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Reciprocal Antidiscrimination Arguments

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Rights and Reciprocity

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This Article addresses a common characteristic of antidiscrimination law: To what extent should one antidiscrimination campaign be held accountable for other, related, discriminatory structures that it does not and cannot purport to correct? Plaintiffs in antidiscrimination cases are sometimes expected to account for the larger social context in which their claim is made. Defendants invoke this larger context as a way of rebutting the discrimination claim, by arguing that the plaintiff’s claim has “discriminatory residue” that would exacerbate related discriminatory structures. For example, in a case in which same-sex couples seek the right to contract with surrogate mothers, the defendant can argue that accepting the plaintiff’s claim that they are discriminated against on the basis of sexuality might exacerbate the exploitation of surrogate mothers. This Article dubs such rebuttal claims RADARs: reciprocal antidiscrimination arguments. It offers a framework for weighing RADARs’ feasibility, by mapping both their potential and their limitations. It concludes that RADARs can be useful analytical tools for legislators and policymakers when assessing the overall impact of specific antidiscrimination measures. RADARs are also helpful for cause lawyers in considering the long term impacts of antidiscrimination litigation. In contrast, courts should be cautious in accepting RADARs made by defendants in antidiscrimination cases due to the inherent institutional and procedural limitations of adjudication.
INTRODUCTION: THE QUESTION

Discrimination claims often challenge courts. One central reason is that claimants in discrimination cases ask the court to “zoom in” and focus on one aspect of what are otherwise rich and intricate institutional, organizational, or socio-legal arrangements. Remedying the discrimination claim requires a surgical dissection of sorts; a removal of a malignant discriminatory arrangement while keeping the rest of the organizational settings structure intact and the organism viable. Yet, such judicial dissections often seem artificial since they do not sufficiently take into account the larger context—the complex organism in which the discrimination takes place. It therefore might be tempting for courts to “zoom out” and examine the discriminatory arrangement within its larger organizational, institutional context as part of its analysis.

This Article questions whether it is desirable that courts go beyond the narrow scope of the discrimination dispute brought before them and examine the larger context of discrimination. It explores one aspect of the larger discussion on the scope and nature of the power of courts in general and in antidiscrimination cases in particular.1 The starting point of this Article is De La Cierva Osorio De Moscoso v. Spain,2 a European Court of Human Rights (ECtHR) case that raises the “zooming out” question in full force. The ECtHR jointly discussed the applications of four Spanish women—the oldest daughters in families in which a parent or a relative had passed away leaving a nobility title. These four women, had they not been females, would have been next in the order of succession. According to the Spanish law of title succession, these women were skipped over because their younger brothers, being male, had precedent. The applicants argued a violation of their right to private and family life under Article 8 in conjunction with the antidiscrimination clause in Article 14 of the European Convention of Human Rights and Fundamental Freedoms.3 As women, they were discriminated against on the basis of sex with regard to their entitlement to inherit nobility titles.

Spain replied to the ECtHR using the “larger context” argument, opining that the applicants’ claim should be rejected because nobility titles originated in hierarchical societies, in which people were unequal citizens by virtue of such

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titles, earned and passed on by rules that contradict contemporary merit-based standards that devalue such status-based social divisions. Thus, continued Spain, the female applicants cannot solely argue against sex-based discrimination while ignoring other forms of discrimination embedded in the titles they seek. At the time of the application, nobility titles lost their status-determining power, and had mere symbolic significance in Spain. Possession of titles provided benefits such as invitations to gallery openings or the opportunity to put one’s name on a wine label, but not much more. It should also be noted that Spain has kept a registry of titles and monitored their succession. The ECtHR accepted Spain’s claim, ruling that the petition should be denied.

The petition was rejected upon the legal reasoning that it would be inappropriate to use antidiscrimination laws to allocate something that is in itself discriminatory and represents an unequal system. The ECtHR, then, rejected the petitioners’ formulation of the discrimination claim as too narrow, and zoomed out to examine the phenomenon of nobility titles more generally. Doing so revealed that nobility titles themselves are inherently non-egalitarian, and therefore, according to the Court, it is incorrect to subject them to the rule of sex equality. This reasoning can be rephrased as saying that one cannot and should not fight for equality by deepening another inequality, or that one cannot ask the law to equally allocate a good that is inherently discriminatory.

