

LABOR MARKET DISCRIMINATION AGAINST ARAB ISRAELI CITIZENS: CAN SOMETHING BE DONE?

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I. INTRODUCTION

By the end of 2001 the Arab Israeli population reached 1.2 million, which is 19 percent of the Israeli population.¹ While Arab Israelis represent a significant minority group, they lack labor market power in the following aspects:

Civilian labor market participation² for Arab Israelis is 43 percent, compared to 56.9 percent among the Jewish population.³ This disparity is, in part, caused by the low participation rates of Arab women in the labor market, compared to Jewish women.⁴ In fact, participation rates of Arab Israeli men are

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1. See STAT. ABSTRACT ISR. 2002 tbl. 2.1 (State of Isr. Cent. Bureau Stat., 2002) [hereinafter 2002 STAT. ABSTRACT ISR.]. The total population of Israel in 2002 was 6.5 million. *Id.* In 1948, at the time the state of Israel was established, the Arab population of 156,000 people represented a similar proportion of one-fifth of the general population. See CENT. BUREAU OF STATISTICS, THE ARAB POPULATION IN ISRAEL 2 (2002), available at <http://www.cbs.gov.il/statistical/arabju.pdf> [hereinafter ARAB POPULATION IN ISRAEL]. Throughout the years, the proportion of Arabs in Israel has fluctuated, primarily due to a higher birth rate among Arab Israelis and to Jewish immigration waves in the 1950s and 1990s. *Id.*

2. Labor market participation figures are based on the civilian labor force, which includes all civilians aged fifteen and over who work or are actively seeking employment. Individuals who choose not to work or have given up seeking employment are not included in the civilian labor force. See 2002 STAT. ABSTRACT ISR., *supra* note 1, at 70.

3. Compare *id.*, tbl. 12.9 with *id.*, tbl. 12.5 (Arab-Israeli and Jewish populations, respectively).

4. Participation rates for Arab women are a mere 15 percent compared to 53 percent among Jewish women. ARAB POPULATION IN ISRAEL, *supra* note 1, at 9. The disparity is especially pronounced in the core employment years, between the ages of twenty-five and fifty-four. While the participation of Jewish women is relatively steady, at 75-79 percent, participation rates of Arab women peaks at 22 percent at ages twenty-five to thirty-four and, thereafter, drops steadily to 8 percent by ages forty-five to fifty-four. *Id.*

slightly higher than that of Jewish men.⁵ While the issue of participation rates is mainly problematic among Arab women, unemployment is an issue of concern for the opposite subgroup of the Arab population. At the end of the year 2000, 12 percent of Arab men participating in the civilian labor force were unemployed, compared to 7.6 percent unemployment among Jewish men.⁶

The most significant characteristic of the Israeli civilian labor market in relation to its Arab participants is the fact that the labor force is highly segregated. Segregation manifests itself in two important dimensions—geographic and occupational. The Arab population is concentrated in limited regions. Most live in small villages, which have not changed much since the establishment of Israel.⁷ The distance from the Jewish cities limits the job opportunities of Arabs seeking employment outside the Arab economy. This especially disadvantages women, who, for cultural reasons, are expected to work close to home.⁸ The weakness of the industrial local Arab labor market restricts jobs in the Arab localities to public services, especially in education and welfare.⁹ The lack of job opportunities within their communities compels Arabs to com-

5. The participation rate of Arab-Israeli men in Israel is 62.1 percent. 2002 STAT. ABSTRACT ISR., *supra* note 1, tbl. 12.9. This is comparable to the 60.4 percent rate among Jewish men. *Id.*, tbl. 12.5. Even though the participation rates are similar, there are differences between the groups in the timing of their entrance and exit from the labor market. For instance, Arab men enter the labor market at an earlier age than Jews, since most do not serve in the army and the proportion of Arab students is lower. See ARAB POPULATION IN ISRAEL, *supra* note 1, at 9. For example, in the eighteen to twenty-four age group, the participation rate for Arab men is 61 percent, compared to 36 percent for Jews. *Id.* Arab men also exit the labor market earlier: in the fifty-five to sixty-four age group, only 39 percent of Arab men participate in the labor market, while the participation rate for Jews is 68 percent. *Id.*

6. ARAB POPULATION IN ISRAEL, *supra* note 1, at 10. The unemployment rate for Arab women was slightly lower than that for Jewish women: 8.4 percent versus 9 percent, respectively. *Id.* Since the participation rates for Arab women are meager, it is unclear whether this fact is significant.

7. NOAH LEWIN EPSTEIN & MOSHE SEMYONOV, *THE ARAB MINORITY IN ISRAEL'S ECONOMY: PATTERNS OF ETHNIC INEQUALITY* 45-46 (1993).

8. Hana Hamdan, *Official Information on Palestinian Women in Israel*, Rikaz Databank for the Palestinian Minority in Israel (June 2002), at http://www.rikaz.org/en/Research/Pal_women.htm.

9. NOAH LEWIN EPSTEIN, ET AL., *THE FLOERSHEIMER INSTITUTE FOR POLICY STUDIES*, HaAravim B'Yisrael B'Shuk HaAvodah [The Arabs in Israel in

mute and seek jobs in the Jewish economic centers. Here they encounter occupational segregation and wage discrimination.¹⁰

Almost a fifth (19 percent) of Arab men are employed within the construction industry, compared to 3 percent of Jewish men.¹¹ And, while Arabs are overrepresented in agriculture,¹² they are underrepresented in the financial services industry, business services, and public administration.¹³

The segregation of the labor market contributes to the wage gap between the two demographic groups. Overall average wages are significantly lower for Arab workers.¹⁴ Average wages in industries overrepresented by Arabs are lower than the overall average wage, while average wages in the industries in which Arabs are lacking meaningful representation tend to be higher.¹⁵ While legal requirements of equal pay and the

the Labor Market], 20 (1994) (finding that in 1983, 40 percent of Arabs working within Arab localities were employed in the public service sector).

10. On average, Arab Israelis fair better occupationally within their own communities. Once they secure jobs within the Arab community their career prospects, especially for educated individuals, are better than within the Jewish labor market. *Id.* at 26-27.

11. *Id.* at 14

12. 2.7 percent of Arab Israeli participants in the labor market were employed in agriculture, compared to 0.9 percent of Jewish participants. 2002 STAT. ABSTRACT ISR., *supra* note 1, at 12-26, tbl.12.11.

13. Only 0.7 percent of Arab Israeli employees were employed in the financial services industries, compared to 4 percent of the Jewish workers. *Id.* In the business activities industry, 6.5 percent of Arab employees were employed, versus 12.6 percent of Jewish workers; in the public administration industry, 3.5 percent of Arab Israeli workers were employed compared to 7 percent of Jewish workers. *Id.*

14. In 1998, the average wage for Jewish employees was NIS 7,459 compared to NIS 5,359 for Arab Israeli employees. Ramsis Gra & Rafaela Cohen, *Poverty Among Arabs and Sources of Inequality between Arabs and Jews*, 48 ISR. ECON. Q., 543, 554 (2001). See also Ruth Klinov, *Changes in the Structure of Wages, Wage Gaps between and within Industries: Israel: 1970-1997*, 1997 HESTADRUT HA-OVDIM HA-KLALIT HA-KHADASHA, HA-MAKHON LE-MEKHKAR KALKALI KHEVRATI [THE GENERAL FEDERAL OF LABOR IN ISRAEL'S INSTITUTE FOR SOCI-ECONOMIC RESEARCH] 1 (finding that, when controlling for demographic and occupational characteristics, Jewish workers still earned 11 percent more than Arab workers).

15. In 2001, the average wage per employee was NIS 4,243 in the agriculture industry, and NIS 6,009 in the construction industry. 2002 STAT. ABSTRACT ISR., *supra* note 1, tbl. 12.34 (providing average wages by industry, excluding workers from the Judea, Samaria, and Gaza areas). The overall average wage stood at NIS 7,079. *Id.* If these average wages are compared to

ban on wage discrimination are sometimes effective measures to battle wage gaps within an identifiable workplace,¹⁶ these same measures are never effective when the source of the wage gap is a segregated labor market.¹⁷ When wage gaps are the product of a segregated labor market, the remedy lies in the integration of the labor market.

Leaving aside the statistics, it is undisputed in Israeli political and academic discourse that Arab Israeli citizens do not enjoy employment opportunities equivalent to their Jewish counterparts.¹⁸ The main hurdle is at the entrance gate.

the average wages in industries in which Arabs are underrepresented, the disparity increases. Average wages were NIS 13,001 in financial services and NIS 9,777 in public administration. *Id.*

16. For the obstacles in enforcing equal pay requirements within an organization, see generally Paul Weiler, *The Wages of Sex, The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986).

17. See Nancy K. Kubasek et al., *Comparable Worth in Ontario: Lessons the United States Can Learn*, 17 HARV. WOMEN'S L.J. 103, 105 (1994) (arguing that equal pay legislation is "unsuccessful because it requires compensation comparisons between jobs with virtually identical training, tasks and conditions and therefore is inapplicable to a sex-segregated labor market"); Susan Bisom-Rapp, *Contextualizing the Debate: How Feminist and Critical Race Scholarship Can Inform the Teaching of Employment Discrimination Law*, 44 J. LEGAL EDUC. 366, 385 n.89 (1994) (claiming that the Equal Pay Act is of limited utility in attacking sex segregation).

Commentators have noted that a comparable worth policy has been seen as having the potential to overcome the wage gap in a segregated labor market. See Kubasek, *supra*, at 106 ("As a consequence of the failure of policies like affirmative action and equal pay legislation to obtain higher earning for women, advocates of fairer pay practices have turned to comparable worth legislation, a strategy that would pay men and women equally for different jobs of comparable value."); Jeanne M. Dennis, *The Lessons of Comparable Worth: A Feminist Vision of Law and Economic Theory*, 4 UCLA WOMEN'S L.J. 1, 22-23 (1993) (under comparable worth, "objective job evaluation systems allow comparison among jobs inside and outside the pink-collar ghetto").

