

A Woman of Valor Goes to Court

• • • *Tort Law as an Instrument of Social Change under Multiculturalism*

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ABSTRACT: Can liberal legal tools appeal to non-liberal communities in settling their internal disputes? Are different legal routes for pursuing human rights instrumental in facilitating such usage? This article seeks to answer these questions by using the Israeli test case of the 'Immanuel affair'. In this case, a segment of the ultra-Orthodox populace resorted to the secular legal system, seeking relief for the discrimination in education it had suffered at the hands of its own community members. As part of a non-liberal community, the plaintiffs were destined to face the classic ideological clash ignited by imposing liberal values on a non-liberal group, even when serving the group's best interests. This article analyzes the plaintiffs' choice to bring their grievances to court through the civil justice system. It concludes that the ethical 'cosmology' of non-liberal groups is perceived as less abridged when a case is adjudged as a civil tort claim, as opposed to being adjudged within the context of constitutional law.

KEYWORDS: ethnic discrimination, human rights, liberalism, multiculturalism, post-liberal perspective, tort law, ultra-Orthodox society

The Israeli ultra-Orthodox population's alienation from the state's justice system is well-documented (Englard 1987; Horowitz 2001). These two entities may be seen as representing polar opposites within Israel's contentious multiculturalism: one embodies communitarianism, religiosity, and Orthodox ideology, while the other signifies liberalism, secularism, and atomistic ideology (Mautner 2011). The 'Immanuel affair', which represents this contention, gave rise to two lawsuits dealing with discrimination perpetrated against Mizrahi ultra-Orthodox students in the town of Immanuel. The students were forced to study at hours that were different



from those of their Ashkenazi classmates and in separate classrooms after the school erected walls to spatially separate the two groups.

The first lawsuit began with a petition submitted to the Israeli Supreme Court by a public organization seeking a finding that the discrimination against the ultra-Orthodox students was unconstitutional. The second was a private tort claim filed in the Magistrate's Court by the Mizrahi students, who sought compensation for the harm they had sustained through the segregation. Although it has traditionally refrained from acknowledging ethnic discrimination against Mizrahim (Bitton 2012), the Supreme Court delivered an unprecedented ruling in this case. Defining the segregation as blatant and unlawful ethnic discrimination, it issued writs of mandamus to both the parents and the school, ordering them to reintegrate the school. Shortly afterward, the Magistrate's Court delivered its own decision, ordering the defendants to pay damages.

The dual mechanism used to unravel the Immanuel affair provides an opportunity to explore the interaction between two seemingly opposed worlds of meaning and value that intersected here—the ultra-Orthodox and the liberal-secular. The Immanuel affair ostensibly represents a case in which an ethnic minority group, suffering from blatant discrimination within the ultra-Orthodox society, acknowledged the ameliorative power of the secular justice system and employed it in its favor. However, with regard to the liberal inclination to consider such legal action as a sign of the law's potential to bring non-liberal groups closer to liberal values, a critical analysis of Israel's multiculturalist reality indicates otherwise. As shown by Nissim Mizrahi (2014), marginalized groups in Israel adamantly refuse to adopt the liberal identity politics paradigm intended for their 'liberation'. Mizrahi's post-liberal perspective helps point out the cultural conceptions underlying the secular legal system that impede its acceptance among non-liberal groups. Concurrently, the choice of private legal proceedings—that is, the use of tort law—for these parallel cases provides an opportunity for an interpretive perspective that focuses on the characteristics of this route and illuminates its potential to serve as a conceptual space for cross-cultural dialogue, thereby highlighting the role of the legal system in a liberal society.

A Background of Cross-Tensions

The Immanuel affair encompassed some of Israeli society's most troubling social tensions—those between ultra-Orthodox Jews and the secular population and between Mizrahim and Ashkenazim—and dealt with the intersection of these tensions within the ultra-Orthodox community. From

its inception, Israeli society has been roiled by tensions between Jewish religion and traditions, on the one hand, and secularization and Western liberalism, on the other (Liebman and Cohen 1998). Despite comprising less than 10 percent of Israel's Jewish population, the ultra-Orthodox minority is present at the very heart of public discourse and enjoys substantial involvement in and influence on Israeli politics, notwithstanding its separatist ideology (Ben-Rafael 2008). Ultra-Orthodoxy emphasizes refusal to assimilate into the modern secular lifestyle and a strict adherence to an ancient and conservative interpretation of Halakhah (Jewish law) (Sivan 1995). Shilav and Friedman (1985) depict ultra-Orthodox society as a 'society of institutions' that maintains an independent and wide-ranging array of services designed to address almost all individual, familial, and community needs. Accordingly, the resolution of conflicts as well as the ethical regulation of social relations is largely the domain of the communities' private rabbinical authorities (*poskim*).