Indeed, there is some appeal to this reasoning. The Court refused to accept as-is the petitioners’ formulation of the discrimination claim and broadened its perspective to determine the larger socio-legal arrangement within which the discriminatory arrangement segment operates, leading the Court to conclude that the discrimination question is more complex than initially meets the eye. The women’s request in itself is discriminatory, although they themselves are discriminated against on the basis of sex. The Court found that status stratification lies at the backdrop of sex-discriminatory practices, concluding that within this backdrop it would be strange and out of place to introduce one small “bubble” of non-discrimination.

The appeal of this reasoning is that it represents, at least at first sight, a holistic approach to the law’s workings. Whereas the petitioners argued sex-based discrimination, Spain and the Court replied that the petition would deepen class-discrimination (albeit symbolic rather than material). If the goal of antidiscrimination law is to eliminate discrimination, then this goal is best served when legal decisions are based on a deeper and larger conceptions of equality and do not confine

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4 De La Cierva Osorio De Moscoso v. Spain, supra note 2, at 8.
5 Id. at 9.
6 Id. at 11.
themselves to a narrow, formalistic examination of discrimination that the plaintiff (justifiably or not) frames. This reasoning is analogous to the doctrine of “unclean hands” in private law.7

In seeking to theorize this type of reasoning, this Article begins by mapping additional cases in which such arguments are raised, and proceeds by considering how courts should determine whether to apply this logic: What is the vision of equality that should lie at the basis of judicial decisions when judges deny discrimination claims on the grounds that the claims are themselves discriminatory? To what extent can the discrimination claimant be held responsible for other forms of discrimination that are in the vicinity of the discrimination he or she highlights, but that would not be remedied — or would even be exacerbated—if his or her claim is accepted? How should we think of the scope of the mandate of courts in examining discrimination claims: are they to remain within the narrow analysis of the discrimination phenomenon that claimants bring before them, or should they widen their analysis and examine discrimination within the broader context in which it occurs?

In this Article I name the argument that remedying one type of discrimination would produce or exacerbate another type of discrimination, and begin theorizing its weaknesses and strengths. As mentioned above, the ECtHR gave this argument considerable weight. I suggest that the contextualization as conducted by the ECtHR should be examined through a prism of reciprocity: The Court held that the petitioners should not ask to remedy their discrimination if they cannot reciprocate by formulating a discrimination claim that is itself “clean” of discrimination. If the petitioners’ appeal to the law’s remedy is itself discriminatory, then it would not be right to remedy their discrimination claim. I, therefore, dub this reasoning reciprocal antidiscrimination argument or RADAR. RADARs are claims used against plaintiffs in discrimination cases, according to which a plaintiff will not win if his or her discrimination claim is tainted with discriminatory residue.

This Article works through both the potential and the pitfalls of a reasoning that denies discrimination claims as tainted because of their reliance on other hierarchical and discriminatory structures. My goal is not to offer an exhaustive blueprint, but to conduct an initial typology that I hope to be helpful for courts and claimants to tackle the dilemma of RADARs.

The discussion is structured as follows: Part I reviews case law in which courts and parties to litigation raise the reciprocal antidiscrimination argument. Part II discusses the promises and advantages of the reciprocal discrimination arguments, and Part III explores the challenges and complexities of these arguments. Finally,

7 For elaboration on the relevance of unclean hands see infra, text near note 24.
the conclusion offers normative guidelines for determining whether and when to rely on reciprocal antidiscrimination arguments.

I. LEGAL CONTEXTS IN WHICH RADARs ARE FOUND

The Spanish case seems unique because it is easy for us to identify with the Court’s sense that there is something condemnable, or at least unappealing, with the applicants’ efforts to gain access to nobility titles. Of all goods to which women and men should have equal access, nobility titles seem an item that should be placed at the bottom of the priority list, if included at all. Nobility titles indeed represent a bygone world of arbitrary hierarchies, and it is hard to recognize why granting women equal access to titles would enhance a substantially more egalitarian world.

However, this case is not unique. As I demonstrate in this part, many antidiscrimination claims can be presented as tainted with a similar problem, namely, that granting plaintiffs equal access to the goods or opportunities they seek would have adverse impact on someone else’s equality, and, therefore, in which RADARs can be framed to block the plaintiffs’ argument.

In the cases enumerated below, RADAR is not manifested as neatly as in the nobility titles case. Rather, arguments that the plaintiff’s antidiscrimination claim lacks reciprocity are usually raised by defendants or critics of the judicial ruling and not by courts. RADARs are also often considered by cause-lawyering organizations to determine whether and how to litigate, while taking into account the broader, strategic implications of their chosen tactics. Yet, as the nobility titles case might suggest, there is certainly a potential that RADARs will become a common judicial technique to deny antidiscrimination claims, and, therefore, it is important to consider its merits.