18. See, e.g., DAVID KRETZMER, *THE LEGAL STATUS OF ARABS IN ISRAEL* 83 (1993) (outlining the legal hurdles to secure equal opportunities); Gra & Cohen, *supra* note 14, at 563 (stating that monetary returns for education—salary-wise—are lower for Arabs); Leah Achdot, Victor Lavi, & Victor Sola, *Ha-Avtalah B'Yisrael BePerspektiva Shel Ha-Asor Ha-Akharon: Megamot, Me-Afyenim VeDfusei Shinui [Unemployment in Israel in Perspective of the Last Decade: Characteristics and Patterns of Change]*, 47 ISR. ECON. Q. 328 (2000) (finding that unemployment is significantly higher for a non-Jew with the same qualifications as his Jewish counterpart); see generally BENJAMIN W. WOLKINSON, *ARAB EMPLOYMENT IN ISRAEL: THE QUEST FOR EQUAL EMPLOYMENT OPPORTUNITY* (1999) (conducting a field survey on discriminatory practices within manufacturing plants in Israel).

Outside the industries that traditionally employ Arabs the barriers for a qualified Arab individual are usually insurmountable.¹⁹ This is especially true in the private sector, where employers openly discriminate in their hiring decisions.²⁰

The objective of this paper is to inquire into the enigma of the pervasiveness of discriminatory practices against Arab Israelis in the workplace, despite legislative efforts. In 1995, the Equal Opportunities in Employment Act, 1988, was amended to explicitly outlaw workplace-related discriminatory practices based on national origin, nationality, and religion.²¹ In 2000, the government, as an employer, was required to implement an affirmative action policy in favor of Arab citizens, and in its appointment of directors to government corporations.²² Formally the legal requirements against discrimination on the basis of nationality and religion are equivalent to the prohibition of sex discrimination. Yet the reality is quite different. While Jewish women are gaining gradual power within the Israeli labor market, Arabs are still an under-represented group in the industries and occupations that traditionally did not include them.

The explanation of the perseverance of discriminatory practices against Arabs, despite legal protection, is three-fold: First, the stereotypes of Arab workers as imposing a security²³

19. See generally SIKKUY'S REPORT ON THE EQUALITY & INTEGRATION OF THE ARAB CITIZENS IN ISRAEL 2000-2001 (Ass'n Advancement Civic Equality Isr. 2001), available at <http://www.sikkuy.org.il/english/report2001eng.htm> [hereinafter SIKKUY'S REPORT].

20. See, e.g., Avoda Ivrit [Hebrew Labor], at www.avodaivrit.org.il (website including advertisements of Israeli businesses and a listing of job opportunities available only to Jewish applicants). The legality of such advertisements are discussed *infra* Part IV.5.

21. Equal Opportunities in Employment Act, 1988, 42 L.S.I. 31. This is the major legislation in Israel outlawing employment discrimination practices. It incorporates a sophisticated scheme of legal rules to combat discrimination in the workplace.

22. State Service Act (Appointments) § 15A, 1959, 13 L.S.I. 32; Government Corporations Act § 18(A), 1975, 29 L.S.I. 132.

23. See Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law after September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. OF AM. L. 295, 301-27 (2002) (discussing the stereotyping of Arabs as terrorists and religious fanatics).

and social threat²⁴ are more prevalent than the stereotypes of Jewish women as less qualified and less dedicated to the workplace than men.²⁵ Second, sex equality is more accepted by Israeli society than equality between the Jewish and Arab population. The ethos that Israel was established as a “Jewish-Democratic state”²⁶ may justify (incorrectly so) in the eyes of some sectors the preferential treatment of Jews over Arabs in the labor market.²⁷ Legal regulation of sex discrimination in the workplace preceded the prohibition of the discrimination of Arabs by two decades.²⁸ Laws against workplace discrimination based on national origin, nationality and religion—demographic characteristics relevant to protecting the rights of Arab Israelis—are only eight years old.²⁹ Naturally the penetration of and adjustment to such standards are not instantaneous. It is thus perhaps too early to assess whether the battle to secure equal employment opportunities for the Arab minority in Israel has been successful. Finally, Arab victims of employment discrimination do not generally assert their legal rights. Instead, NGOs have assumed the responsibility of securing the right to labor equality for Arabs by developing and implementing strategies that address Arab needs.³⁰ NGOs, however, mainly focus on discrimination taking place within the public sector. Thus, private sector employers are left un-

24. By “social threat,” I mean the belief that Arab Israelis will not assimilate well and will remain outsiders in the workplace due to cultural differences and language barriers.

25. This stereotype is presumably based on the belief that women carry a substantial load of family-related duties.

26. This language is present in the Israeli Declaration of Independence. THE JERUSALEM CTR. FOR PUB. AFFAIRS, *THE CONSTITUTION OF THE STATE OF ISRAEL* 23 (1996); see also, Basic Law: Human Dignity, *id.* at 90; Basic Law: Freedom of Occupation, *id.* at 93.

27. This can also be inferred from WOLKINSON, *supra* note 18. Wolkinson discusses the results of a survey he conducted in 1996 in forty manufacturing plants in Israel. Twenty plants (50 percent) did not employ a single Arab Israeli. In excluding Arab Israelis, personnel managers mentioned the fact that, apart from the security threat, they prefer to offer employment to individuals who served their country in the army, or who are new immigrants. *Id.* at 111-37.

28. See discussion *infra* Part II.A.

29. See discussion *infra* Part II.B.

30. Such organizations include Adalah, Mossawa, Sikkuy, the Center for Jewish-Arab Economic Development, and the Association for Civil Rights in Israel.

threatened and undisturbed by the anti-discrimination mandate. To break the pattern of a segregated labor market, attention should be shifted to private employment settings, where many Arab Israelis could possibly find employment.

This Article investigates the patterns of national discrimination in Israel and the road taken by NGOs to combat it. The discussion will contrast the milestones achieved by Israeli NGOs promoting women rights in the past twenty years with what is currently being done by NGOs promoting the rights of Arab Israelis. This comparison is needed to evaluate the prospects for the success of the latter. Cases of sex discrimination in employment are still the most litigated in Israeli labor courts among the twelve groups protected by the Equal Opportunities in Employment Act.³¹ Moreover, women were triumphant in many respects in converting the legal principle into tangible rights.

This Article continues as follows: Part II outlines the legal protection against labor market discrimination against the Arab minority. Part III probes the question of why Arabs do not enjoy equal employment opportunities. Part IV analyzes the steps taken by NGOs to secure and enforce this right of equality. Part IV also examines the effectiveness of the measures adopted and suggests alternatives paths. Part V offers several concluding observations.

II. LEGAL PROTECTION OF ARAB ISRAELIS AGAINST MARKETPLACE DISCRIMINATION

A. *Prior to the Enactment of the Equal Opportunities in Employment Act*

Thirty years ago, in *El Al v. Hazin*, a landmark ruling of the Israeli National Labor Court,³² a collective bargaining agreement was declared void because it contained a promotional scheme that was discriminatory towards female flight attendants. The ruling was not based on an anti-discrimination

31. Section 2(a) of the Equal Opportunities in Employment Act prohibits an employer from discriminating on the basis of "sex, sexual orientation, marital status, parenting status, age, race, religion, nationality, land or origin, opinion, party or reserve service" Equal Opportunities in Employment Act, § 2(a), 1998, 42 L.S.I. 31.

32. C.A 3-25/73, *El Al v. Hazin*, 4 P.D. 365.

act paralleling Title VII of the Civil Rights Act (1964)³³, because at that time Israel lacked such legislation. Surprisingly, it was based on a public policy doctrine which states that contractual covenants that undermine public policy, in this case discrimination on the basis of gender, are void.³⁴

The *Hazin* ruling could have brought change to the realm of employment discrimination on the basis of nationality or religion, but no such case was litigated prior to the 1995 amendments to the Equal Opportunities in Employment Act. Thus, the claim that workplace practices that discriminate against Arabs undermine public policy and, therefore, should be struck down was never judicially tested. Had it been tested, it would have been very difficult for the labor court to differentiate between cases of sex discrimination and those of religious and national origin discrimination. The sources the National Labor Court cited in the *Hazin* ruling treat religious and national discrimination as equivalent in importance to sex discrimination.³⁵ In Supreme Court decisions of the mid-nineties, the Court states that Israeli public policy does not tolerate discrimination based on national origin or religion and that the Court would not have hesitated to strike down such discriminatory workplace policies prior to the 1995 amendments.³⁶ These statements were written as an obiter in discussion on related topics, such as whether age discrimination³⁷ and discrimination based on sexual orientation³⁸ are on the same platform as sex discrimination in that they undermine public policy, and, therefore, are unlawful even in the absence of explicit legislation. In that sense, the anti-discrimination mandate in Israel is declaratory. It does not constitute the right to equal opportunity, but simply declares its existence.³⁹

33. Title VII of the Civil Rights Act (1964), 42 U.S.C. § 2000e-2(a) (West Supp. 2003) (outlawing discrimination on the basis of race, sex, national origin, color, and religion).

34. *See Hazin*, 4 P.D. 365. The public policy exception is based on section 30 of the Contracts (General Part) Law, 1973, 27 L.S.I. 117, 122.

35. *See Hazin*, 4 P.D. at 376-377.

36. H.C. 721/94, *El-Al Israel Airlines Ltd. v. Danilovitz*, 48(5) P.D. 749, 763-65; H.C. 4191/97, *Rekanat v. Beit Ha-Din Ha-Artzi L'Avodah* [National Labor Court], 54(5) P.D. 330, 361-367.

37. *Rekanat*, 54(5) P.D. at 361-67.

38. *Danilovitz*, 48(5) P.D. at 763-65.

39. *See Rekanat*, 54(5) P.D. at 369.

As mentioned, after the *Hazin* ruling, Arab victims of employment discrimination did not pursue litigation under the public policy doctrine. This may have been due to Arabs' distrust of the Israeli Judicial system and the scarce access to effective legal representation in the late seventies and early eighties.

The public policy doctrine was revolutionary because it recognized the duty, absent legislation, of private sector employers to act in a non-discriminatory manner. Under the rules and doctrines of administrative law, public sector employers were always obligated to treat applicants and employees equally.⁴⁰ The actions of public sector employers in the labor market were viewed as state action and, therefore, restricted by standards of equality.⁴¹ Nonetheless, no challenges were set forth to test discriminatory practices against Arab Israeli applicants or employees in the public sector either.