Ultra-Orthodox separatism ends where political mechanisms begin. The sector is fully represented by political parties that have the power to exert significant influence on the distribution of state resources in its favor (Kook et al. 1998). These parties routinely demonstrate their ability to dictate policies intended to preserve the community's unique cultural autonomy and to reinforce the Jewishness of the State of Israel as a whole through institutional and legal dominance (Ben-Rafael 2008).

Commonly considered homogeneous, ultra-Orthodox society consists of distinct camps relying on different legacies. One of its most overt rifts is that between Ashkenazi and Mizrahi (Sephardi) congregations (Leon 2008). Ultra-Orthodox Mizrahim are a distinct minority within the ultra-Orthodox population. The phenomenon of Mizrahi ultra-Orthodox Judaism is perceived as new and complex (Caplan 2008; Leon 2011). Jewish ultra-Orthodoxy originated in Europe as a counter-reaction to the secular Jewish Enlightenment movement (*Haskalah*) and was developed over time as a survival method by Ashkenazi religious Jews (Caplan 2008). Mizrahi ultra-Orthodox identity is often perceived as detached and even imitative, ranked hierarchically below Ashkenazi groups for its alleged inferior spiritual and ideological values (Leon 2011). Consequently, Mizrahim face overt patterns of discrimination and exclusion from elite positions in Ashkenazi ultra-Orthodox society. These patterns are also manifested in the educational facilities, where a quota of Mizrahi ultra-Orthodox students is often set in order to 'protect' the facility's standards and quality.¹

The marginal social position of ultra-Orthodox Mizrahim should be viewed in the broader context of the Mizrahi-Ashkenazi rift in Israel as a whole. The inequalities between Mizrahim and Ashkenazim in both the politics of wealth distribution and the politics of recognition have been

extensively investigated (Khazzoom 2008; Shafir and Peled 2002; Shohat 1999). The roots of ethnic inequality in Israel are as old as the state itself (Shenhav 2006; Smootha 2004). Ethnic differentiation within the education system is also apparent within Israel's secular society, where Mizrahim suffer reduced access to education and therefore achieve a lower degree of educational attainment compared to Ashkenazim (Ayalon and Shavit 2004; Cohen et al. 2007).

Description of the Immanuel Affair

The Immanuel affair exposed the extensive phenomenon of segregation among Mizrahi and Ashkenazi female students at the Beit-Ya'akov ultra-Orthodox school in the town of Immanuel. Ashkenazi school authorities maintained that the segregation was aimed at establishing two parallel study tracks based on different religious and cultural legacies. In other words, the school argued for its right to practice religious multiculturalism. The Supreme Court, however, ruled that this separation expressed an unlawful ethnic discrimination and imposed provisions intended to end it. Against wide condemnation of the school among Israel's secular public, ultra-Orthodox leadership throughout the country supported Immanuel's Ashkenazi community and encouraged it to resist the Supreme Court's decision, which was portrayed as the action of an oppressive secular power foreign to the Ashkenazi lifestyle and devoid of any spiritual authority. The school authorities and Ashkenazi parents who refused to obey the Court's reintegration order were fined and imprisoned, while being lionized by the general ultra-Orthodox public.²

The prominence of public tensions evoked by the affair and by the Court's almost unprecedented use of mass incarceration to induce compliance overshadowed the ruling's limited results. As the school neared the end of its summer break, an interim compromise was reached between the litigants outside the Court. The imprisoned Ashkenazi parents were released and later established their own autonomous, public-subsidy-free new school. It has since been operating alongside the old school, implementing segregationist customs similar to those that existed before the decision. The Immanuel affair shall thus be remembered not as a tale of the Court's success in imbuing ultra-Orthodox society with equality and protecting the rights of its discriminated groups, but rather as the story of a collision that led to an eventual rupture between ultra-Orthodox society and Israeli judicial authorities.

It is unsurprising that the case gained such prominence in public and academic discourse,³ but this attention failed to cover the whole legal

picture. Outside the media spotlight, the Immanuel affair was also deliberated in the Magistrate's Court as part of a tort suit filed by the Mizrahi students, who sought compensation for the emotional harm they had suffered. The nature of these privately initiated civil legal deliberations was a world away from the concurrent public deliberations at the Supreme Court level, and, consequently, significant differences were evident in the way the case was handled. A non-profit organization provided an independent public petitioner, who argued for the Mizrahi pupils and their parents before the High Court of Justice (HCJ). The students pro-actively contacted a Mizrahi feminist human rights organization called Merkaz-Tmura, asking it to manage their tort suit. Furthermore, as noted above, a violent polemic was apparent between the Ashkenazi parents and the Supreme Court during the deliberations, and it was the ultra-Orthodox community's own rabbis that secured the eventual resolution of the affair, after it had already been formally decided by the Court.