A. GAY COUPLES’ RIGHT TO HIRE SURROGATE MOTHERS

The field of reproductive rights provides a good example of the potential power of RADAR to rebut discrimination claims. Israeli law uniquely regulates the manner couples may enter contractual relationships with surrogate women.\(^8\) Accordingly, a governmental committee of experts must approve every surrogacy agreement subject to various conditions dictated by ethical and Halachic considerations, in order to prevent personal status problems. One example of a personal status problem is mamzerut—a Jewish status that occurs when a child is born to a married women

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\(^8\) Surrogate Motherhood Agreements (Approval of Agreements and Status of the Newborn) Law, 5756-1996, SH No. 157 p. 176 (Isr.). For an English translation of this law, see CATHERIN A. MACKINNON, SEX EQUALITY 1367 (2001).
and fathered by a man who is not her husband. Thus, the law permits only married couples to enter a surrogacy agreement with unmarried surrogate mothers; moreover, single men or women, or same sex couples, cannot enter a surrogacy agreement. In a petition before Israel’s Supreme Court sitting as the Israel’s High Court of Justice (HCJ), a gay couple argued that the surrogacy law is unconstitutional since it discriminates based on sexuality.9

The petitioning couple was represented by the Human Rights Clinic of the Faculty of Law, Tel Aviv University. However, this couple first turned to a prominent Israeli NGO, the Association for Civil Rights in Israel (ACRI), for representation. Yet, due to a RADAR consideration—the sense that surrogacy agreements raise gender equality and commodification problems—ACRI was reluctant to take the case. ACRI was concerned that most surrogate mothers enter surrogacy contracts out of financial constraints, which objectify them to becoming “baby machines,” commodifying that which cannot be a commodity—their emotional and physical labor of pregnancy and childbirth. Moreover, recognizing that these babies are also problematically commodified,10 ACRI lawyers thought that correcting the wrong committed against gay couples—discriminating against them compared to straight couples—should not be at the expense of exacerbating discrimination against potential surrogates.

**B. WOMEN IN MILITARY COMBAT ROLES**

The next example is from the field of sex equality. In *Alice Miller v. Minister of Defense,*11 a young female pilot petitioned the HCJ to instruct the Israeli Defense Forces (IDF) to allow women to compete to serve as air force pilots. Until this petition, women were banned from serving in military combat roles. Miller was represented by the Israel Women’s Network (IWN) and by the ACRI. The High Court found for the petitioner and declared the IDF policy unconstitutional, since it violated the right to equality by compromising Miller’s right to human dignity. This case had implications beyond the narrow question of women pilots and lead to a military-wide reform—opening many other combat roles to women.

Yet after the case was decided, critics argued that the petition failed to serve the purpose of promoting sex-equality. Had Miller’s discrimination claim been examined within a broader context, its discriminatory residue would have become

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9 The petition was withdrawn because the Government established a committee to examine Israel’s reproduction policy. HCJ 1078/10 Arad-Pinkas v. The Approval Committee (unpublished decision, June 28, 2010).

10 On the problem of surrogacy and commodification, see Margaret J. Radin, *Contested Commodities* 140-44 (1996).

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apparent. The very remedy sought by the petition betrays worthy norms of equality since the petitioner seeks a place in an organization that discriminates and oppresses others. Some arguments against the petition were expressed as:¹²

1. The IDF oppresses and operates aggressively against Palestinian women, men, and children in Israel and in the occupied territories. Therefore, by seeking to do away with one form of discrimination (sex-based discrimination against Jewish women), the petition ignored the ways in which it contributes to other forms of discrimination and oppression. In this, the petitioner not only betrayed other types of inequality (nationality and religious discrimination), it also ignored sex-equality considerations of fellow women.¹³

2. The petitioner sought to enter as an equal into an organization that is inherently hierarchal and patriarchal. The petition failed to decrease the discrimination level in the IDF, and by joining it increased its hierarchical structure, portraying it as prestigious, and abiding by its rules.¹⁴

3. Many Jewish women are also betrayed by this petition since they are not privileged enough to be eligible as candidates for combat roles (roles typically given to candidates of strong socio-economic backgrounds). Therefore, the petition does not serve a general sex-equality interest, but a sectarian one—beneficial to a small and elitist segment of female soldiers.¹⁵