B. *After the Enactment of the Equal Opportunities in Employment Act*

In 1988, when the Equal Opportunities in Employment Act was passed by the Knesset,⁴² it protected against employment discrimination in only three categories: sex, marital status, and parental status.⁴³ It was designed to address the discriminatory issues women and working mothers were confronting in the Israeli labor market. The list of protected groups deliberately did not include protection against discrimination based on race, nationality, national origin, or religion. In other legal regimes committed to enforcing the principle of equality, the protection of such groups against labor market discrimination is unquestionable.⁴⁴

40. See, e.g., Equal Opportunities in Employment Act, 1988, 42 L.S.I. 31.

41. See *id.*

42. *Id.*

43. Prior to the 1988 Act, section 1(a) of the Employment (Equal Opportunities) Law, 1981, 35 L.S.I. 350, prohibited employers from refusing to hire an individual because of sex, marital status, or parenting status. The Act did not create a civil right of action, but established criminal liability for violations. *Id.* § 6(a). Criminal charges were never filed based on the 1981 Act, and it was later canceled by the 1988 Act. See Equal Opportunities in Employment Act, § 15(c), 1988, 42 L.S.I. 31.

44. See, e.g., 42 U.S.C. § 2000e-2(a)(1) (stating that “[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to

The issue of racial, national, and religious discrimination was partially regulated through the Employment Service Law of 1959.⁴⁵ Section 42(a) of the Law prohibited the employment service agency from discriminating against individuals seeking employment on a list of grounds that included religion, race, and nationality.⁴⁶ Until 1991, the Israeli labor market was highly regulated. Employers seeking workers had to operate through the Government Employment Service Agency.⁴⁷ Although there were some exceptions, much of the hiring was done with the government acting as *laison*. Presumably, the anti-discrimination mandate of section 42(a) effectively curtailed discriminatory practices in hiring decisions because the Government Employment Service Agency had to divide employment opportunities equally, while employers were compelled to hire only through the Agency.⁴⁸ Section 42(a) mandated non-discriminatory behavior by employers, prohibiting them from refusing to hire an individual based on the list of protected characteristics.⁴⁹ The mandate, which theoretically could have handled discrimination claims pertaining to hiring, was never influential. Claims based on section 42(a) were rarely litigated, and never in the context of race, religion or nationality. In 1988, when the Equal Opportunities in Employment Act was enacted, it amended section 42(a) to clarify that employers cannot discriminate against applicants in hiring decisions whether the applicant was sent by the employment agency or not.⁵⁰ Yet, no lawsuit of discriminatory hiring practices was filed.

discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin"); Race Relations Act, 1965, c. 74 (U.K.) (disallowing discrimination based on racial grounds which it defines as "any of the following grounds, namely colour, race, nationality or ethnic or national origin"); Betriebsverfassungsgesetz (BetrVG) [Works Constitution Act] (F.R.G.), v. 15.1.1972 (BGBI. S. 13).

45. Employment Service Law, 1959, 13 L.S.I. 29.

46. *Id.* § 42(a).

47. See Evelyn Gordon, *State's Job Service Loses Monopoly*, JERUSALEM POST, May 8, 1991, at 6.

48. *Id.*

49. Employment Service Law, § 42(a), 1959, 13 L.S.I. 29.

50. Equal Opportunities in Employment Act, 1988, 42 L.S.I. 31.

In 1992, the Equal Opportunities in Employment Act was amended.⁵¹ The list of protected groups was broadened to include sexual orientation.⁵² Mandating that employers not discriminate on the basis of sexual orientation is contested terrain,⁵³ but the Israeli legislature was willing to recognize the rights of homosexuals before recognizing the rights of its Arab citizens. Not until 1995 did the legislature amend the list of protected groups in the Act once again to include age, race, religion, nationality, land of origin, views, and political affiliation.⁵⁴ Since this recent amendment, no legal dispute alleging discrimination against Arab Israelis based on nationality or religion has arisen. Today, an employer who engages in such unlawful practices potentially faces both civil liability and criminal charges.⁵⁵

C. *Affirmative Action Policies to Promote Arab Israelis*

In 2000, the Knesset passed two statutes to protect the socio-economic status of Arab Israelis in the labor market. In December 2000, the legislature amended the 1959 State Service (Appointment) Law and incorporated an affirmative action policy that expanded the number of Arab workers among state service employees.⁵⁶ Currently there are 56,000 state service employees, which represent about 2.4 percent of the jobs in the civilian labor market.⁵⁷ The amendment requires that “adequate representation among state service employees be given to the Arab population including the Druze and Cauca-

51. *Id.*

52. *Id.* § 2(a).

53. Title VII, for example, does not include sexual orientation as one of its protected groups. 42 U.S.C. § 2000e-2(a).

54. Equal Opportunities in Employment Act, § 2(a), 1988, 42 L.S.I. 31.

55. In much of the minimum standard legislation in Israel, a criminal penalty is incorporated alongside the civil right of action. Presumably, this reflects the severity with which the legislator views a breach of the standards.

56. State Services Act (Appointment), § 15A, 1959, 13 L.S.I. 87. This followed an earlier amendment to the act that established an affirmative action standard to the benefit of women in the state service.

57. Central Bureau of Statistics of the State of Israel, *Government Employees, by Ministries and the Israel Police*, available at http://www.cbs.gov.il/shnaton53/st10_11.pdf (last visited Nov. 11, 2004). The total number of people employed in the civilian labor market in the year 2001 was 2.27 million. 2002 STAT. ABSTRACT ISR., *supra* note 1, 12-8 tbl. 12.1.

sus.”⁵⁸ The amendment does not define the term “adequate representation,”⁵⁹ but clarifies that the government must act to promote adequate representation by, among other things, accommodating the needs of members of these populations,⁶⁰ setting aside vacancies for qualified Arab individuals,⁶¹ and giving preferences to Arab applicants when they hold similar qualification to other applicants.⁶² The government is required to submit an annual report to parliament regarding the actions taken to comply with the statute.⁶³

According to the most recent Government Report on the Representation of Arabs in the State Service, 6.1 percent of all state service employees are Arabs (approximately 3,440 individuals).⁶⁴ Nevertheless, Arabs remain poorly represented if one considers that 19 percent of the general population is Arab. Although there has been gradual improvement in the representation of Arabs within the state service—from 5.2 percent in the month the amendment was passed to the current 6.1 percent—this increase occurred prior to the amendment. In 1992, Arab representation in the state service was a mere 2.1 percent, increasing annually by 0.5 percent each year up to 5.2 percent by 2000.⁶⁵ These changes were likely a by-product of the Oslo peace process. The Rabin administration, from 1992 to 1996, initiated without legislation a program to integrate

58. State Services Act (Appointment) § 15A, 1959, 13 L.S.I. 87.

59. The contours of the standard were interpreted by the Supreme Court in H.C. 453/94, *Shdulat Ha-Nashim B-Yisrael v. Memshelet Yisrael* [Israeli Women’s Network v. Israel], 48(5) P.D. 501.

60. State Services Act (Appointment) § 15A(b)(1), 1959, 13 L.S.I. 87.

61. *Id.* § 15A(b)(2).

62. *Id.* § 15A(b)(3).

63. *Id.* § 15A(g).

64. REPORT ON THE ASSIMILATION OF ARABS AND DRUZ IN THE STATE SERVICE IN THE YEAR 2002 (2003) [hereinafter REPORT].

65. See CENTER FOR JEWISH-ARAB ECONOMIC DEVELOPMENT, REPORT ON REPRESENTATION OF ARAB CITIZENS WITHIN THE STATE SERVICE, GOVERNMENT CORPORATIONS AND THE COURT SYSTEM 4 (2002) [hereinafter REPORT ON REPRESENTATION OF ARAB CITIZENS].

Arab and Druz in the public sector.⁶⁶ This program is responsible for adding 1759 new Arab employees.⁶⁷

Another fact worth noting is that, by 2002, 38.3 percent of Arab state service employees were women.⁶⁸ This is an encouraging figure because the labor market participation rates among Arab women are extremely low.⁶⁹

Because the amendment is only two years old, it is still premature to assess whether the Israeli government takes adequate representation requirements seriously. Labor market changes tend to occur gradually, even in cases where regulations are enforced.⁷⁰ What may raise concern is the fact that more than two-thirds of the Arabs employed by the government are working for the Ministry of Health, mainly in government hospitals, while in other units there are literally “token” Arabs.⁷¹

The second affirmative action program concerns the appointment of directors of government corporations. There are 116 government corporations in Israel, employing approximately 50,000 employees.⁷² The Government Corporation Act, 1975, was amended in 2000 to ensure that the Arab population is adequately represented among directors appointed to government corporations.⁷³ Until adequate representation is achieved, appointing ministers are required by the Act to select Arab candidates as long as the circumstances permit them

66. See SIKKUY REPORT, *supra* note 19, at 6, 15. See also Prime Minister Yitzhak Rabin, Ratification of the Israel-Palestinian Interim Agreement, Address before the Knesset (Oct. 5, 1995), available at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH00te0> (last viewed Mar. 1, 2005); Address to the Knesset by Prime Minister Rabin Presenting His Government (July 13, 1992), available at <http://www.israel-mfa.gov.il/mfa/go.asp?MFAH0je40> (last viewed Nov. 14, 2003) (following the Israeli elections).

67. SIKKUY REPORT, *supra* note 19, at 15.

68. REPORT, *supra* note 64.

69. Participation rates for Arab women are a mere 15 percent compared to 53 percent among Jewish women. ARAB POPULATION IN ISRAEL, *supra* note 1, at 9.

70. See NEAL S. ZANK, MEASURING THE EMPLOYMENT EFFECTS OF REGULATION 14 (1996).

71. For example, only 5 Arab Israeli employees are present in the Ministry of Foreign Affairs. REPORT, *supra* note 64, tbl. 9. There are less than ten Arab Israeli employees in eleven out of twenty-four existing Israeli government ministries. *Id.*

72. REPORT ON REPRESENTATION OF ARAB CITIZENS, *supra* note 65, at 6.

73. Government Corporations Act, § 18A(1)(a), 1975, 29 L.S.I. 132.

to do so.⁷⁴ In March 2002, out of 641 directors, thirty-eight were Arabs (5.9 percent), and only six directors were Arab women (0.94 percent).⁷⁵

While the statute requires adequate representation in the appointment of government directors, it does not apply the same standard to hiring decisions concerning government corporations' employees. Judicial interpretation, however, expanded the coverage of this standard to cover all hiring and promotional decisions within the public sector.⁷⁶ Therefore, Arabs are now entitled to adequate representation within government corporations as both employees and directors. The representation of Arabs in the workforce of government corporation is still extremely low—2 percent in 2002.⁷⁷

III. WHY ARAB ISRAELIS ARE DISCRIMINATED AGAINST IN THE LABOR MARKET

A. *Preliminary Comments*

Despite the adoption of the aforementioned regulations, the fact remains that Arab Israelis encounter disparate treatment in the labor market. The question, therefore, is whether there is any justification for this reality.