The tort proceedings, on the other hand, ended with both parties accepting the authority of the civil court to decide the case. Unlike the insults leveled against the petitioners and their lawyers in the HCJ proceedings (Hacohen 2013), the female counsel for the Mizrahi plaintiffs was actually labeled by the Mizrahi ultra-Orthodox population of Immanuel—where women are usually relegated to domestic matters rather than conducting themselves in court in a clearly feminist manner—as a 'woman of valor' (*eshet-chayyil*) (Proverbs 31:10), a sobriquet reserved by Halakhah to describe a woman of exceptionally high accomplishments.⁴

The lack of attention to and analysis of the strikingly divergent ways in which the two legal routes unfolded led to framing the affair according to familiar critiques from the theoretical literature, which has long criticized the failure of liberal anti-discrimination doctrines to effect change in the current era's multiculturalist reality (Mautner 2011). However, these perceptions do not align with the complexity presented in this particular case. First, they do not conform with empirical findings that suggest an increase in ultra-Orthodox appeals to Israeli courts (Hacohen 2013). Second, conventional analysis cannot explain why both of the Immanuel lawsuits—concerned with the same factual narrative—began together yet concluded separately, with one creating a massive cultural clash and the other giving rise to not even a shred of resistance.

Against this backdrop, this article presents a novel perspective for evaluating the effect of different legal tools and proceedings to promote social change in non-liberal communities via dialogue and intercultural agreements. Focusing on the differences between the legal proceedings in the Supreme Court and the civil court insofar as they concern the encounter between the liberal justice system and the ultra-Orthodox world of meaning

is essential.⁵ It will allow us to identify divergent response strategies among the Mizrahi ultra-Orthodox community to a liberal legal message that might favor it as a marginalized and excluded population, but that simultaneously represents a threat to its identity and world of meaning as a religious community. Based on the distinction between norms of conduct and their underlying justifications offered by Taylor (1994, 1999; see also Mizrahi 2014), we shall go on to show how the use of the tort route has allowed the ultra-Orthodox community and Israeli courts to agree upon certain norms of behavior without involving a simultaneous rejection of the entire underlying ultra-Orthodox ethical apparatus by either the liberal or religious camp.⁶

The Double Legal Routes of the Immanuel Affair

We believe that substantial differences between the two proceedings—the petition to the Supreme Court and the civil claim—are crucial when analyzing both the ways that the ultra-Orthodox population is addressed and the response of this community. Before discussing these differences, we wish to introduce briefly the historical developments that led to the creation of two such parallel legal frameworks.

Social Change through Legal Tools: From One Route to Two

Struggles for the promotion of human rights have traditionally taken place in the arena of public law. Normally, the primary infringer on human rights is the state, due to its extensive power over the individual and its ability to endanger the individual's autonomy as a bearer of rights. Lawsuits filed against the state traditionally fall under the jurisdiction of the HCJ, due to its institutional strength. Invoking constitutional and administrative law, the HCJ serves as the primary means for reviewing and limiting state actions against its citizens. This legal paradigm, under which systematic petitions against state actions have been successfully adjudicated by the Supreme Court sitting as the HCJ, has been efficiently implemented in Israel for decades. Toward the late 1980s, the rise of values and the decline of formalism in the Supreme Court's reasoning facilitated massive use of this tool by human rights advocates (Mautner 1993).

The Supreme Court responded positively, mainly through the expansion of the 'standing' doctrine, which now permitted parties not directly influenced by the state action to petition the Court as representatives of the public's interest (Mautner 2011). In the early 2000s, however, it became apparent that such top-down action is of limited effectiveness in achieving the desired outcome. In the context of the right to equality for both women

and the Arab citizens of Israel, for example, where this strategy has been extensively applied, the expected social change was not fully realized (Dotan 2015). While the Supreme Court indeed employed rigorous rhetoric supporting human rights, it nevertheless failed to provide for similarly strong and extensive implementation of its decisions (Jabareen 2008).

In light of the growing acknowledgement of the limitations inherent in recourse to public law, civil tort suits aiming for social change through private legal means began to emerge in the mid-2000s.⁷ This new trend was made possible due to a simultaneous revolutionary approach taken by tort practitioners and theorists in which the law of torts is seen as a central and important tool for the promotion of human rights (Bitton 2008; Fletcher 1972). This strategy pointed to tort law's professed objective of deterrence, meaning that a ruling awarding damages would serve as a clear economic motivation to the state to refrain from infringing upon fundamental rights. Finding the state liable by means of a private suit, brought by a party damaged by its actions, would spur the state to change its ways in order to avoid the use of taxpayer funds to compensate for harm done to private individuals (Bitton 2014).

The present article is perhaps the first to advance a discussion of a further, sociological aspect of this transformative use of tort proceedings in the context of conflicts taking place in non-liberal communities. We shall see that the Immanuel affair bears a telling message regarding the inherent potential of tort proceedings to promote a legal discourse that neither necessitates the total acceptance of liberal authority as a supreme moral arbiter nor risks antagonizing conservative and religious worldviews.