¹³ Hassan Jabareen, Towards Critical Accounts of the Palestinian Minority: Citizenship, Nationality and Feminism in Israeli Law 9 PLILIM 53 (2000) [in Hebrew]. I have briefly replied to this claim elsewhere. See Yofi Tirosh, Alice through the Looking Glass: Reflections on the Representation of the Female Body in the Discourse in Women in Combat Roles, in STUDIES IN LAW, GENDER, AND FEMINISM 885, 888 n.9 (Daphne Barak-Erez et al. eds., 2007) [in Hebrew].
These arguments are RADARS, since they suggest that a macro examination of the context would have led to the conclusion that the inherent inequality of combat roles, sought by the petitioner, taints her petition (especially since the petitioner did not file alone but was backed by a central feminist NGO). While I am not suggesting that the HCJ would have relied on RADAR to deny this case, in principle, RADAR could have been applied to prevent its adjudication as did occur in *De Moscoso*.

C. HUMAN RIGHTS OF SETTLERS

The context of Israel’s ongoing rule of the occupied territories, and the legal abnormalities it creates, produces many similar dilemmas to the issues discussed above. Typically, these dilemmas arise during the course of action of Israeli human rights NGOs. Such organizations are on the one hand concerned with discrimination—even when Jewish settlers’ rights are violated—and on the other hand are no less concerned with the lingering occupation and the deep structures of discrimination it sustains. They worry that by fighting for, say, sex equality for Jewish women settlers, they might inadvertently contribute to the normalization of occupation.

Here are two examples from NGOs whose work I know firsthand. The first example involves the recent case of ethnic segregation between Ashkenazi and Mizrahi students¹⁶ in an ultra-Orthodox Jewish girls’ school in the settlement Emanuel.¹⁷ Lawyers of *Tmura*, an Israeli NGO working on attaching monetary value to discrimination cases, were torn between supporting the Mizrahi girls, denied education under conditions of equality and respect, and their concern that through their campaign against one aspect of racism in the territories they could unwittingly legitimize the racist and nationalist realities of discrimination between Israelis and Palestinians in the territories. Such a problem can easily lead to invoking a RADAR—fighting against Mizrahi girls’ discrimination is incorrect when its remedy would enhance these girls’ ability to live in the occupied territories, where discrimination against Palestinians is ubiquitous.

The second example involves the dilemma of *Itach-Maaki*, an NGO working for the rights of poor underprivileged women who took it upon itself to help unionize ultra-Orthodox women working as kindergarten teacher aides. Since Jewish

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¹⁶ The ethnic differentiation between Ashkenazis and Mizrahis refers to the origin of Jewish immigration to Israel. Those whose forefathers immigrated to Israel from Europe and North America are considered Ashkenazi, and those whose forefathers immigrated from Arab and North African countries are considered Mizrahi.

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religious conventions dictate that women are not allowed to take leading roles, these women are unionized in a male-governed union that openly discriminates between women’s and men’s labor standards. When the NGO advanced its efforts to mobilize employees, however, it found that although union members and kindergartens are spread throughout Israel, the women who are most active and willing to mobilize and lead reside and work in settlements in the occupied territories. This fact raised a question whether by representing these women and advocating for settlers’ labor rights the NGO is also legitimizing the occupation.

Which axis of discrimination and injustice should be more significant in this context: discrimination against women in a patriarchal society or the discrimination of Palestinians, for whom the daily lives these women lead in the territories prompt many forms of violations of their basic rights? To complicate the picture even more, some argue that these ultra-Orthodox women may not only be the victims of their patriarchal community but also of Israel’s discrimination and neglect of Mizrahis—a policy that pushed them to live in the subsidized settlements as the only viable option for affordable housing. (Many of these women, like their husbands, are not “hard core” settlers, motivated by “greater Israel” ideology).  

Turning the argument on its head once again, advancing labor rights would raise employers’ costs in the territories, which would, plausibly, weaken Israel’s hold in these areas.

