

## On Gender, Nationalism and Universalism: The Legal Issue of Representation for Women in Israel

By Abeer Baker<sup>1</sup>

Not all women suffer from discrimination and oppression to the same extent. Talk of shared codes of deprivation and oppression toward all women and the proposal of a uniform remedy are liable to perpetuate the discrimination and exclusion of women who belong to groups with unique characteristics, such as ethnic or national groups. One of the acute criticisms leveled against Catharine MacKinnon, among the pioneers of feminist jurisprudence, came from feminist women belonging to a deprived minority group in the United States, African-American women in particular.<sup>2</sup> According to these women, MacKinnon's theory regarding the deprivation of women with a uniform "universal identity" ignores the patterns of their deprivation as black women, which also differ from the patterns of oppression faced by black men.<sup>3</sup> In this short article, I will seek to challenge the implication of the "universal identity" of women and to expose the particularity within it. I will argue that it is correct to regard the universal female identity as a suitable model only when this identity is not oblivious to the components and characteristics of the groups of women within it. The reference point in this article will be the struggle of the women's movement for suitable representation on the boards of directors of government corporations in Israel. This will be presented as an example illustrating how a feminist struggle in the name of "all women," despite all of its achievements, neglected Arab women. When the Supreme Court of Israel was asked to accept a petition demanding suitable representation for Arab women as a distinct discriminated group that had yet to taste the legal victory achieved on the issue of the representation of women, it adopted a different attitude and legal arguments than those it adopted when asked to rule on the issue of representation of "women." An analysis of the judicial rhetoric used in these rulings will help to challenge the existing definitions of who constitutes "we women," and to determine when it is possible to speak on behalf of all of us, the women.

Between the years 1993 and 2001, there was a significant increase in the representation of women on the boards of directors of government corporations. There is no dispute that the road toward this increase was paved to no small extent by the feminist struggle in Israel for broader representation of women on these boards. The proven results of the feminist struggle on this issue began with Amendment 6<sup>4</sup> to the Government Corporations Law – 1975,<sup>5</sup> which instructed government ministers to take action aimed at giving suitable representation to both sexes in the composition of the board of directors of every government corporation.<sup>6</sup> This amendment charted the course that government ministers must follow when nominating a candidate to a board of directors, stipulating that "Until

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<sup>2</sup> See Catharine MacKinnon, *Legal Feminism in Theory and Practice*, Dafna Barak-Erez (ed.), Resling Publishing, 2005, p. 12 (Hebrew). A good example of the demand made by black women for recognition of the distinct discrimination against them is the case of *Jeffries*. In this case, Jeffries submitted her candidacy for a job that was previously held by a white woman and a black man. It was decided, however, to fill the position once again with a white woman and a black man. In her lawsuit, Jeffries argued that she had been discriminated against on the basis of gender and race. The court accepted her argument and ruled, *inter alia*, that the fact that black men and white women are not subject to discrimination is irrelevant, as it does not mean that she was not discriminated against as a black woman. The court ruled that it could not leave this group of women without unique protection. *Jeffries v. Harris County*, 615 F. 2d 1025 (5<sup>th</sup> Cir. 1980) at p. 1034. See also *Lam v. University of Hawaii*, 40 F. 3<sup>rd</sup> 1551 (9<sup>th</sup> Cir. 1994) at 1562; *Hicks v. Rubber Co.* 833 F2d 1406, 1416 (10<sup>th</sup> Cir. 1987).

<sup>3</sup> See, for example, Angela P. Harris, "Race and Essentialism in Feminist Legal Theory," 42 *Stanford Law Review* 581 (1990).

<sup>4</sup> Approved by the Knesset on 16 March 1993.

<sup>5</sup> Hereinafter: The Government Corporations Law.

<sup>6</sup> Article 18a of the amended law.

appropriate representation is attained, the ministers, as far as circumstances allow, will appoint directors of a gender that is not appropriately represented at the time on the corporation's board of directors."