Between Two Arenas: The Different Routes

The essential differences between entertaining an anti-discrimination lawsuit using public law and managing the same lawsuit using private law can be divided into two categories: procedural and substantive. Procedurally, a public petition enjoys the advantages of immediacy in managing the proceedings and the ability to request unconventional remedies. Managing a private civil suit, in contrast, takes place in lower civil instances. According to this institutional division, while the parties involved in tort proceedings meet in the trial courtroom, which admits their testimonies and examines their evidence and conceptual frame, these proceedings are almost entirely absent from the Supreme Court, where the hearing is restricted to 'principled' arguments by the lawyers alone. Another procedural point of difference concerns the standing doctrine, which allows a public petitioner who is not the immediate party harmed by the public authority's conduct to bring petitions in the public interest before the

Court. In civil proceedings, however, the plaintiff must have standing as one who personally endured the harmful outcomes of the defendant's conduct. This prerequisite ensures that in the civil route, plaintiffs have a greater degree of influence over the content of the demands made to the civil court and have more control over the manner in which the proceedings are being managed.

Substantively, managing a suit using public law necessitates dealing with principled and wide-ranging issues that involve an overview of the phenomenon that is to be remedied by the most important and powerful institution of the legal system. Tort claims, on the other hand, deal with specific, concrete issues and are rarely likely to involve any significant discussion of matters not directly related to the case at hand (Green 1959). This difference has a derivative effect on the impact that the court's decision may be expected to have on the issue brought before it. An HCJ ruling will often be principled, theoretical, and less concrete and will reflect wide concern with 'public' issues (Jabareen 2008). To this should be added the fact that the HCJ offers petitioners a narrow range of remedies that are largely devoid of effective significance (Zamir 1975). Accordingly, the HCJ rarely takes actions to enforce its rulings when contempt is involved. Conversely, a civil proceeding verdict is invariably concrete and contains strict implementation orders that, if ignored by the losing party, will activate a simple procedure for enforcement.

The different characteristics noted above reflect the key implications entailed by choosing to manage a legal proceeding for social change through public versus private routes. The following post-liberal sociological analysis of these differences indicates their social and cultural meaning to non-liberal parties.

The Sociological Relevance of the Two Legal Arenas

The Public Law Arena: The Public Trial of an Entire Public

The Supreme Court, sitting as the HCJ, acts as the central legal arena for the normative evaluation of principled issues. Within its deliberations, specific practices are detached from their particular contexts and are repositioned in a principled, general, and representative debate, drawing massive media attention. Hence, the power and significance of the HCJ derives primarily from its social perception as the arbiter of comprehensive normative pathways, where liberal cosmology and ethical theory routinely prevail. This embedded virtue is among the things that antagonize groups alienated by this liberal heritage.

In order to understand the link between petitioning the HCJ and resorting to liberal activism as ‘liberating’ tools of limited power, we draw on the post-liberal theory offered by Mizrachi (2014), who reveals how socially disadvantaged groups consistently and decisively reject the messages offered to them by liberal identity politics. This is largely due to the fact that these messages embody a series of justifications and values that fundamentally contradict these groups’ traditional worldview. According to this paradigm, a struggle against discrimination using liberal identity politics would necessarily pass through a number of checkpoints, including (1) a demand for recognition based on a common coerced stigmatized identity; (2) a demand for an equal position in the social order based on the divergent identity and not in spite of it; and (3) a defiant stance toward the ostensibly natural social order and, at a later stage, even a recognition of the demands of other groups to join forces in order to overturn the existing social order and adapt it to their needs. The link between these checkpoints arises from a principled perception that posits individual rights as possessing normative priority, that considers human order to be socially constructed, and that perceives the proper relations between individual and society as based on a consensual treaty that can be recreated through negotiation.

Seeking to illuminate the moral and cultural chasms between the liberal camp and the groups that oppose it, Mizrachi (2011, 2014) grounds his arguments in Taylor’s (1994) political theory, characterizing traditional ethics as resting on the perception that social order is not a construct that draws its authority solely from human reason. On the contrary, the traditional worldview suggests that human beings and the social order are not separate from the cosmos but rather are derived from it—an argument that traditionalists use to justify their existence.

Therefore, social change can emerge only from new thinking on the possible ways of adapting and integrating the cosmic order and human constructs. Liberalism’s denial of the neutrality and naturalness of existing order is received by traditional views as an attempt to topple the cosmic order as well as the related affinities of identity, belonging, meaning, and self-esteem (Taylor 1994). Thus, even if a particular liberal position or practice is capable of benefiting a marginalized group belonging to a non-liberal community, the intermingled necessity to adopt a whole range of justifications and meanings in addition might deter the very constituency that the liberal justice system seeks to protect. These sociological insights shed light on the ultra-Orthodox opposition evoked by the all-encompassing and principled nature of the public legal process. An appeal to the HCJ signifies a radical and sweeping act that seeks not merely to right a particular wrong, but also to create a negative identification between this wrong and an entire cultural system that ostensibly lies behind it.