Up until this point, I have surveyed RADAR cases that have the potential to prevent the discriminated plaintiff from suing or serve the defendant by convincing the court that the plaintiff’s claim is tainted with discriminatory residue, and, hence, should be rejected. Yet, unlike the result in De La Cierva Osorio De Moscoso v. Spain, it was highly unlikely that Israeli courts would have accepted RADARs to deny discrimination claims: Unlike nobility titles, which have a symbolic and controversial status in Spain, the goods and opportunities sought after by the plaintiffs (military service in a militaristic society, the right to parenthood in a society that actively encourages child-birth, and the Jewish hold of occupied territories in a country that despite a rhetorical commitment to peace facilitates and subsidizes Jewish settlements in Judea and Samaria) are all understood to be part of the normal, and even essential, elements of Israeli politics, society, and economy. In other words, the plaintiffs sought mainstream goods and opportunities that do not have the same “unpleasant aftertaste” as nobility titles. With that said, like the

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18 For an eloquent formulation of this argument, see YEHOUA SHENHAV, THE TIME OF THE GREEN LINE: TOWARDS A JEWISH POLITICAL THOUGHT (2010) [in Hebrew].
nobility titles case has equalizing influences for some, discriminatory effects for others, and in principle is subject to be rebutted by RADARs.

II. RADARs’ Appeal

In Parts II and III, I consider the promises and the shortcoming of using RADARs in discrimination cases. This discussion aims to provide tools, both to cause lawyers and judges, to assess reciprocal antidiscrimination arguments when encountered.

As a means to trace and uproot deep non-egalitarian structures, RADARs’ call for zooming out to the larger social structure seems, at face-value, desirable. RADARs’ appeal lies in their ability to prompt the advocate or court to consider the wider context of a given discrimination claim. They contest the manner the discrimination claim was framed in litigation, focusing attention on broader and deeper structures of discrimination. Indeed, women are discriminated against in the succession line of nobility titles, but nobility titles are based on a discriminatory class structure. Or—yes, gay male couples are discriminated against compared to heterosexual couples in the access to surrogacy contracts, but surrogacy contracts are exploitative of many women and deepen their discrimination.

RADARs are also appealing because they facilitate the use of litigation as a platform—not necessarily to achieve an immediate remedy—but for raising awareness and creating public discourse and policy initiatives for larger discrimination issues that might have otherwise gone unnoticed. Indeed, the petition of gay couples for access to surrogates has lead to the establishment of a governmental committee mandated with examining the entire framework of Israeli law’s regulation of fertility rights. Such developments are potentially more democratic than litigation and can lead to more comprehensive and coherent legal arrangements.

RADARs’ strength is also found in their ability to return the discrimination issue to the plaintiffs, and ask for their critical self-reflection on the manner they framed their discrimination lawsuit and the very choice of what to fight for. Invoking RADAR against the Spanish female applicants to the ECtHR, for example, could allow the former to reconsider whether equal access to nobility titles indeed represented worthwhile values of equality. Similarly, RADAR can invite critical self-reflection for the NGOs fighting for Alice Miller—IWN, ACRI—whether

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21 I am grateful to Yossi Dahan for this point. On the effects of litigation in steering public debate and prompting mobilization, see Gad Barzilai, Law as a Field in the Framework of Political Power: Are Courts Carriers of Socio-Political Change, and If So—How?, in DOES LAW MATTER? 107, 117 (Daphna Hacker & Neta Ziv eds., 2010) [in Hebrew].
fighting for women’s participation in the military is the most pressing challenge facing women’s equality in Israel. RADARs, then, pave a path to contest the narrow design of discrimination claims, formulated without appropriate consideration of the deeper and larger structures of inequality.

III. RADARs’ Pitfalls

A. The Unbearable Ease of Producing RADARs Against Discrimination Plaintiffs

In contemporary society, inequality is omnipresent and multilayered. Therefore, every legal claim seeking to correct discrimination is likely to touch upon other forms of discrimination with which it is in tension. This renders the task of formulating a RADAR an easy one. A RADAR can be designed against almost any antidiscrimination claimant in any context of antidiscrimination law. We should thus be highly cautious against its ubiquitous, routine use to block discrimination petitions.

Discrimination claims are usually made within a complex context of social, cultural, and legal arrangements. As is common in the present socio-political world, these arrangements are imbued with discriminatory structures. It is to be expected, then, that a discrimination claim like Alice Miller’s, arguing against exclusion of women from a certain civic domain, will be surrounded by forms of inequality and discrimination of women from other backgrounds, and of other underprivileged groups, such as Palestinians. It is similarly to be expected that a discrimination claim made by homosexuals will be interrelated to other forms of discrimination, in this case potential surrogate mothers.

Furthermore, because it is reasonable to assume that most plaintiffs in discrimination cases, as opposed to defendants, are members of underprivileged groups (women, people of color, etc.), these plaintiffs are burdened twice: once by the discrimination experienced in their socio-legal lives, and second by the fact that they are more exposed than defendants to RADAR-type rebuttals of their discrimination claim. It is hard to think, then, of an argument against one form of discrimination that would be “bulletproof” against the defendant’s ability to

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22 See Barak-Erez, supra note 12 (framing the struggle of Israeli women to serve in combat roles as a struggle for citizenship).