Around a year after the amendment, the Israel Women's Network (IWN) petitioned the Supreme Court with a request for implementation of the article mandating suitable representation for women so as to increase the representation of women on the boards of directors of government corporations.<sup>7</sup> In its petition, the IWN asked the Court to cancel the appointment of a member of the board of directors of the Ports and Railways Authority and two directors for Oil Refineries' board. The IWN's main argument was that, in light of the amendment to the Government Corporations Law on the issue of providing suitable representation for both sexes, there was reason to prefer the appointment of a woman for each of these three positions. The failure to appoint a woman constitutes complete disregard for the amendment and a violation of what it stipulates. Therefore, the appointment should be canceled. It should be noted here that the IWN did not propose any particular female candidate to the Court with qualifications appropriate for one of the three job openings. The Court, in a majority opinion, canceled the appointment decision and ruled that the decision of the ministers had ignored the directives of the law by not examining the possibility of appointing women. In a long and reasoned ruling, Justice Matza focused, among other things, on the essence of affirmative action, on the correlation between it and historical injustice, and on the fact that it constitutes a way of compensating an individual or (the group) that is part of a weak stratum for the sins of historical discrimination it suffered in the past.<sup>8</sup> Ostensibly, the rhetoric of this ruling and its positive statements referred to all women as a single bloc.

In the wake of this ruling, the percentage of women on the boards of government corporations significantly increased. In November 1995, a year after the ruling, the percentage of women on these boards rose to 15% from 7% in 1994. In 1996, there was another increase in the representation of women, with the proportion rising to 26%. In 2001, the percentage of women serving as directors in government corporations stood at 37%.<sup>9</sup>

At first glance, this increase in the number of women appears to reflect a positive trend, signaling the rapid implementation of gender equality. However, a closer look at the way government ministers implemented the directives of the law and the lessons of the first IWN ruling clearly shows that the increase in the number of women on boards of directors, which was ostensibly carried out in the name of "equality," actually perpetuated and deepened discrimination against Arab women. An examination of the number of Arab women serving on the boards of directors of government corporations in 2001 reveals that of **216** women who served as directors until that date, only **seven** were Arab women.<sup>10</sup> This means that the first IWN ruling, which charted and paved the way for increasing the representation of **all** women, was interpreted by the state, whether consciously or not, as benefiting only Jewish women. The resultant exclusion of Arab women from the application of the ruling and the law's directives pertaining to the granting of representation to women as such constitutes discrimination on the basis of gender *and* nationality.<sup>11</sup>

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<sup>7</sup> H.C.53/94, *Israel Women's Network v. Government of Israel et. al.*, 48(5) PD 501 (hereinafter: the first IWN case).

<sup>8</sup> The first IWN case, pp. 520-521.

<sup>9</sup> See Report on the Appointment of Directors on Behalf of the State in Government Corporations, State Comptroller (1998); Knesset Protocol, Debate on the Government Corporations Bill, 6 May 1998; Report on the Activities of the Government Corporations Authority in 2000, Prime Minister's Office, 2001.

<sup>10</sup> From data provided to Adalah by the Government Corporations Authority in November 2001.

<sup>11</sup> The updated Report on Government Corporations for 2001 indicates that the number of Arab women on the boards of directors of government corporations in 2000 was only 5 from 242 women serving as directors at that time (or 2.02% of the total number of women). The proportion of Arab women among all directors that year was 0.75%. Until December 2002, there were just 6 Arab women compared to 231 Jewish women, comprising 2.6% of the women directors and 0.9% of all directors. During the years 2000 to 2005, the percentage of women serving as directors remained almost

On 30 May 2000, a further amendment was enacted to the Government Corporations Law that added an article stipulating that the composition of the boards of directors of government corporations should provide suitable representation for the Arab population.<sup>12</sup> Like Amendment 6, which stipulates the requirement for suitable representation of both sexes, the legislature also described the action the ministers must take to achieve this by stating: "Until attaining this suitable representation, the ministers will appoint, to the extent that circumstances permit, directors from the Arab population." A year and a half after the enactment of this amendment, it was found that the Arab minority was not suitably represented on the boards of directors of government corporations. Of 584 directors, only 25 – including only seven women – were from the Arab minority (4.28%).<sup>13</sup> A detailed study conducted on the distribution of Arabs in government corporations found that some government ministers have never proposed an Arab candidate, male or female, to serve on the board of directors of a government corporation. Thus, for example, data provided to Adalah by the Government Corporations Authority indicates that since the enactment of Amendment 11, the education minister has recommended 16 candidates, not a single one of whom was Arab. The minister of national infrastructures has recommended 66 candidates, including only two Arabs. The finance minister has recommended 33 candidates, only one of whom was Arab. These figures, in addition to the non-implementation of the law and the Supreme Court's ruling on the first IWN case in regard to Arab women, as well as Adalah's extensive correspondence with government ministers on this issue since 1997 (which failed to produce results) led Adalah to submit a petition to the Supreme Court in 2001.<sup>14</sup>