Two traditional explanations of labor market discrimination account for the phenomenon of employment discrimination.⁷⁸ The first explains the existence of discrimination as arising out of different forms of prejudice.⁷⁹ Employers holding prejudicial beliefs against minorities view them as less productive and, thus, are unwilling to hire them altogether, or pay

74. *Id.* § 18A(1)(b).

75. Ali Haider, *Follow-Up: Arab Representation in the Civil Service, In Government Corporations and in the Court System* 9-10, available at <http://www.sikkuy.org.il/2003/english03/pdf/civilEn03.pdf> (last visited Apr. 20, 2005).

76. *See* H.C. 2671/98, Shdulat Ha-Nashim B-Yisrael v. Sar Ha-Avoda V'Harvacha [Israeli Women's Network v. Minister of Labor], 52(3) P.D. 630, 648; H.C. 6924/98, Ha-Aguda L'Zchuyot Ha-Ezrah B'Yisrael v. Memshélet Yisrael [Association for Civil Rights v. Israel], 45(5) P.D. 15.

77. REPORT ON REPRESENTATION OF ARAB CITIZENS, *supra* note 65.

78. For an overview of these economic accounts, see RONALD G. EHRENBURG & ROBERT S. SMITH, *MODERN LABOR ECONOMICS: THEORY AND PUBLIC POLICY* 432-49 (6th ed., 1997).

79. *See generally* GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed., 1971).

minorities less when hired. In competitive markets, these practices presumably disappear in time because they are economically irrational. Instead of maximizing profits, prejudicial employers base their employment decisions on personal preferences with respect to the profile of their workforce. They rely on information that does not accurately measure the productivity of workers, and will eventually be proven wrong by competitors employing these qualified workers. The other account for discrimination refers to instances in which employers cater to the preferences of their customers or workers when denying employment opportunities to members of certain minority groups. In these instances, the employer acts rationally because, when employers invest in the training of their workforce or where employees have significant client contact, employers do not want employees to retaliate or resign, or lose customers, if the demographics of the workplace changes. Thus, it is in the employer's economic interest to avoid hiring members of groups with whom his workers or clients prefer not to be associated. This is especially relevant in service industries. Profit maximizing businesses will match the profile of the service provider to the preferences of its customers. Customers are willing to pay a premium to receive services by a person congenial to their taste. Because discrimination that is based on co-employee/customer preferences is economically rational from the employer's perspective, only regulation can combat this type of conduct.

Statistical discrimination is also commonly used to understand the persistence of discriminatory behavior. According to this theory, employers use group membership as a proxy for other traits or qualifications they are interested in or trying to avoid.⁸⁰ This is a signaling model, in that group membership reveals to the employer information about the applicant/worker that is not readily or cheaply verifiable. Employers engaging in statistical discrimination are acting rationally when-

80. See generally Dennis J. Aigner & Glen G. Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 *INDUS. & LAB REL. REV.* 175, 176, 183 (1977) (discussing employer uncertainty about the productivity of racial or gender groups); Kenneth J. Arrow, *Models of Job Discrimination*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE* 83 (Anthony H. Pascal ed., 1972) (explaining income differentials between black and white workers in the United States as a phenomena of employer perceptions about productivity based on group membership).

ever there is a close fit between group membership and the qualification at question.⁸¹ Of course, injustice is done to individuals seeking employment who are qualified notwithstanding their group affiliation. Because statistical discrimination is based on group averages and not individual assessment, its use is prohibited in many countries, including the United States and Israel. To lawfully engage in statistical discrimination, an employer must prove that, "all or substantially all group members" cannot perform the task at question.⁸² This is an onerous standard that, in practice, requires a perfect fit between group membership and the qualification at question.

How do these theoretical explanations of discrimination play out in Israel? I believe that all the above-mentioned practices of discrimination take place in the Israeli labor market. However, this Article highlights the most pervasive and distinct forms that are relevant to the Israeli employment setting.

B. *Requirement of Army Service as a Condition of Employment*

One of the most common obstacles Arab Israelis face in their attempt to penetrate the Jewish labor market is the "army service requirement."⁸³ Many employers, including public sector employers, condition employment on the completion of army service. This requirement disparately impacts the Arab population, which generally does not serve in the Israeli Defense Forces.⁸⁴ Only Arab Druze men are not exempt from military service.⁸⁵ The nexus between army service and job op-

81. When employers base their decisions on inaccurate proxies, they are acting prejudicially. Statistical discrimination occurs when the proxy is accurate. An example would be a preference for male applicants for a position requiring physical strength on the correct assumption that, on average, men are stronger than women.

82. *Western Air Lines v. Criswell*, 472 U.S. 400 (1984). In Israel, a similar standard was adopted in H.C. 4191/97, *Rekanat v. Beit Ha-Din Ha-Artzi L'Avodah* [National Labor Court], 54(5) P.D. 330, 355.

83. WOLKINSON, *supra* note 18, at 9-15 (contending that the army service requirement impedes the successful integration of Arabs in the civilian labor market).

84. The basis for this government exemption is the recognition that many Arabs may be related by family ties, as well as by feelings of nationalism, to Arabs outside of Israel. However, Arabs may volunteer to serve, as do many Bedouins and Caucasus. See WOLKINSON, *supra* note 18, at 15.

85. Since the establishment of the state of Israel, the Druze have emphasized their close relationship with the Israeli government. Their strong sup-

portunities adversely impacts other segments of the Israeli society as well, including ultra orthodox Jews and people with physical and mental disabilities who are exempt from service.

A requirement that employees have completed military service can be understood on several levels, and is adopted by employers for various reasons. Some employers use this criterion as a subterfuge for intentional discrimination against Arab Israelis (and perhaps other groups who cannot serve in the military). This is presumably a subtle way of conveying the message that Arab applicants are not welcome.⁸⁶ Other employers utilize the requirement as a proxy for security clearance, motivation, and ability and, in a limited number of occupations such as security guards, to guarantee knowledge of how to operate weapons. While requiring army service may function as a proxy in some cases, the fit often varies with the trait or qualification the employer intends to predict. The main problem with this criterion is that it is riddled with false negatives—for example, many people who are not drafted do not pose a security threat and are both motivated and qualified to perform the job at question. But when the pool of applicants is large and there are enough qualified individuals who are army veterans, employers may resort to this requirement as long as it does not produce too many false positive applicants (individuals who served in the army, but do not possess the desired trait). Finally, some employers argue that the preferential treatment given to army veterans is a way of thanking individuals who contributed to safeguarding the security of Israel.⁸⁷

The Supreme Court has held that employers using seemingly neutral criteria that disparately impact members of pro-

port manifested itself in significant voluntary Druze participation in the War of Independence. See Laila Parsons, *The Druze and the Birth of Israel*, in *THE WAR FOR PALESTINE* 60, 63-70 (Eugene L. Rogan & Avi Shlaim eds., 2001); ZEIDAN ATASHE, *DRUZE & JEWS IN ISRAEL: A SHARED DESTINY?* 99-101 (1995). Since 1956, Druze males have been drafted into the armed forces in the same manner as Jewish youth. KAIS M. FIRRO, *THE DRUZES IN THE JEWISH STATE* 127 (1999).

86. L.C. 2154/98, *Hasan Agbariah v. Reshut Ha-Do'ar* [Postal Service] (unpublished) is such a case. For a discussion of the facts, see *infra* Part IV.5.

87. In the survey by Wolkinson, which is the only one to date probing into the issue, all of these justifications play a role. WOLKINSON, *supra* note 18, at 60-62.

tected groups are engaging in prohibited discrimination, unless the employer can offer a “business necessity” justification for utilizing the criterion.⁸⁸ Disparate impact theory goes beyond the detection of employers who turn to neutral criterion as a means of concealing their prejudicial preferences. The theory requires employers to question whether the criteria they incorporated into their selection process are essential to their business, regardless of whether the policy was originally implemented with an intention to discriminate.

In the Israeli context, disparate impact theory distinguishes employers who use the army service requirement as a discriminatory tool from those who incorporate it as a proxy for other desired qualifications. In a case of first impression decided in mid-July 2003, the Regional Labor Court in Tel Aviv found an employment agency liable for discriminatory behavior for including an army service requirement in its newspaper advertisements for various job opportunities.⁸⁹ The court explicitly stated that such requirement disparately impacts Arabs, who by and large do not serve in the army. Therefore, an employer who wishes to include army service as a condition of employment must support his claim with evidence of business necessity and job relatedness.⁹⁰ The impact that this decision will have is difficult to assess. But, if implemented rigorously, it may prove a serious obstacle to use of the army service criterion. Only under special circumstances, where the job in question requires military training, would an employer be able to include this requirement.

Conditioning employment on army service for ideological reasons poses a different issue. Preferential treatment in this case arises out of an employer’s patriotism. Israel’s legislature and government engage in such preferential treatment of

88. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971). In Israel the disparate impact model was adopted in L.C. 8-3/51, *The State of Israel v. Gestetner*, 24 P.D. Labor 65, 76-79 (discussing disparate impact theory, and its relevance to Israeli employment discrimination cases); L.C. 4-10/98, *Delek v. Histadrut Ha-Ovdim Ha-Klalit Ha-Hadasha* [New General Foundation of Labor] (general discussion of disparate impact theory, and its relevance to Israeli employment discrimination cases).

89. D.L.C 1038/99, *Medinat Yisrael v. Taffkid Plus* [Israel v. Taffkid Plus] (unpublished). Section 8(a) of the Equal Opportunities in Employment Act, 1988, 42 L.S.I. 31, prohibits discriminatory advertisements.