23 But see Charles A. Sullivan, The World Turned Upside Down? Disparate Impact Claims by White Males, 98 Northwestern L. Rev. 1505, 1506-11 (pointing to instances in which members of dominant groups can have a disparate impact claim, which is more common than usually assumed).
argue that the claimant has not gone far enough, and had they really cared about
discrimination they would have refrained from submitting their own discrimination
claim due to its discriminatory residue.

Therefore, formulation of RADAR should not in itself serve as an indication
of its merit. But another question should be explored in this context: What if a
plaintiff actually tried to avoid RADARs and to submit a claim that would be free
of discriminatory residue? That is, can plaintiffs design discrimination claims that
would not have a negative impact on the discrimination of others? This question is
explored in the next section.

B. RADARs AND INSTITUTIONAL CONSTRAINTS ON THE PLAINTIFFS

Even if we accept the appeal of RADARs, and think it would be desirable if
discrimination plaintiffs designed their claim in a way that is more responsible to
its discriminatory side effects—I maintain that this is mostly an impossible tasks
due to the institutional constraints put on plaintiffs in litigation. Standing (even
when the standards are very relaxed, as in Israel) requires that a plaintiff points to
a concrete wrong that could be remedied by a writ that is within the authority of
the court. In that sense, discrimination claims must be concrete; they must identify
who is disadvantaged by the alleged discriminatory practice and delineate a remedy
that the court could issue.24 RADARs, on the other hand, often point to much less
concrete forms of discrimination. The deeper structures of inequality that they
expose tend to spread beyond what can be contained and processed in one case.

In the Spanish nobility title case, for example, Spain’s argument implied
that rather than worry about sex-discrimination in accessing nobility titles, the
petitioners would have been just (from the standpoint of equality) had they argued
that nobility titles should be abolished altogether since titles represent the old non-
egalitarian world. Yet institutional constraints become pivotal at this point: Spanish
women, offspring of nobility but themselves not entitled to nobility titles, claiming
in court that the nobility titles should be abolished altogether—would have most
likely lack standing. Courts have tools to deal with particular claims of parties
that can demonstrate their injury. In this hypothetical case, petitioners would need
to start by demanding a remedy before they have proved their injury. The absurd
now becomes apparent: had the Spanish women claimed that nobility titles should
be altogether abolished, the defense and the court would have probably replied
that applicants can only argue against their own sex-discrimination and not posit a
general attack on nobility titles unrelated to their specific injury.

24 Moreover, as Gad Barzilai notes, even when discrimination plaintiffs are interested in
raising the larger structure of discrimination in court, they are often aware of courts difficulty in
responding to the larger questions. See Barzilai, supra note 21, at 114.
C. RADARs AND INSTITUTIONAL CONSTRAINTS ON COURTS

If plaintiffs face difficulties incorporating RADAR concerns, what should courts do when they confront this dilemma? Should courts zoom out to consider the larger context of discrimination, and be mindful and open to RADARs? I maintain that they should not, because such a task is inherently external to the institutional constraints within which courts operate.

Let me illustrate this point by discussing Center for Women’s Justice v. The Management of the Rabbinical Courts.²⁵ In this case, it was the plaintiffs themselves who tried to design their discrimination claim more widely, by requesting that the Court zooms out to the deeper discriminatory structure at play. The Court’s insistent rejection of any attempt to widen the context of the case was, in my view, appropriate and demonstrates my argument that courts should decline to accept discrimination arguments that spread beyond the narrow, remediable discrimination wrong.

The defendant sought to fill the position of legal assistants for judges in rabbinical courts (dayanim). Under Israeli law, rabbinical courts have exclusive jurisdiction over matters of marriage, divorce, and some aspects of inheritance law, and they rule according to Jewish law (Halacha). All judges in these courts are male, as warranted by the prevalent interpretation of Jewish law on this matter, according to which women are forbidden from serving as judges in questions pertaining to religious law.²⁶ One of the requirements of potential candidates for the position of legal assistant was that they are ordained as rabbis in an institution recognized by Israel’s Chief Rabbinate. This requirement effectively meant that women were categorically blocked from competing for this office because, in Israel, the Rabbinate does not ordain women as rabbis. In pre-trial stages, the defendant agreed to remove the ordainment requirement from the call for applications, but instead added a comment noting that preference would be granted to those ordained to rabbinate.