The petition submitted by Adalah, and so named, argued that government ministers failed to apply the law guaranteeing fair representation for women from 1993 to Arab women, and that the same holds true for the entire Arab population since passage of the subsequent amendment concerning this population in 2000. In regard to Arab women, Adalah emphasized the importance of recognizing them as a distinct group suffering from special historical deprivation distinct from that experienced by Jewish women and Arab men. The petition argued that the ministers' failure to fulfill their duty toward Arab women dated back to 1993, when the law was first amended with the obligation of ministers to appoint women until suitable representation was attained. The ministers violated their duty by not appointing Arab women. Thus, these women were discriminated against twice, on the basis of their gender *and* on the basis of their nationality. In other words, Adalah sought to read into the concept of "suitable representation for women," which was extensively and generally discussed in the first IWN ruling, Arab women as well and to give this ruling universal meaning that also includes them. The petition asked the Court to interpret the expression "suitable representation for women" as one that is not oblivious to "all women."

The state, via the Attorney General's Office, did not dispute the lack of suitable representation for Arabs, both women and men. Yet, the state claimed that the legal obligation of ministers to work for the appointment of Arabs is relative rather than absolute and depends on "the circumstances of each case." From the state's perspective, the ministers' obligation to appoint Arabs only began with the amendment enacted in 2000 – that is, twenty months before the response to the petition was written. In regard to Adalah's argument that the state's obligation toward Arab women had been violated since 1993, the state attorney responded that it does not recognize any special obligation toward Arab

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unchanged (ranging between 34 and 36% of all directors). In parallel, the huge gap between Arab and Jewish women remained unchanged. The increase in the percentage of Arab women was miniscule. See Ali Haider, "Arab Citizens in the Civil Service," *Sikkuy Report: Equality and Integration of the Arab Citizens in Israel 2000-2001*, June 2001; letters to Adalah by Ms. Noga Kadosh, Secretary of the Public Committee for Reviewing Appointments, dated 30 December 2002 and June 2005.

<sup>12</sup> Amendment 11, based on Article 18a1 of the law.

<sup>13</sup> From a letter to Adalah, dated 28 November 2001, from Ms. Noga Kadosh of the Government Corporations Authority.

<sup>14</sup> H.C. 10026/01, *Adalah v. The Prime Minister et. al.*, Takdin Elyon, 2003 (2), 65 (hereinafter: "H.C. Adalah").

women and that if there is such an obligation, then it should be grounded in **law**.<sup>15</sup> The state also stated:

The responding ministers wish to emphasize that, despite the fact that **there is no special obligation for suitable representation of Arab women on the boards of directors of government corporations**, they are working to locate female candidates in the Arab population and to appoint them as directors. However, these efforts have led to identifying a relatively small number of Arab women compared to other women and Arab men."<sup>16</sup> (Emphasis added)

Thus, in the state's view, the obligation is to appoint women and not necessary Arab women; the duty to appoint Arab women must be anchored in law. Since the law lacks particularity in regard to the identity of the women, the state is exempt from interpreting it as containing an obligation to appoint Arab women.

The state also noted that it was making an effort to identify candidates, but it said nothing about the extent of these efforts. Instead, the state's response says that its limited success in locating Arab women was not due to the quality of its efforts but rather to the relatively sparse supply of suitable candidates.

The Supreme Court accepted the state's position, rejected the petition and ruled that the state should be allowed to continue to work toward increasing Arab representation on boards of directors of government corporations. The ruling did not say a word about the state's failure to apply the law, nor did it discuss the first IWN case as clearly including Arab women. The Court's decision in the Adalah case is problematic from both a factual and legal perspective.

In the ruling, Supreme Court Chief Justice Barak writes that the two sides are not disputing the obligation of the respondents according to the articles of law requiring suitable representation for women and for the Arab population.<sup>17</sup> In Barak's view, the disagreement between the sides is, "*What is the pace of realizing the obligations imposed on the respondents from all articles in the law?*"<sup>18</sup> and "*Is it possible to derive lessons for this case from the pace in which the articles were implemented for other entitled groups?*" It is not clear how the Court reached its conclusion about the lines of dispute between the parties. The dispute between the two parties was clearly different from the outset: The state, through its ministers, did not carry out what the law mandated in regard to Arab women for over eight years, despite the fact that the law was beginning to be implemented *vis-à-vis* Jewish women; the state did not provide any details about its efforts to attain and locate suitable Arab women; the state did not provide any satisfactory explanation for why its obligation to appoint Arab women arises only after anchoring the obligation for suitable representation of the Arab population and not from the amendment that came years earlier about suitable representation for women. The question of the pace of the implementation of the law was not the subject of the Supreme Court petition. Discrimination, exclusion and selective enforcement of the law and legal rulings that pretended to speak in the name of "all women" constituted the basis of this petition.