This generalized critique mode became particularly evident as the HCJ moved toward the adoption of a blatant value-laden discourse, which necessarily requires dwelling on moral questions and the regulation's existential basic principles (Mautner 1993). And indeed, the ultra-Orthodox population manifestly recognizes the HCJ's function and its principled tone and expresses its discontent with its functional institutional dominance.

These sociological implications of the Supreme Court can explain why concern with the Beit-Ya'akov educational facility spread beyond the town of Immanuel to the ultra-Orthodox camp as a whole, and why the rest of the public perceived it as symbolic of an ideological and cultural war between these two factions. The HCJ's all-encompassing function can be readily identified in the reasoning and rhetoric employed by the Court in its decision:

Once a certain [educational] institution has established characteristics for distinguishing between sectors of the population, its policy shall be examined on the basis of ... the fundamental values of our legal system. If the distinction has served its purpose—the right to sector-specific education—in an irrelevant manner ... this shall be considered as wrongful discrimination.

It is true that no unique characteristic—whether cultural, religious, customary, or ideological—can justify discrimination ...

The Court is the party that shall determine whether a certain sector has been justly made distinct—in order to allow a certain other sector to maintain a free existence within its own community—or whether this is a case of wrongful discrimination solely intended to distance a divergent party and alienate it from a proper social existence.⁸

The Court's rhetoric distances itself from the concrete case at hand. Its universalistic language, which marginalizes the unique communal and religious context, is alien and opposed to that of conservative communities. Additionally, the Court uses rhetorical strategies to fortify its authority to determine when traditional customs express a 'relevant' distinction between its members and when they embody 'wrongful discrimination'. While this discourse aligns with the institutional role of the Supreme Court, it nevertheless reinforces the perceived antagonistic conflict between religious, spiritual, and monopolistic authority and the secular legal monopolistic authority. The Court quite explicitly states that recognizing its ruling in this specific case means recognizing the fundamental values of the liberal legal justice system in their entirety. Such a statement forces the defendants to choose one system of normative justifications over another.

Toward the end of the quotation above, the Supreme Court sets itself to answer the question as to whether the group's customs allow an individual to maintain a "free existence within ... [her/his] community" or are "solely

intended to distance a divergent party and alienate it from a proper social existence.”⁹ The Court’s phrasing accords with a liberal conception of personal freedom, which the social framework is meant to realize. Reading between the lines above reveals a direct opposition between a liberal community, which allows and realizes personal autonomy, and a non-liberal community, whose social regulations are deemed oppressive, exclusionist, and clearly alienating.

In their ruling on the Immanuel affair, the Supreme Court justices had carefully dealt with complex issues. However, the embedded ethical logic underpinning this discussion is liberal reasoning—which prioritizes the free person as an *a priori* entity and considers the social order as a contractual human product (whether worthy or malicious)—and thus is open to harsh criticism, negotiation, and replacement. Therefore, even when the HCJ recognizes discrimination aimed at a non-liberal group, and even when it seeks to liberate and protect them, the HCJ still formulates this recognition in liberal terms, which may evoke a sense of deep aversion within the discriminated group.¹⁰

The religious and communitarian Jewish worldview regards an individual’s duties as preceding her or his rights and liberties. This view yields the following two implications. First, contrary to the logic of liberal law, discrimination might be interpreted as an ethical flaw, but not because it constitutes the opposite of an individual’s autonomist liberty. Second, correcting the evils of discrimination does not warrant conceptualizing it as a man-made experience. This conceptualization is therefore deemed subversive since it undermines the very foundations of the community’s spiritual and normative sources of justification, which assign more spiritual meanings to what is perceived as social order.

Revisiting the representative elements of the HCJ’s discourse, it is hardly surprising to find that its rulings raised fears among the groups it aimed to protect. This outcome implies the inherent expansive nature of the messages evident in the decision (Mautner 2013). As mentioned above, the horizon to which liberal identity politics aspires to expand in its war against discrimination necessitates an acceptance of the universal right for recognition and equality for all minority groups (Mizrachi 2014). Expanding the limits of this judicial ruling (or social change) beyond this particular case is an obvious and necessary perceptual move for faithful advocates of critical liberalism. However, the array of liberal justifications that necessitate extending equal treatment to all excluded groups whatsoever may deter people for whom the cultural limits of tradition and religious, popular, or national community form an inseparable part of their identity and their experience of themselves as moral subjects. Analyzing the way in which public law was used in the Immanuel affair through this post-liberal

perspective clarifies this argument, which suggests that the public law course embeds procedural and normative loads that make it difficult for members of non-liberal groups to accept.

The Private Law Arena: An Individual Trial on a Particular Harm

The experience of the Immanuel affair illustrates the need to search for a legal channel that protects central liberal values without eliciting such a dissonance of identities and fundamental resistance by non-liberal groups. We argue that filing civil tort suits against abridgement of human rights embodies such a path. Our focus on the domain of discrimination is essential. Discrimination within the non-liberal group encompasses a conflict involving a 'minority within a minority' situation that requires the application of external liberal values yet threatens to infringe on and undermine the values associated with the minority's identity by this very application (Crenshaw 1991; Pinto 2015). Thus, the proposed legal channel must offer a more nuanced, 'softer' approach to this conundrum. In order to identify the distinct ability of tort law to do so, we shall now contrast the public legal proceedings with the concrete, local, personal, and emotional foundations of the civil tort legal proceedings.