90. *Taffkid Plus* at 11 (unpublished).

army veterans and their families.⁹¹ While, the controversy surrounding these government policies is beyond the scope of this Article, the mere fact that they exist strengthens the arguments of employers who wish to give weight to army service for ideological reasons. These employers argue that this is their way of thanking individuals who served the state of Israel and risked their lives unselfishly for the state's security. Moreover, the fact that the government engages in similar behavior may suggest that it is lawful.

The youth in Israel put their lives on hold to serve the military. They are sacrificing not only their lives, but also valuable time. Other youngsters, who do not serve, study or work. These are precious years in which a head start is sometimes priceless. Ex-post, preferential treatment of army veterans strengthens the continuation of the norm in Israel: One does not question service in the army. Although it is required by law, serving in the army is foremost a social norm. Avoidance is possible, and the reality is that most youngsters serve because they want to. They look forward to this stage in their lives. It symbolizes one's inclusion in the Israeli collective. But this norm is extremely fragile because of its altruistic nature. Maintaining a status quo in which serving is unquestioned (for the Jewish secular population and segments of the Jewish religious population), relies on many pillars, including advantages gained in the labor market for army service.⁹²

These factors distinguish army service from other conventional cases of disparate impact. Utilizing this proxy falls neatly into the disparate impact doctrine because army service disparately impacts segments of Israeli society that are exempt or excluded from serving, even though there are no business necessity justifications on behalf of the employer. This proxy

91. For the list and discussion of entitlements and benefits of army veterans and their families, see KRETZMER, *supra* note 18, at 100-07.

92. See KRETZMER, *supra* note 18, at 89-108; Orly Lobel, *Class and Care: The Roles of Private Intermediaries in the In-Home Care Industry in the United States and Israel*, 24 HARV. WOMEN'S L.J. 89, 123 (2001); Ayelet Shachar, *Whose Republic?: Citizenship and Membership in the Israeli Polity*, 13 GEO. IMMIGR. L.J. 233, 258-64 (1999). In the mid-80s, the possibility of evading service was not discussed. Even the most utilitarian person understood that evasion would culminate in social and professional ostracism and, therefore, was not considered a realistic option. Evasion meant the person would then need to immigrate abroad. Twenty years later, this is no longer true.

also serves a national and social objective. Should the focus be only on the specific employment context when determining the legality of such criterion? Or is it necessary to appreciate and acknowledge that employers (public and private) are also social players in a broader sense? The actions of employers affect other social institutions, in this case, a person's motivation to serve in the army.⁹³

Considering this question strictly in the employment context would facilitate the elimination of the army service requirement, culminating in greater inclusion and integration of Arabs and ultra orthodox Jews into mainstream Israeli society. The tradeoff would be that it weakens one of the most vital norms in Israel—not questioning one's duty to serve in the military.

For now the court has set its standard, which focuses on the employment context. Social arguments were not discussed aside from stating that army service is a central institution that symbolizes the secular Israeli Jewish consensus.⁹⁴ This suggests that to amalgamate disparate segments in Israeli society, we must let go of this institution, which connotes and symbolizes only the most influential segment of secular Jews.

C. *Nationality as a Proxy to Identify Those Imposing a Security Threat*

Employers dealing with sensitive information or equipment require that their employees have appropriate security clearance. The use of nationality as a proxy to weed out individuals who may breach confidentiality and pass out information is an example of statistical discrimination. Arabs are excluded for this reason from employment in military industries. Many manufacturers and other contractors who have contact

93. When initially restricting the discretion of private sector employers by imposing an anti-discrimination mandate on them, legislators around the world implicitly acknowledged that private employers are social players who can bring about changes in a broader social context. Their nondiscriminatory actions in the employment context were deemed to create positive spillover effects outside the workplace—minority group members will have an incentive to attain more education, higher wages will improve their living conditions, integration in the workplace will evolve to broader social integration. These positive spillovers are one of the main justifications of regulating the actions of private actors.

94. *Tafkid Plus* at 11-12 (unpublished).

with these industries also do not recruit Arabs, presumably because security reasons informally require them to avoid such hiring.⁹⁵

As mentioned in the above section, statistical discrimination is permissible only when the employer can prove that “all or substantially all Arabs” do not meet the level of security clearance required. Alternatively, an employer might prove that individual screening is impossible, and that reference to nationality is the best alternative to ascertain who is unqualified.⁹⁶ It is obvious that some Arabs can pass a security clearance check. However, employers, especially those in the private sector, may claim that they cannot conduct the comprehensive security clearance checks required. Resorting to the nationality proxy efficiently weeds out individuals who are not likely to pass the security clearance check. The employer can then extensively scrutinize a smaller pool of applicants. Another factor is the cost of error. Erroneously granting a security clearance to an unworthy individual might jeopardize the security of Israel and its citizens.

Statistical discrimination, in the context of basing security clearances on nationality, was never seriously examined in the courts. The only relevant case, *Huri*, involved a transportation company seeking a foreman. The Northern Regional Labor Court accepted an employer’s explanation for refusing to hire an Arab applicant as legitimate.⁹⁷ The plaintiff was referred to the company by the national employment service and was denied employment. On the referral slip, the manager scribbled: “I requested a Jewish foreman (without hurting any of the unemployed).” In its defense, the employer presented evidence proving that, numerically, the company employs more Arab workers (156) than Jewish workers (forty-six); and that only one of its six foremen is Jewish.⁹⁸

The employer’s justification for specifically requesting a Jewish foreman was that the foreman would be assigned to clients sensitive to security issues, such as army bases and military

95. WOLKINSON, *supra* note 18, at 132-33.

96. *Western Air Lines v. Criswell*, 472 U.S. 400 (1984). In Israel, a similar standard was adopted in H.C. 4191/97, *Rekanat v. Beit Ha-Din Ha-Artzi L’Avodah* [National Labor Court], 54(5) P.D. 330, 355.

97. L.C. 3017/00, *Huri v. Amnon Mesilot* (unpublished).

98. *See id.*

industries. These clients request that people who enter their premises have appropriate security clearances and army service credentials. The employer argued that the correct interpretation of the refusal note is that the plaintiff was denied employment because he did not serve in the army, not because of his nationality.⁹⁹

The court accepted the Bona Fide Occupational Qualification defense (BFOQ) of the employer, according to which at least one of the company's foremen needed to have army service credentials. It is intriguing that the Court was willing to overlook the explicit language of the refusal note. The manager did not mention the requirement of army service. The Court interpreted this language as perhaps insulting and negligent, but was convinced that the manager was referring to the lack of army service and not to the nationality of the applicant.¹⁰⁰

This is, however, an isolated case and should certainly not be interpreted as giving employers the freedom to exclude Arabs (or individuals lacking military service) whenever there is a security concern and the job requires some level of security clearance. Indeed, one must distinguish employers in the military and defense industries with the means and expertise to readily conduct individual security clearance checks. These employers will usually conduct final, thorough security clearance checks on all of their employees. Such employers should be required to examine each qualified applicant without referring to the nationality proxy. Other employers, whose dealing with security and state confidential information is incidental to their main line of business, may be relieved of the duty to perform individual security clearance checks, but this exemption should be implemented with great caution. The more incidental the security issues are to the job, the less likely it is that security clearance is a genuine requirement of the job.

Returning to the transportation foreman case: Does dealing as a civilian transportation foreman with army bases and military plants necessitate high levels of security clearance? Cases in which the BFOQ defense is permitted should be limited to special circumstances in which an employer does not regularly conduct individual security screenings of his employ-

99. *See id.*

100. *See id.*

ees. For certain positions, such clearances are genuinely necessary and the consequences of a false positive (individuals who seem qualified, but are not) are detrimental.

Another form of statistical discrimination in Israel is using nationality as a proxy for the security threat the individual himself imposes. This is caused by existential fears Israeli residents have of becoming victims of a terror attack. Interest in minimizing physical contact with individuals of Arab origin spread dramatically with the revived tension and suicide attacks in the region in September 2000.

Concern over physical safety affects labor market practices. Employers avoid hiring Arab employees for several security-related reasons. Some out of concern of their own safety (employers have been murdered by their own employees), others at their employees' request, and many more because customers prefer to not associate with Arab service providers as long as terror attacks persist.

Take, for example, the website *Avoda Ivrit* [Hebrew Labor], which advertises businesses that employ only Jewish workers.¹⁰¹ The purpose is two-fold: To inform potential clients that these businesses do not present "security hazards," and to create an advertising platform for businesses hiring only Jewish workers. Advertising businesses cater to client preferences not to receive services from Arab individuals for fear that they may pose a security threat. Unsurprisingly, many of the 120 listed businesses are service-oriented and rely heavily on their clients' preference for discrimination.

The fear that terror attacks have rooted in Israelis is understandable. But Israeli society should not yield to these fears by excluding a fifth of its citizens from the public sphere, especially in the employment context. There should be no exception to the standard that employers cannot refuse hiring employees because of their customers' or workers' preferences. Otherwise, all service providers will have a strong economic incentive to exclude Arab workers. Today, many Israelis are willing to pay high premiums to ensure that services requiring physical contact will be provided by non-Arabs.

The Israeli Supreme Court, in an age discrimination case, ruled that adhering to clients' discriminatory preferences

101. The website is available at www.avodaivrit.org.il (last visited, Nov. 11, 2003).

could not justify the Bona Fida Occupational Qualification defense (BFOQ) in a case of disparate treatment.¹⁰² Surely this standard will be implemented in national origin cases as well. The fact that the motivation underlying the preference for non-Arabs is not driven by animosity, but rather existential fear, should not alter the outcome. First, the Jewish public does not distinguish between various sects of the Arab minority. The public wishes to avoid contact with all Arabs, including those who have never been involved in suicide attacks, like Christians and Druze. Most Israeli Jews incorrectly group Arabs into one homogenous collective. Employers, however, should not be permitted to satiate customers' preferences and exclude even Muslim Arabs from the labor market. Surrendering to this fear is unthinkable from a societal and legal viewpoint. Israel is a democratic society that promotes and protects human and civil rights. These values should not be undermined by excluding Arabs from the public sphere, including the workplace.