The plaintiff was an NGO dedicated to protecting Israeli women’s rights to equality, dignity, and justice under Jewish law. In formulating its attack on the legality of the tender, the plaintiff argued that the preference of ordained candidates was discriminatory since ordainment was not essential for the position in question: Possessing extensive Halachic knowledge needed to write briefs for rabbinical court judges is not exclusive to those ordained.

However, this was not the end of the plaintiff’s argument.27 The Center for Women’s Justice added that in examining sex-discrimination in this case, the Court should be especially resolute in its decision to availing the position to women because women are categorically blocked from most other positions in the rabbinical court system, most notably, from serving as judges. Therefore, continued the plaintiff, the rabbinical court system should be viewed as a generally sex-discriminatory body, and, importantly, as such be held accountable to stricter sex-equalitarian standards wherever possible, in order to balance its blanket exclusion of women from judicial positions. The selection criteria for other roles in this institution should therefore be scrutinized with extra suspicion and whenever possible, be made more accommodating for women. Additionally, the plaintiff argued that in light of the absence of women in any other role in the rabbinical courts, the Court should view the position tender as an opportunity to apply the duty for affirmative action—which is mandated by Israel’s civil service law.28

The plaintiff’s argument, then, was RADAR-like: It asked the Court to zoom out and examine sex-discrimination in this particular case within the larger context of the institution in which it had occurred. Only then, argued the plaintiff, would the interests of fairness and sex-equality be fully served.

In finding for the plaintiff and deciding that the preference granted to ordained candidates was indeed discriminatory against women, the Jerusalem Regional Labor Court accepted the plaintiff’s argument. Noting that the occupational qualifications for the position of legal assistant should have been crafted with more care, to capture the actual merits required, and that ordainment to the rabbinate does not accurately define the abilities of excellent candidates. Instead, the tender should require that candidates have an in-depth of knowledge of Jewish law. However, the Court flatly rejected the plaintiff’s RADAR claim and emphasized several times throughout its decision that “the Court is not supposed, in the context of the present decision, to establish whether a norm of women’s discrimination exists in Rabbinical courts. All that is required is to establish whether the present tender is illegally discriminatory.”29 The Court, then, refused to zoom out and examine the question of sex-discrimination within the larger context of the rabbinical courts system, and strictly stuck to the narrow question of the contested tender.

As much as it is tempting to dissect the entire rabbinical courts system and denounce its consistent exclusion of women, I believe the Court’s refusal to widen

27 See id. at paragraph 3, p. 7.
29 Id. at para. 18. (trans. Y. T.).
the scope of examination demonstrates a sound judicial practice. Courts, as opposed to legislators and to policymakers in the executive branch, are well-equipped to adjudicate concrete incidents, involving actual parties, with very specific arguments and evidence. Yet asked to consider general issues beyond the ones brought before them, courts can no longer rely on their regular toolbox—namely the parties’ facts, evidence, and arguments—they have difficulty producing well-reasoned decisions.

Indeed, abolishing discriminatory structures (especially through litigation) is a patchwork process more than it is a comprehensive, all-encompassing one stage pursuit. This incremental nature of widening the coverage of antidiscrimination law stage by stage in increasingly specific areas of socio-legal life, means that no single case is likely to provide an exhaustive, enveloping remedy for equalizing an entire area of institutional or social life. Additionally, RADARs’ zooming out requirement would burden the courts with a task that is potentially infinitely recursive: when widening the judicial inquiry out to larger and larger contexts of discriminatory structures, each enlargement of the context would likely lead to a different analysis of the inequality, and to a different outcome in the case.

I used the case of *The Center for Women’s Justice*, then, to illustrate that as a matter of institutional constraints, courts are right to reject attempts to prompt them to decide on a wide and amorphous scope of discrimination. That is, they are right in refusing RADARs, even when they are raised by a party that is, like in this case, traditionally discriminated and underprivileged.