A tort suit centers on the particular experience of the relations it seeks to address. Above all, it is concerned with harms inflicted upon the injured party, since it is first and foremost a means to compensate the injured party for harms it has sustained. The tort suit explores the harmful ordeal in the most concrete fashion possible. It is concerned with the clarification of specific testimonies and evidence in order to determine the amount of damages due as a result of the harm (Weinrib 1995).

Comparing the different repercussions of the HCJ petition and the civil tort suit, it is apparent that the latter opens the door to a softer and more dialogue-driven legal manner of resolving conflicts grounded in discrimination. First, tort suits are normally handled and deliberated in a low profile, ostensibly limited to the traditional domains and contents of the private sphere. This characteristic may be perceived as diminishing the importance of the tort decision, but it still imbues it with the significant capacity to examine interpersonal relationships in a thorough manner. In other words, this virtue allows the tort suit to suspend an overview of the principled level in favor of an examination of the day-to-day routine of social relations and the ambivalent emotions they evoke (Bublick 2006). Moreover, some scholars have recently suggested that this feature has genuine therapeutic value to tort litigants (Feldthusen et al. 2000). This is contrasted with the HCJ proceedings, where the parties themselves are almost never permitted to make their own voices heard. The use of a compensation order in tort

proceedings also allows the remedy to be focused on a concrete person, as opposed to remedies such as a writ of mandamus or a prohibitory injunction, both of which are routinely employed by the HCJ.¹¹ The tort proceeding is thus less prone to overall judgmental decisions concerning the defendants and their lifestyle. Instead, it focuses its analysis on the concrete case and the parties at hand.

Second, being more technical by definition, tort anti-discrimination doctrine also contributes to the prevention of a principled judgmental evaluation, primarily mandating that any good or service be provided without discrimination. In this respect, the law allows a 'fast track' passage through the grounds for the discrimination and an examination of their justifications, concentrating its scrutiny on the execution of a discriminatory act by the defendant and the harm it inflicted upon the plaintiff.¹² By contrast, legal analysis of a discrimination claim under public law warrants placing the onus on the issue of the grounds for the discrimination and its possible justifications and, in any case, is concerned with setting the principled scope of the proper extent of liberty due to the alleged discriminating party in her/his relations with her/his community (Bitton 2014–2015).

Moreover, the embedded perception within tort law with regard to the relationship between the individual and the community marks a departure, to an extent, from the traditional liberal view that is prevalent in the public law discourse. Tort law's most fundamental and instinctive account of liberal autonomy is that people are expected to restrain their autonomy when it unlawfully harms others, even in cases where their actions do not amount to criminal behavior. Under tort law, individualism and autonomy are weakened concepts and are of less importance than they are in classic liberal thought. Tort law envisions people, first and foremost, as social creatures who brush up against and clash with each another (and sometimes hurt one another) and considers this an inseparable part of human reality (Fletcher 1972).

Reading the civil court's decision in the Immanuel tort suit reveals exactly that virtue. Indeed, while the HCJ was preoccupied mainly with the reasons for discrimination and with arguments countering its justification, the civil proceedings centered on the plaintiffs' personal experience as reflected by the depositions submitted to the court, which presented narratives of humiliation and harms sustained by the Mizrahi students.

Indeed, the personal and emotional aspects of the affair are extensively addressed in the tort suit's eventual decision. Setting the stage for the analysis, its opening lines declare: "In 2007, the town of Immanuel decided to separate the Mizrahi and Ashkenazi students at the local girls' elementary school ... the minor plaintiffs' parents, as well as the girls themselves, felt humiliated, like their dignity was being crushed on a daily basis."¹³

Although it includes considerable attention to the students' humiliation and sadness, this opening statement nevertheless lacks one-sided judgments and possibly even sets the stage for future dialogue between the parties. The court chooses to organize the legal context in a manner that joins the plaintiffs' sense of harm with the "trembling and trepidation"¹⁴ indicative of the careful tone taken in this case by the defendants themselves. The conciliatory tone also arises from the largely accommodative language that the defendants employ in formulating their desire to "explain" their worldview so that it can "be understood"¹⁵ with regard to the controversial case at hand.