IV. STRATEGIES IMPLEMENTED BY NGOs TO SECURE THE ENFORCEMENT OF EQUAL OPPORTUNITY IN EMPLOYMENT FOR THE ARAB POPULATION

A. *Preliminary Observations*

This Section examines the road taken by various NGOs in an effort to transform the principle of equality for Arabs in the labor market from its status today into the ideal legal principle it should be. By 1995, the Israeli legislature had paved the way towards such equality by amending the Equal Opportunities in Employment Act to include race, religion, and nationality. In 2000, the legislature acknowledged that affirmative action was needed if Arabs were to penetrate the state service in substantial numbers. The Supreme Court facilitated this policy by expanding the adequate representation standard's reach to the entire public sector.¹⁰³

102. See H.C. 4191/97, Rekanat v. Beit Ha-Din Ha-Artzi L'Avodah [National Labor Court], 54(5) P.D. 330, 347-355.

103. See H.C. 453/94, Shdulat Ha-Nashim B-Yisrael v. Memshelet Yisrael [Israeli Women's Network v. Israel], 48(5) P.D. 501, 648; see also H.C. 6924/98, Ha-Aguda L'Zchuyot Ha-Ezrah B'Yisrael v. Memshelet Yisrael [Association for Civil Rights v. Israel], 45(5) P.D. 15.

The legislature has done what it can to provide Israeli Arab citizens with the legal right to equal opportunity in employment. These rights stand today, for the first time, on par with the formal legal rights of women. Yet, not much change is visible in the labor market. Part II.C noted the growth in the representation of Arabs among state service employees in the last decade. In the private sector, and in the public sector at large,¹⁰⁴ legal reform has not positively affected the hiring of Arab citizens. The Elaqsa Intifada erupted by September 2000, around the time the legislative process was complete. Since then, the tension, concern of client fear, and enforced stereotyping of Arab Israeli workers has driven employers to increasingly withhold employment opportunities from Arabs.

In Israel, the statutory scheme to combat employment discrimination is extraordinarily advanced. The inclusion of twelve protected groups is unusually broad. The Equal Opportunities in Employment Act explicitly embraces the disparate impact doctrine.¹⁰⁵ The Act also shifts the burden of persuasion to the employer to prove that he acted in a non-discriminatory manner once the plaintiff proves that he was qualified to perform the job.¹⁰⁶ This model favors plaintiffs more than the *McDonnell Douglas* prima facie case model used in the United States.¹⁰⁷ The U.S. model shifts the burden of production to the employer, but leaves the burden of persuasion with

104. There are approximately 700,000 jobs within the public sector. Only 56,000 of these jobs are in the state service. Other public sector jobs are in the municipalities, government corporations, and the public education system. Central Bureau of Statistics of the State of Israel, *supra* note 57.

105. Equal Opportunities in Employment Act, § 2(b), 1988, 42 L.S.I. 31. Disparate impact theory acknowledges that discrimination may take place when a neutral criterion disproportionately disfavors protected group members without a business necessity justification. Disparate impact theory was embraced by the U.S. Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 432, 436 (1971) (holding that Title VII prohibits employment practices that disparately impact protected classes, where such practices are not demonstrably related to job performance).

106. Equal Opportunities in Employment Act, § 9(a)(1), 1988, 42 L.S.I. 31.

107. According to the *McDonnell Douglas* model, plaintiff must prove the following in order to establish a prima facie case:

- (i) that he belongs to a racial minority;
- (ii) that he applied and was qualified for a job for which the employer was seeking applicants;
- (iii) that, despite his qualifications, he was rejected, and
- (iv) that, after his rejection, the position remained open and the employer

regard to establishing liability on the plaintiff at all stages. In addition, the Israeli Act gives special standing to NGOs committed to promoting equal opportunities in the workplace. NGOs can file a civil suit with the permission of the candidate or employee,¹⁰⁸ and submit, with the permission of the court, independent briefs in standing cases.¹⁰⁹

But the apparently progressive Israeli legislation and case law is deceiving. Although its statute is more detailed than Title VII of the 1964 Civil Rights Act, in substance, Israel is lagging behind the United States in the enforcement of its anti-discrimination mandate. This is true not only with respect to the treatment of discrimination based on religion and national origin, but also in relation to the most litigated category in Israel—discrimination based on sex. The causes of the gap between the range of protection the statute offers and the enforcement of these protections are complex and beyond the scope of this Article. Cultural differences between the two societies offer a partial explanation for the discrepancy. The social acceptance and understanding of the principle of equality is different in Israel when compared to the United States. This is noteworthy because it sheds light on the motives various NGOs have for dealing with discrimination issues.

As stated, prior to the amendment of the Equal Opportunities in Employment Act in 1995, no challenges to discriminatory practices against Arabs were brought before the courts. No NGOs attempted to utilize the public policy doctrine to challenge discriminatory practices of employers. This was true even in cases involving public sector employers. With no explicit prohibition, NGOs seemed to think that the legal battle was doomed. In retrospect, it would have been strategically wise to test a case involving a public sector employer. It seems that the National Labor Court and the Israeli Supreme Court would have ruled in favor of the existence of a public policy doctrine, prohibiting discrimination on the basis of nationality and religion.¹¹⁰

continued to seek applicants from persons of complainant's qualifications.

See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

108. Equal Opportunities in Employment Act, § 12(c), 1988, 42 L.S.I. 31.

109. *Id.* § 13.

110. See discussion *supra* notes 35-39 and accompanying text.

NGOs began playing a role in the enforcement of Arab rights in the labor market shortly after the 1995 amendment was passed in the Knesset. This validates the assertion that, without the explicit inclusion of religion and nationality as protected categories of the Equal Opportunities in Employment Act, NGOs were not confident courts would protect Arab citizens from employment discrimination.

B. *First Impressions: The Abu Razek Decision*

The first lawsuit to rely on the amendment concerned an individual Arab-Muslim employee.¹¹¹ The plaintiff, Abu Razek, was not represented by an NGO. The case is unusual in that it involves the promotion denial and subsequent transfer of the plaintiff to another location within the Israeli Tax Authority. The plaintiff, a tax officer within the Authority, claimed that the Tax Commissioner based the decision not to promote him partially on the fact that he is Arab. The plaintiff offered anecdotal evidence that the Tax Commissioner defined him in the presence of other employees as a “security risk.” The regional labor court rejected the discrimination claim, although it was willing to acknowledge that the Commissioner may have questioned whether the plaintiff had the security clearance needed for a promotion.¹¹²

From a sociological perspective, the facts are intriguing. First, both the current Tax Commissioner and his predecessor took the witness stand, the latter as a witness on behalf of the plaintiff. It is extraordinary that two high-ranking civil servant officers were willing to testify against one another on discriminatory practices within the Authority. Moreover, the court itself not only denied the discrimination claim, but also felt compelled to assert that the plaintiff benefited from affirmative action. Indeed, the court made reference to the plaintiff’s testimony that “he never felt mistreated or different from other employees, on the contrary, he enjoyed favorable treatment—that is affirmative action.”¹¹³

This case received no publicity or attention within professional circles, nor was it mentioned in subsequent litigation.

111. L.C. 3-2198/96, *Abu Razek v. Reshut Ha-misim B'Yisrael* [Razek v. Israeli Department of Taxes and VAT] (unpublished).

112. *See id.*

113. *Id.*

Many people in the field probably do not even know that it exists. Moreover, the case appears to be wrongly decided. The circumstances of the case situate it as a mixed motive case. The tax commissioner, as decision-maker, was motivated by both legitimate and illegitimate motives. The mixed-motive rule stated by the U.S. Supreme Court in *Price Waterhouse* is the same model used by the Israeli National Labor Court, which adopts a tainting model of discrimination.¹¹⁴ Whenever an employer takes both discriminatory considerations (such as nationality or sex) and lawful non-discriminatory considerations (such as qualifications) into account in the decision-making process, Title VII is violated. To establish liability, the plaintiff does not have to prove that the discriminatory motive was a “but for” reason, meaning that without the discriminatory motive, the employer’s decision would have been different. It is sufficient to demonstrate that the discriminatory factor was one among other motivating factors. The centrality of the discriminatory factor is weighed in the remedy stage of the trial. The employer’s remarks concerning plaintiff’s security clearance in *Abu Razeq* are similar to the stereotyping remarks about the female employee in *Price Waterhouse*. The mere reference to the security status of the plaintiff because he is Arab, and without any concrete information that he does not carry the needed security clearance, is a common stereotype in Israeli society. It is no different from requesting Ann Hopkins to dress, walk, and talk more femininely. Coincidentally, two months after the *Abu Razeq* case was decided, the Israeli National Labor Court, in a sex discrimination case, adopted the tainted model of liability in mixed motive cases.¹¹⁵ It followed the example of *Price Waterhouse* by distinguishing between the liability stage, in which it is enough to prove that the discriminatory factor was one of many motivating factors, and the remedy stage, in which the fact that the discriminatory factor was not a substantial factor will be given weight.¹¹⁶

114. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240-41 (1989) (holding that an employment decision based on a combination of legitimate non-discriminatory motives and illegitimate discriminatory motives constitutes a violation of a statute prohibiting gender discrimination in employment).

115. L.C. 3-129/96, *Sharon Plotkin v. Ahim Izenberg* [*Izenberg Brothers*], 33(11) P.D. 481, 497.

116. See *id.*

One could argue that the tainted model was applicable in the *Abu Razek* case and that the fact that it was not implemented is important because it suggests that the labor courts view sex discrimination cases more favorably than cases alleging discrimination based on nationality. This conclusion is misguided. Until the *Plotkin* precedent, regional labor courts implemented a “but for” causation model to sex discrimination cases.¹¹⁷ The judge in *Abu Razek* was most likely unaware that there is an alternative model to the “but for” causation model and the argument was not presented by the plaintiff. *Abu Razek* is simply another example of the gap in the general enforcement of the anti-discrimination mandate in Israel. It has nothing to do with the animosity labor courts may have towards nationality-based discrimination cases or preferences for victims of sex discrimination.¹¹⁸

C. *Actions to Combat Employment Discrimination Within the Public Sector*

Partly because the *Abu Razek* decision is not well known and was largely ignored, it had no impact on the future legal actions of NGOs. Instead, NGOs concentrated their efforts on enforcing legal rights to equal opportunities in the public sector, and neglected the private sector.

The focus on the public sector is related to three motivations: First, the belief that government policies in the past five decades are primarily responsible for the isolation and discrimination of Arabs within the Israeli society. Because discrimination against Arabs is institutional and stems from government policies, it should be attacked primarily within these institutions. Theoretically, restricting discriminatory practices among public sector employers will have a positive spillover effect on the private sector.