The Court's response to the question over the pace it set for itself is also problematic, and it would not be an exaggeration to say that it is tainted with prejudice. The Court set as a principle that the unique characteristics of a particular group should be taken into consideration when judging the pace of attaining suitable representation for members of the group. In regard to the Arab population, and Arab women in particular, the Court was

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<sup>15</sup> It should be noted that on 27 December 1997, the Knesset speaker was presented with a private member's bill that sought to establish the obligation for suitable representation of Arab women in the civil service. The state opposed this amendment, arguing that there was no need for such a law.

<sup>16</sup> Paragraph 26 of the state's response from 26 March 2002.

<sup>17</sup> Articles 18a and 18a1 of the law.

<sup>18</sup> H.C. Adalah, paragraph 8 of the ruling.

convinced that the pace at which the government ministers had acted was justified in light of the difficulty in finding Arab male and female candidates.

The Court did not seek to study this difficulty by checking the reasonability, effectiveness and scope of the measures the state claimed to have taken generally, but rather relied on data collected by the petitioner. The petitioner presented data to the Court showing that in 1995, there were over 28,000 Arab citizens of Israel with academic degrees who could be potential candidates for directorships. In addition, Adalah submitted a list of 50 candidates whose names were presented to the state; despite this, no one took the trouble to investigate the possibility of appointing them as directors. The petitioner further noted before the Court that in addition to this list of 50 names, there was a reserve list of 100 candidates who were apparently suitable candidates. The state was invited to examine this reserve list, but did not respond.<sup>19</sup> The petitioner's intention was clear: had the state so wished, it could have made an effort to identify relevant Arab candidates, male and female. However, instead of pointing out the state's error and rejecting its contention (which was not based on any serious examination) that there exists a lack of women with suitable qualifications, the Court preferred to adopt the state's position and did not challenge it.

The question over the difficulty in locating suitable female candidates did not arise at all in the first IWN case. The insupportable ease with which the Court accepted this argument in the Adalah case, without the state's bothering to provide a factual basis for it, reflects distorted, underlying assumptions that appear to have guided the Court regarding the qualifications of Arab women as opposed to Jewish women. If the Court had agreed that Arab women were included under the protection of the IWN ruling, this would have led to the conclusion that their unique characteristics should not constitute an obstacle to applying this ruling to them. On the contrary, as women protected under the IWN ruling, **their unique characteristics become a reason for the state to exert increased efforts to meet its obligations under the law.** The Court ignored the fact that the slow pace of appointment could also be an indication of a failure to take the necessary measures in accordance with the characteristics of a group of women.<sup>20</sup>

The issue of the status of Arab women won attention on the last page of the ruling, where it is stated that the matter requires further study. The Court preferred not to discuss this issue as it believed that it raises a "complicated" question and also because the petitioner (Adalah) did not provide examples of candidates who meet the combined conditions of eligibility and whose candidacy did not receive appropriate consideration. The Court's second argument regarding the lack of an injured petitioner is especially puzzling because it is not the first time that the Court is asked to rule on the question of suitable representation in general and of women in particular where the petition is presented by a public petitioner rather than injured women. Thus, for example, in the first IWN case, the Court did not mention the matter of the right of standing and even accepted the petition and canceled appointments after they had

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<sup>19</sup> As of the date the petition was written, at least.

<sup>20</sup> The efforts the state should take to prove that it was impossible to appoint a person belonging to an eligible weak group were discussed in the first IWN ruling. Justice Matza explicitly ruled that the scope of efforts depends on the type of appointment involved and that "the circumstances of the case" the law refers to do not include a situation in which the state was indolent and did not fulfill its obligations. This means that a general statement about a general difficulty is insufficient; this difficulty must be identified in the circumstances of each particular case and in each particular appointment – something that was not implemented in the Adalah case. Justice Matza also ruled that a minister does not fulfill his duty by conducting a "formal" search for a candidate; to fulfill his duty faithfully, he must take reasonable steps aimed at bringing a suitable candidate (the first IWN case, p. 528). It goes without saying that if it had so desired, the state could have sought the assistance of numerous professional organizations, various universities and colleges, and non-profit groups in an attempt to reach its target audience. These reasonable efforts were not made in the Adalah case and, as a result, the state did not succeed in meeting its burden of proof, thereby violating its legal duty. It is important to note that, contrary to Justice Matza, who supports the approach of calling upon the assistance of external organizations, Justice Kedmi's minority opinion in the first IWN case was that there is no need to call upon external organizations and that reasonable diligence suffices.