In line with this approach, the judge addresses the arguments of representatives from Immanuel's Ashkenazi community in his deliberations, despite ruling against them later. The judge remarks that the defendants sought to explain the "difference" between the Ashkenazi and Mizrahi constituencies as "a consequence of the past added on to the long and difficult history of the Jewish people" and that, according to them, "only time, rather than judicial decisions, can alter it to fit the new reality we live in, and that which we seek."¹⁶

The tort case, like the HCJ's, was decided in favor of the Mizrahi students' parents. However, despite the similar eventual outcome, an examination of the legal proceedings and rulings illustrates that each case contains different legal and cultural rationales. The civil proceedings were not deeply antagonistic and argumentative, but rather conciliatory and averse to one-sided judgmentalism. This tone may be interpreted as an instrumental attempt by the court to turn down the heat generated previously during the HCJ's ruling. Yet it may also be read as the court's decision not to cast aside the deep meaning of the fundamental values guiding the life of the ultra-Orthodox community.

Moreover, the manner in which the court's ruling establishes links between the plaintiffs' and the defendants' positions indicates an in-depth perception that suggests the impossibility of examining the customs of a community by employing—as the HCJ set out to do—an external, alienating perspective. Instead, the court can use the parties' positions as a benchmark for its analysis. Such a legal approach is indispensable to any effort made by courts to promote a solution that would take into account the social order rather than deny and overturn it. It is apparent that the Magistrate Court's decision, unlike the HCJ's, allowed a communitarian worldview to be expressed even as it rejected the same worldview's power to exclude the plaintiffs at that particular level.

As soon as it became clear that it was not the community or the community's cosmology that was on trial, but rather the concrete conflict between its members, it was possible for the court to juxtapose both communalism

and personalism in the same decision. Furthermore, instead of focusing on judging the purposes of and justifications for the harmful act, the judge condemned the wrongful means used for its execution and their injurious results. This judicial approach makes it possible to rule that any means of separation tantamount to discrimination must not be harmful and humiliating, even if the parties do not agree among themselves or with the secular court on the essence of what renders the separation/discrimination unlawful.

The differences between the Immanuel affair's two legal proceedings thus teach us that the interaction between the liberal justice system and non-liberal groups does not necessarily have to lead to ideological warfare, as long as it stays bilateral and, to an extent, personal. This perception, which draws on Charles Taylor's work, offers some refreshing thoughts about the possibility of attaining moral agreements between groups with different ethical legacies. According to Taylor (1996, 1999), attaining such agreements presupposes a distinction between norms of conduct and their underlying justifications. Agreement between the rival groups with regard to the former does not entail involvement of the latter.

This distinction allows different ideological camps to agree on the importance of a desired behavioral norm—even if they disagree on *why* it is important—without allowing their differences to interrupt the desired consensus. In the case at hand, Taylor's distinction is insightful in suggesting possible reasons why the Mizrahi ultra-Orthodox community limited their outreach to the liberal system to a tort suit. Similarly, it potentially explains why the defendant population, the Ashkenazi ultra-Orthodox—who objected to the HCJ's decision using the most extreme measures—accepted the legal ruling here without regarding it as subversive of the foundations of justification and meaning offered by their religious moral authority.

Two different legal rationales are thus apparent when the two different legal adjudications of the Immanuel affair are juxtaposed. One is formal, rational, and principled, while the other is particular, emotional, and interpersonal. One offers an all-encompassing and universalist perspective, while the other is grounded in the space, context, daily living routines, and interpersonal relations of people living side by side. One judges the purposes and ideological objectives of the community concerned, while the other focuses on the ways and means of its daily existence. One demands the adoption of a general and controversial array of justifications, while the other seeks agreement concerning concrete behavioral norms. As a result, one inflames and clashes, while the other achieves compromise and communication.

The plaintiffs' victory in the civil proceedings was very clear in terms of tort law: each Mizrahi family was granted tens of thousands of NIS in compensation meant to ameliorate the harms they had suffered.¹⁷ This

compensation was paid to them jointly by the school, which had directly imposed the discrimination, and by the Ministry of Education, which had not intervened to prevent it. Beyond compensating the plaintiffs for their suffering, the decision managed to achieve much wider effects as well. The inclusion of the Ministry of Education as a defendant in the tort proceedings had mitigating effects in two ways: first, it prevented the conflict from being depicted as solely an intra-ultra-Orthodox affair by moving the locus of the legal critique away from ultra-Orthodox concepts and worldviews. Second, it signaled that wrongful discrimination can be found in a liberal framework and that it is not a necessary result of the ultra-Orthodox lifestyle in particular.

Moreover, the Ministry, which feared a future recurrence in which it would be required to pay compensation, made it clear that henceforth ultra-Orthodox schools acting in a discriminatory manner would not receive budgetary allotments from the government (Vorgan 2010). The tortious effect in relation to the state was nothing short of revolutionary, while the same effect in relation to the ultra-Orthodox community, which did not respond with any kind of resistance, allows us to determine that there is no need for a symbolic threat to an entire world of values at the hands of the judiciary in order to achieve effective change of behavioral norms among members of a non-liberal community.