Second, the public sector in Israel consists of 700,000 employees, representing a third of the civilian labor force.¹¹⁹

117. L.C. 12-1182/89, *Alona Plusker v. Red Carpet* (unpublished).

118. See L.C. 3-2198/96 *Abu Razek v. Reshut Ha-misim B'Yisrael* [Israeli Department of Taxes and VAT] (unpublished). The court did prohibit transferring the plaintiff to another region of the Authority, but the decision was based on other reasons.

119. Central Bureau of Statistics of the State of Israel, *supra* note 57.

Curtailing discrimination within it will open up many employment opportunities to the Arab population.

Finally, the 2000 amendments to the State Service (Appointment) Law and the Government Corporations Act only recognize the right to adequate representation in the public sector. Adequate representation is a rigid standard that gives weight to whether the minority group is, in fact, adequately represented. It enables NGOs to evade evidentiary issues, such as whether the employer considered the applicant's nationality or religion when denying him employment. Unquestionably, the greatest NGO successes were achieved in the area of adequate representation.

D. *Securing Adequate Representation for the Arab Minority*

The Supreme Court cases asserting the Arab population's right to adequate representation¹²⁰ follow the reasoning of Supreme Court cases securing adequate representation of women.¹²¹ These decisions do not deal directly with employment, but examine government appointments to politically influential government councils and committees. The essence of these decisions is that the standard of adequate representation must be taken seriously by the government when appointing candidates and hiring employees. The court emphasizes that it will enforce the standard beyond the reach of the 2000 Amendments.¹²²

The first petition initiated by the Association for Civil Rights in Israel challenged the demographic composition of the Israel Land Administration Council.¹²³ When in 1997, the

120. See H.C. 6924/98, Ha-Aguda L'Zchuyot Ha-Ezrah B'Yisrael v. Memshélet Yisrael [Association for Civil Rights v. Israel], 45(5) P.D. 15; H.C. 9472/00, Ha-Aguda L'Zchuyot Ha-Ezrah B'Yisrael v. Sar Ha-Pnim [Association for Civil Rights v. Minister of Interior Affairs] (unpublished).

121. See, e.g., H.C. 453/94, Shdulat Ha-Nashim B-Yisrael v. Memshélet Yisrael [Israeli Women's Network v. Israel], 48(5) P.D. 501; H.C. 2671/98, Shdulat Ha-Nashim B-Yisrael v. Sar Ha-Avoda V'Harvacha [Israeli Women's Network v. Minister of Labor], 52(3) P.D. 630, 648.

122. See Association for Civil Rights v. Israel, 45(5) P.D. 15; Association for Civil Rights v. Minister of Interior Affairs (unpublished).

123. See Association for Civil Rights in Israel, *Fair Representation of Arabs on Israeli Lands Administration Council*, at <http://www.acri.org.il/english-acri/engine/story.asp?id=77> (last viewed Mar. 1, 2005). As of 1997, 93.5 percent of land in Israel was administered by the Israel Lands Administration Council, an agency created to administer lands owned by the Jewish National Fund

government appointed new members to the Council, no Arab member was among the eighteen members appointed. In mid-2000, after the petition was filed, one Arab member was appointed. The petition requested the court to cancel some of the government's appointments to facilitate the appointment of additional Arab members.

The 2000 Amendments concerning adequate representation rights for Arabs do not cover appointments to the land council. Nonetheless, the Supreme Court declared that the standard of adequate representation should be adhered to in the appointment of members to the council. The decision followed the Supreme Court decision in the second *Women's Network Case*, which expanded the standard of adequate representation beyond the reach of the statute to cover appointments to government committees, commissions, boards, and councils.¹²⁴

In that case, the Court defined the right to adequate representation as a non-formal right.¹²⁵ On the one hand, it is not fulfilled when a token Arab is appointed. On the other hand, it does not require that Arabs represent a fifth, or the equivalent of their presence in the general population, of any committee or workplace. That is, adequate representation does not aspire to meet a targeted quota. Whether the government complies with the standard is context-related and will be determined on an individual basis.

In *Association for Civil Rights v. Israel*, past appointments to the land council were not voided.¹²⁶ Instead, the Court ordered the government to put greater effort into actively seeking qualified Arab candidates for the next round of appointments.¹²⁷

The second petition, also filed by the Association for Civil Rights, requested application of the adequate representation standard to the appointments of Arab members to the Re-

(JNF) and by the government. Of the total land in Israel, the government directly owned 79.5 percent and the JNF owned 14 percent. See Francis Raday, *Self-Determination and Minority Rights*, 26 *FORDHAM INT'L L.J.* 453, 488 n.133 (2003).

124. See *Israeli Women's Network*, 52(3) P.D. at 648.

125. See *id.*

126. See H.C. 6924/98, *Ha-Aguda L'Zchuyot Ha-Ezrah B'Yisrael v. Memshélet Yisrael [Association for Civil Rights v. Israel]*, 45(5) P.D. 15.

127. *Id.*; see also *Association for Civil Rights in Israel*, *supra* note 123.

gional Committee of Urban Planning in Northern Israel.¹²⁸ Regional Planning Committees play a pivotal roll in urban planning, since they issue the permits and licenses necessary for construction. Encouraged by the success of the Land Council petition, the Association for Civil Rights argued that since the population in Northern Israel is roughly half Arab, half (nine out of seventeen) of the members of the planning committee should be Arabs.¹²⁹

The Supreme Court rejected the theory that adequate representation requires that the demographic composition of the committee mirror the demographic composition of the region. This factor is only one among others that should be taken into account when determining whether the standard was met. The government argued that it could not appoint any Arab candidates, as the statute requires that candidates be high-ranking employees within the government. Qualified Arabs were not identified within the state service resulting in lack of Arab representation. This, of course, is a poor argument. It suggests that the government cannot find relevant candidates because it did not take remedial actions in the past to integrate the Arab population within the state service. Now it builds on these past wrongs to justify the meager representation of Arab individuals in government councils committees, boards, and commissions. The Court acknowledges that integrating minorities in the state service is a gradual process. It takes time for individuals to be integrated in the government sector and be promoted into the pool of jobs from which candidates to government committees are selected. Nonetheless, the government was not exempted from the duty to continue seeking qualified Arabs to serve as members of the regional urban planning committee. The Court did not issue any operative order and the petition was denied.¹³⁰

A third petition, this time submitted by the Adala Center, probes into the issue of what a reasonable timeframe is to reach equal representation.¹³¹ Chief Justice Barak acknowl-

128. *See*; H.C. 9472/00, Ha-Aguda L'Zchuyot Ha-Ezrah B'Yisrael v. Sar Ha-Pnim [Association for Civil Rights v. Minister of Interior Affairs] (unpublished).

129. *See id.*

130. *See id.*

131. H.C 10026/01, Adalah v. Rosh-Memshelet Yisrael [Prime Minister of Israel].

edged the need to act in a reasonable timeframe in implementing the standard of adequate representation. He also recognized the government's duty to act diligently in gathering information on qualified nominees. Overall, this petition was denied because the government actions in this case were found reasonable. The progress achieved in the two years since the adequate representation amendments came into effect was deemed sufficient for the time being.

Although, formally, courts did not intervene with past government appointments in the three petitions, they *de facto* recognized the right of Arabs to adequate representation in the public sector. NGOs successfully brought life to the principle of adequate representation. Unlike the process of attempting to enforce the traditional right to equal opportunity in employment, the right to adequate representation was transformed from a statutory principle into a factor that the government must seriously take into account.¹³² Annual reports prepared by the NGO Sikkuy documents data pertaining to the representation of Arabs in the state service, government corporations, and the courts.¹³³ This information receives media coverage and offers visibility and public pressure on the government to comply with the standard. Another example is the NGO Mossawa's lobbying ventures to enforce adequate representation for Arabs by bombarding ministers and high-ranking civil servant officers with demands to appoint Arabs to various committees, councils, and boards, including the Council of Higher Education.¹³⁴

The successful penetration of the adequate representation principle has numerous components. It benefits from the

132. See, e.g., Memorandum Issued by the Legal Council of the Government, March 2003, at www.justice.gov.il (outlining for the Prime Minister and government Ministers the contours of their duty to seek Arab candidates in appointing directors to government corporations). The government also issues an annual compliance report according to the requirement of the 2000 Amendment of the State Service Act. The report compiles statistical data on the representation of Arabs in various units of the state service, and documents other actions the government took to strengthen communication with the Arab population. The statistical data is utilized by NGOs in preparing their petitions to the Supreme Court. See, e.g., Plaintiff's Brief, H.C 10026/01, *Adalah v. Rosh-Memshelet Yisrael* [The Prime Minister of Israel].

133. REPORT ON REPRESENTATION OF ARAB CITIZENS, *supra* note 65.

134. Various letters are on file with author.

explicit statutory requirements. The standard is outcome-based, unlike the intangible traditional anti-discrimination standard. Another component is that NGOs, through their involvement in the enforcement of the standard, have developed specialized expertise in preparing and filing petitions to the High Court of Justice. The procedure of filling petitions in the Israeli High Court of Justice is fairly easy, quick, and inexpensive. The petitions are backed by affidavits and usually do not involve witnesses. It is less complicated than filing a tedious employment discrimination lawsuit in the less glamorous regional labor court, where one gets tangled in a web of evidentiary hurdles of proving that an employer did indeed take into account the applicant's nationality or religion when refusing employment.

The three petitions for the enforcement of the adequate representation standard all concern high-end appointments in the civil service. They open up opportunities to a fairly restricted group of Arab individuals. No petition was filled to secure adequate representation in low-end jobs within the state service. Numerically, such petition would cause a greater impact than appointing sixty additional Arabs to the boards of government corporations.¹³⁵ In order to reach the representation rates of Arabs in the general population within the state service, the government must replace approximately 8,000 Jewish employees with Arab ones. Is it more important to integrate Arabs at the policy issuing level or the execution level? Is this a conscious decision that attacks the problem at the top of the power pyramid, with the belief that once Arabs are granted access to decision-making levels, other levels of government will gradually change in a similar manner? No documentation suggests that the strategy to focus on high-end appointments is premeditated. One explanation could be that NGO activists can personally relate to the frustration of qualified Arab individuals who historically failed to receive appointments to government boards, councils, committees, and commissions.