already been approved. In the second IWN case,<sup>21</sup> the petition was presented solely by a public petitioner, without a list of injured women, and the Court accepted the petition and expanded the obligation of providing suitable representation for women in the management of statutory bodies, even in cases in which the law does not directly apply. In a ruling on a case brought by the Association for Civil Rights in Israel (ACRI), the Supreme Court adopted the same approach that it took in the second IWN case and mandated suitable representation for the Arab minority on the Israel Lands Administration's Council. The question of the petitioners' status as public petitioners and not as injured parties was never part of the Court's considerations when deciding to accept the petition.<sup>22</sup>

Thus, the Attorney General's Office and the Court erred in their failure to regard Arab women as constituting a group that is itself protected from discrimination while also belonging to the general group of women. Just as discrimination on the basis of sexual orientation was recognized as a separate category of discrimination even before it was anchored in law,<sup>23</sup> the recognition of discrimination on the basis of gender *and* nationality follows from the recognition of the universal identity of women as including women with clear particularistic aspects.

The IWN case is a clear example illustrating the shortcomings of universal rhetoric: it pretends to speak in the name of all women but in practice excludes many of them. Both the petitioner and the Court in this case referred to the rights of suitable representation, ostensibly for all women, without attributing a particular national identity. However, it turns out that in practice, the implementation of the Court's ruling applies only to Jewish women, and this widens the gap between the two groups of women on the basis of national belonging. In the Adalah ruling, Arab women sought to implement and to be included in the IWN ruling, while emphasizing that the IWN ruling applies to all women and not just Jewish women. That is, they tried to give a universal definition to the expression "representation of women" to include both Arab and Jewish women. The Supreme Court ruled that this demand was "complicated," and, according to the Attorney General's Office, there is no such identity as "Arab women" that requires suitable representation and, if there were, it must be anchored in explicit and separate legislation.

This situation requires, in my view, a new definition of the expression "the universal identity of women." This identity must be included within the characteristics of oppression of non-dominant groups, such as belonging to a national or racial minority that suffers discrimination. We should not suffice with the overall definition based only on gender affiliation. The ruling in the case of *Alice Miller*<sup>24</sup> is another example of an ethnic-essentialist feminist legal achievement which is not universal. This case, which revolved around the issue of women's rights to serve in the Israeli Air Force, was presented as a case involving the rights of all women in Israel and in the name of "we women," despite the fact that Arab women's movements in Israel do not regard this struggle as a feminist struggle. On the contrary, they view this demand as a Jewish women's request to join a circle that oppresses and is opposed to their entire worldview. What was clear in this case was that Arab women would not enter the Israeli Air Force and would even oppose such a demand on feminist

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<sup>21</sup> H.C. 2671/98, *Israel Women's Network v. The Labor and Welfare Minister*, PD 52 (3) 630.

<sup>22</sup> It is important to note that in the first IWN case Justice Kedmi mentioned in one sentence the issue of a lack of injured women, though his minority opinion was not based on this fact.

<sup>23</sup> A good example of this is the Canadian ruling in *Vriend v. Alberta*. The petitioner was not accepted to work at a private Christian college after declaring that he is gay. The college argued that sexual orientation is not included among the groups protected from discrimination under the Individual's Rights Protection Act RSA 1980. The Court ruled in favor of the petitioner, deducing from the legislation (also called "reading-in") that gay and lesbian groups are included among those slated to benefit from the legislation. It was determined that there is no cause to discriminate between groups when they meet the aims of the legislation. See *Vriend v. Alberta* (1998) 156 DLR (4<sup>th</sup>) 385.

<sup>24</sup> H.C. 4541/94 *Alice Miller v. Security Minister, et. al.* PD 49 (4) 94.

grounds. One of the obvious conclusions is that the feminist struggle as presented in the *Alice Miller* case was ethnic and not universal.<sup>25</sup>

I believe that feminist critical literature is wrong in seeking to oppose the use of universal identity. This mistake derives from the fact that this literature surrenders to the dominant meaning of the definition of what constitutes "uniform and universal identity," while it would be possible to define this differently. Our task as critics is to provide other content for definitions and not to reject them out of hand. "Uniformity" is that which includes all of the components of oppression and does not ignore them.

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<sup>25</sup> See Hassan Jabareen, "Toward Critical Approaches of the Palestinian Minority: Citizenship, Nationality and Feminism in Israeli Law," *Pilim*, 9, 11-93 (2000) (Hebrew).