A further reinforcement of this understanding of the Immanuel affair carries a meaning well beyond the boundaries of its specific facts. It can be found in a case with a similar context, where the Supreme Court itself decided to suggest to the female petitioners, who were protesting the discrimination they had experienced as women in an ultra-Orthodox community, to utilize tort suits in order to rectify the wrongs they had incurred.¹⁸ By doing so, the Court avoided a principled discussion on issues of religion and equality, thus espousing political pragmatism and the avoidance of 'clashes' (Raday 2007). Despite the reservations that may be expressed with regard to such a trend on the Court's part, this decision nevertheless reinforces the theory suggested above.¹⁹

Conclusion

In his book *The Hollow Hope*, Gerald Rosenberg (1991) presents a challenging argument. He suggests that social change fought through the judicial system cannot be realized by the courts alone, which have very limited tools at their disposal. To effect large-scale social change, courts need the support and assistance of extra-judicial frameworks such as the legislature and the executive, as well as support from civilians and civil society

organizations. Basing itself on a comparable argument, the present article seeks to illuminate the lack of power of internal legal critique alone to evaluate the ability of the courts to bring about social change. Legal criticism should be enriched with post-liberal sociological insights that shed light on the importance of carefully crafting dialogical paths with the target population that the law impacts. Such analysis does not aim simply to add a further layer of complexity; rather, it intends to open conceptual space for the highly contentious attempt to forge a fruitful dialogue between non-liberal populations and liberal systems of justice and equality. An excellent example of such a conceptual, as well as practical, space of this kind is the civil legal proceeding undertaken in the Immanuel affair.

We accept the basic premise that the ultra-Orthodox camp, like the liberal camp, maintains a valid and ordered theory of ethics anchored in solid and rooted horizons of meaning. In light of this premise, we submit that civil legal procedures possess a unique potential for the promotion of liberal values via communication from within conflict and divergence, insofar as the increasingly more prevalent local cultural and political conflicts of our current multiculturalist reality are concerned.

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NOTES

1. These perceptions are clearly reflected in this quote offered from the head of an Ashkenazi ultra-Orthodox educational facility: “‘Sephardi ultra-Orthodoxy’? There is no such thing! ... [I]t contains nothing that is fundamentally ultra-Orthodox” (Leon 2011: 217).
2. At the time, massive and offensive protests attempting to delegitimize the Supreme Court’s authority were widely covered by the Israeli media. The Hasidic leader (*admor*) of Slonim declared: “We will not surrender, even if they make us face a firing squad. I will lead my disciples to prison” (Hacohen 2013: 89).
3. For example, the Israeli scholarly journal *Tarbut Demokratit* (Democratic Culture) devoted a special issue to the Immanuel affair (see Sagi et al. 2013).
4. A television show broadcast from the town of Immanuel following the tort ruling showed two Haredi men (*avrechim*) pointing to Yifat Bitton and commenting: “She is a woman of valor.”
5. In this context, it is important to note that the focus of this article and its arguments do not concern the social relations between Immanuel’s ultra-Orthodox groups before or after the affair, but rather the relations between them and the legal system, as reflected by each of the legal proceedings.
6. See also Sunstein (1996), who argues that where deep political controversies are concerned, judges should formulate their decisions as concrete solutions grounded in the analysis of precedents and avoid exposing the controversial wider ethical world that underpins them.
7. This trend was led by the Tmura Center for Promoting Equality, a non-governmental organization that utilizes tort claims to combat inequality (Bitton 2014). An author of this article, Yifat Bitton, is a co-founder of the Center.
8. HCJ 1067/08 *Noar Kahalacha v. Ministry of Education* (2009) PD 63(2) 398: 430.
9. *Ibid.*
10. It should again be noted that while empirical findings show that the ultra-Orthodox do in fact appeal to secular courts, they tend to prefer appeals to civil private venues over appeals to public ones (Hacohen 2013).
11. This positive difference also bears the risk of commodifying social responsibility on the defendant’s part, although there are other solutions for this within the framework of tort liability (Bitton 2014).
12. This is the structure of the Product, Service, and Entry to Entertainment and Public Facilities Discrimination Prohibition Law 5761 AM–2000, BL 58.
13. MC 11475-10-09 *Jane Doe, Minor v. Israeli Ministry of Education and Others* (2011), par. 2 (see <http://www.tmura.org.il/20110803112915768.pdf>).
14. *Ibid.*
15. *Ibid.*
16. *Ibid.*
17. *Ibid.*, par. 12.
18. See HCJ 746/07 *Ragen v. Ministry of Transportation* (2011). In this case, and despite condemning the practice of separating women and men on means

of public transportation, the Court refrained from canceling the bus line that engages in this practice. Instead, the Court counseled women to exercise their right to bring tort suits in cases of harm. For a description and critique of this case, see Bitton (2016).

19. In another case involving religiously observant women, who were asked to obey public signs requiring their adherence to strict rules of modesty, the women chose to file a tort suit rather than a public suit as a means of recourse. Deciding in their favor, the court focused on the personal harm they had suffered rather than on the propriety or impropriety of the standard of modesty they were coerced to follow. See TA (Beit Shemesh) 41269-02-13 *Philip v. Abutbul* (2015).

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