E. *Actions to Enforce the Equal Opportunities in Employment Act*

To date, NGOs have failed to translate the traditional anti-discrimination mandate into enforceable employment rights

135. The number would numerically bring about adequate representation.

for the Arab minority. In the private sector, employers carelessly communicate their preferences against associating with Arab employees. Discrimination is pervasive and, in the vast majority of workplaces, exists with no intrusion.

NGOs do not enforce the anti-discrimination mandate with the same passion as the adequate representation standard for several reasons. Proving that the employer did in fact base his decision on discriminatory factors is difficult. It is hard to convince prospective plaintiffs to come forward and file a discrimination complaint because the chances of success and the pecuniary payoffs are low. Others emphasize that employers are concealing their discriminatory motives by requesting qualifications such as prior army service or fluency in the Hebrew language.

There is nothing unique about these obstacles. NGOs promoting the equal rights of women in Israel confronted the same dilemmas. They had to convince women to come forward with discrimination claims, although these individuals would not benefit personally from the process. Additionally, evidentiary problems apply to all discrimination cases.

But these barriers did not deter women's associations from pursuing litigation against private and public sector employers who practiced discrimination. The labor courts recognized that disparate impact liability arises under the 1988 statute when an employer makes use of a neutral criterion that disparately impacts women with no business necessity justification.¹³⁶ Labor courts were willing to shift the burden of persuasion to employers once the plaintiff established a *prima facie* case of discrimination. In determining liability the courts applied the tainted model, which is favorable to plaintiffs. The state of affairs in Israel is that employers are weary of sex discrimination claims. Discrimination against women is never overt and has decreased substantially in the last decade. Women gained labor market power by entering male-based industries, professions, and occupations. Discriminatory practices against women now tend to be more subtle and in many in-

136. L.C. 8-3/51, *The State of Israel v. Gestetner*, 24 P.D. Labor 65, 76-79; L.C. 4-10/98, *Delek v. Histadrut HaOvdim HaKlalit HaHadasha* [The New General Foundation of Labor], 33(8) P.D. 337 (general discussion of disparate impact theory and its relevance to Israeli employment discrimination cases).

stances raise sex plus issues, which means that only a subgroup of women is affected. In the Israeli context, it is usually the subgroup of pregnant women or mothers of young children.

Instead of building on the body of case law on employment sex discrimination, as they did with respect to the adequate representation duty, NGOs neglected the Equal Opportunity in Employment Act altogether. The few lawsuits filed—all with exceptionally strong direct evidence of discriminatory practices—were settled. Therefore, there is no precedent.

One case involved two female Christian Arab students at Tel Aviv University.¹³⁷ They were represented by the Center for Legal Aid in Tel Aviv University. The women were hired as waitresses in a coffee shop, but less than a month after starting to work were fired. The owner of the coffee shop ordered the supervisor to fire the waitresses when he visited the premises and realized that the two waitresses were Arabs. He explained that his prior career in the Israeli Internal Security Services prevented him from employing Arabs. The supervisor, feeling uneasy with the situation, confided in the women and revealed that they were laid off because of their nationality. This conversation was audio taped and presented as evidence in court. The settlement agreement granted each plaintiff NIS 20,000 in damages (approximately \$4,000) and included an apology by the owner. No reinstatement order was issued and no court reasoning to the amount of damages was required.

Another lawsuit filed and settled by the Association for Civil Rights involved the discriminatory hiring policies of the Israeli Postal Service and Temporary Employment Agencies (THAs), which assist the Postal Service in recruiting workers.¹³⁸ A local newspaper advertised the availability of a mail sorting position at the Postal Service. One of the qualifications was completion of army service. The plaintiff, a law student at Hebrew University, contacted the THA in charge of recruiting by phone to inquire about the position. He was refused an interview because he had not served in the army. The THA supervisor explained to the plaintiff that the Postal Service strictly required army service for employment in mail sorting, and that the THA could do nothing about the matter.

137. L.C. 304837/97, *Cathy Hanna v. Oribel* (unpublished).

138. See L.C. 2154/98, *Hasan Agbariah v. Reshut Ha-Do'ar* [The Postal Service] (unpublished).

No meaningful explanation of the army service requirement was given to the plaintiff when he contacted the Postal Service human resources division directly. When another THA published an advertisement for the mail sorting position with no reference to army service, the plaintiffs were immediately invited to a job interview. They arrived to the THA offices 20 minutes after their phone inquires regarding the job opening. At the beginning of the interview, the plaintiffs were asked their names. When they revealed their Arab names, they were told with a grin that the jobs were no longer vacant. Two days later the plaintiffs anonymously placed another inquiry call to the THA, and were again invited for an interview.

The evidence presented in this case is compelling. It strongly suggests discriminatory recruiting practices by the Postal Service and the two THA assisting the Postal Service. But in this case, again, the plaintiffs chose to settle. Without admitting liability, both THAs agreed to pay damages of NIS 25,000. The Postal Service and the THAs signed an affidavit acknowledging their duty to follow the 1988 Equal opportunity requirements, and promised to act in a non-discriminatory manner. There is no mention that their past actions were indeed discriminatory.

The deterrence effect of these settlements is minimal. These settlements receive no publicity and details on them can be gathered only by contacting the plaintiff's legal council. In these settlements, the employer agreed to pay no more than five thousand dollars as damages, and in one case apologized for his discriminatory actions. The amount of damages is so low that, when multiplied by the probability of being sued, it does not present an effective deterrence mechanism for employers with a taste for discrimination.

Disappointment in the outcome of the handful of private lawsuits that were filled is not the only reason NGOs are pursuing civil litigation of private sector employers halfheartedly. If the unimpressive outcomes are disturbing, the legal strategy should be to file new lawsuits, never settle cases with strong evidence, and appeal unfavorable decisions to the National Labor Court and Supreme Court. This was the strategy embraced by the Women's Network in the early nineties and it matured into many legal victories. NGOs especially need to develop a coherent theory of disparate impact liability with respect to army service requirements.

NGOs are neglecting civil litigation against private employers because they also expect and demand the government to proactively curb discriminatory practices in the private sector. The underlying assumption is that discrimination of Arabs in the labor market is occurring with the implicit blessing of the government. The discrimination is institutionalized and, therefore, only institutional actions will eliminate it. As long as the government is not actively involved in the process of restructuring the demographic composition of the private sector, the battle in courtrooms will be futile.

Support for this theory is reflected in the steps taken by the Association for Civil Rights and Mossawa with respect to the website "Avoda Ivrit," mentioned above. Unquestionably, all employers advertising that they seek Jewish employees are in breach of the anti-discrimination mandate. The prohibition against advertising in a discriminatory manner is included explicitly in section 8 of the Equal Opportunities in Employment Act, and section 42(a) of the Employment Service Act. These two statutes are unique because, in addition to civil remedies, the statutes deem discriminatory advertisement a criminal offence.¹³⁹

NGOs view the website activity described above as unlawful. But they did not file civil lawsuits against individual employers seeking only "Jewish workers."¹⁴⁰ Instead, the NGOs focused their efforts on convincing the Legal Council of the Government to open a criminal investigation in the website matter. Letters were also sent to the agency in charge of the enforcement of the labor laws to open an investigation of the alleged breach of the Equal Opportunity Act.¹⁴¹ While a criminal investigation was opened in late October 2002 against the website operators, the website is still accessible and active. Many businesses continue to feel comfortable advertising themselves on the website. One can only guess that these em-

139. Equal Opportunities in Employment Act, § 15, 1988, 42 L.S.I. 31; State Service Act (Appointments), § 77(a), 1959, 13 L.S.I. 32.

140. Mossawa did send individual warning letters to some of the businesses advertising themselves on the website. A sample of response letters to Mossawa's discrimination allegations indicate that the legal tactic of the advertising businesses is to claim that their name was added to the website without their knowledge or consent. Some mention that they employ Arab Israeli workers and/or serve Arab clients. Material is on file with the author.

141. The letters are on file with author.

ployers find that the additional profits they gain by declaring that they employ only Jewish workers outweigh the risk of loss if their actions result in criminal liability.

Why did NGOs find it necessary to involve the Police and Labor Ministry in this matter? It is quicker, simpler, and more effective to directly sue each individual employer who placed an advertisement on the website for civil damages. The statute grants NGOs standing to sue employers practicing discrimination,¹⁴² and provides for non-pecuniary damages.¹⁴³ After the first judgment requiring an employer to pay sizeable damages, not many employers will continue to advertise on the website.

V. CONCLUSION

Labor market discrimination against Arab Israelis is a socio-economic phenomenon that must be resolved in the near future. Labor market segregation along nationality lines contributes to the tension, distrust, and stereotyping between the Jewish and Arab population. Eliminating segregation in the labor market will serve many purposes other than promoting the principle of equality. The workplace is an ideal platform in which individuals, Jews and Arabs, can get to know each other personally, build respect and trust for one another, and breakdown stereotypes.

The question is not whether combating employment discrimination is a necessary measure for Israeli society. The question is only what is the most efficient and effective road to breakdown segregation and under-representation of the Arab population. NGOs petitioned the Israeli High Court of Justice on issues of adequate representation, focusing on high-power appointments in the public sector, where policy decisions are made. Their theory is that the isolation of the Arabs must be addressed at the higher levels. When Arab representatives gain power at the policy-making level, they will be able to influence, through policy reforms, the labor market as a whole, including the private sector. NGOs believe that the discrimination against Arabs in Israel is institutional because the Israeli government implicitly promotes it. Therefore, dealing at this point with private sector discriminatory practices is futile.

142. Equal Opportunities in Employment Act, § 12, 1988, 42 L.S.I. 31.

143. *Id.* § 10(a)(1).

Deserting the battle against private sector employers who practice discrimination is a tactical mistake. The assumption that labor courts are hostile to national and religious discrimination cases is erroneous. Labor courts, especially on the regional level, lack the expertise and theoretical background to deal with discrimination cases.¹⁴⁴ The mission of NGOs should be to educate the courts by filing civil lawsuits against private sector employers and presenting not only the facts, but also the legal arguments and doctrines of employment discrimination law.

144. For a discussion of this issue, see Sharon Rabin Margalioth, *The Elusive Case of Employment Discrimination: How Do We Prove Its Existence?* 44 HAPRAKLIT L. REV. 529, 529-573 (1999, Hebrew).