarding the Israel lawbook and continuing the practice of selection with increasing intensity (*debate on 10 November 2004, on Draft Bill of Prohibition of Discrimination in Products, Services and Entry into Places of Entertainment and Public Places Law, 5761-2000, Draft Bill P/4 – emphasis mine S.J). The ubiquity of this phenomenon and the willingness of countless men and women to blithely ignore it, compels the court to take measures to realize the purpose of the Law in a manner that creates real deterrence against discrimination.

This was the background for the enactment of the Prohibition of Discrimination Law. This law is a central law in a complex and ramified legislative network that has one goal – the promotion of substantive equality in the State of Israel. Naturally, being tender in years, the Law has yet to merit a comprehensive and sufficiently serious discussion; indeed, this is the first hearing in this Court that focuses on the Law as the central grounds of the pleadings. As mentioned, the significance of this Law does not lies in the establishment of a new standard of equality, but rather in the formulation of a practical framework that provides a practical remedy to the victim of discrimination. Once the legislators have had their say it is incumbent upon the court to take measures to realize the legislative purpose in the optimal sense. Obviously, many questions pertaining to the application of the Law have yet to be properly answered and there are disputes between the procedural forums concerning the manner of interpreting the Law. These questions do not necessitate an answer for purposes of our case and will certainly be clarified by this court at some future time.

Judge

It was decided in accordance with the judgment of Justice Y. Danziger