D. PLAINTIFFS ARE RARELY IN A POSITION TO MITIGATE THE DISCRIMINATORY RESIDUE OF THEIR ANTIDISCRIMINATION CLAIM

RADARs are aimed at plaintiffs in antidiscrimination cases, but plaintiffs in such cases are rarely in a position to mitigate the discriminatory residue of their antidiscrimination claim. Rather, it is often the defendant, the one who points to the possible discriminatory effects of a given antidiscrimination campaign, who can minimize the accompanying discriminatory effects of a given antidiscrimination lawsuit. Again, contemporary social arrangements are imbued with discriminatory structures, and plaintiffs cannot singlehandedly do away with them. For example, in

30 On courts fulfilling the function of dispute resolution, see Steven D. Smith, *Reductionism in Legal Thought*, 91 *COLUM. L. REV.* 68, (1991) (“Unlike a statute, for example, the typical judicial decision directly addresses itself to a discrete dispute involving named contending parties.” Id. 71 (citation omitted)).

31 See also Guy Mundlak, *The Law of Equal Opportunities in Employment: Between Equality and Polarization*, 40 *COMP. LABOR L. & POL’Y J.* 213 (2009) (noting that the legal project of equal opportunity “can help bring change in distinct episodes of discrimination but not necessarily the social infrastructure from which discriminatory values emerge.”) *Id.* 242.
De Moscoso it was the Spanish Government—the party who invoked a RADAR—who had the power to cancel registration of nobility titles, thereby considerably weakening their social significance. In other words, if these titles have such a discriminatory effect—as argued by the Spanish government in its RADAR—then it should have used its power to decrease this effect. Similarly, if surrogacy agreements are a wrongful practice that should be abolished, the legislator has the power to annul it, not same-sex couples. Preventing the latter from enjoying surrogacy agreements in the same manner as enjoyed by heterosexual couples will not address the larger problem—it would just keep the license to use this problematic discriminatory practice in the hands of those who can form a traditional, hegemonic family, i.e., heterosexual couples.

The doctrine of unclean hands provides a useful analogy. The party who invokes RADAR argues that the opposite party’s hands are not clean since its discrimination claim exacerbates another form of discrimination or injustice. Yet, an important feature of the unclean hands doctrine is that it can only be used against a party whose actions or omissions may have had influence on the circumstances producing the right to remedy. The unclean hands doctrine helps recognizing that the plaintiffs in discrimination claims should not be exposed to unclean hands arguments (RADARs), because they do not have the power to reduce the discriminatory residue of their discrimination claim.

This part discussed the shortcomings of reciprocal antidiscrimination arguments. It demonstrated that in a world of ubiquitous forms of inequality, RADARs are easy to formulate against almost any discrimination claimant, and therefore the fact that a RADAR can be formulated should not serve as an indication of its justification. It further showed that even if plaintiffs and courts were to attempt incorporating the lessons of RADARs by considering wider contexts of discrimination beyond the narrow and concrete facts in dispute, they would be limited by institutional constraints such that applying RADAR would not be a viable option.

IV. Conclusion

This Article opened by questioning how to assess reciprocal antidiscrimination arguments—i.e., the argument that a plaintiff’s discrimination claim should be denied because he or she cannot commit to ameliorate other forms of discrimination

32 Plaintiffs who ask for equitable relief are exposed to a defense claim that their hands are unclean. The defendant must demonstrate that the plaintiff failed to act bone fide with regards to his or her demand. See T. L. Anenson, Limiting Legal Remedies: The Doctrine of Unclean Hands, 99 Kentucky L. J. 63 (2010-2011).
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to which their claim is related. What conclusions can be drawn from the above exploration of the appeal and the pitfalls of RADARs? Is this type of argument a useful tool for antidiscrimination law? When should it be employed and by whom?

I conclude with two considerations that should guide litigants and courts in considering whether to rely on RADARs.

First, there is a critical difference between courts’ reliance on RADARs (as part of their examination of discrimination claims) and cause lawyers’ reliance on RADARs in their debate whether to pursue a discrimination claim. Such reliance is more legitimate (and even desirable and inevitable) when employed by cause lawyers in their preliminary selection of cases. As I note in the examples in Part I, many discrimination claims seem just and right until one zooms out to examine the larger context in which they occur. A feminist NGO might well decide not to represent a woman seeking an equal right to become a combat soldier because, although her arguments fit the NGO’s causes, winning this case might be a pyrrhic victory in terms of general concerns for sex equality. Or, depending on context and priority, it might decide that such a case should be pursued because the cause of equalizing women’s civil equality might be served by allowing them more significant participation in military life. Similarly, an NGO working toward ethnic equality might rightfully decide not to take a case involving ethnic discrimination between Ashkenazis and Mizrahis in the territories for this might normalize Israel’s hold in the territories and exacerbate other forms of discrimination. Context matters a great deal in such dilemmas. If, for example, such discrimination is also prevalent in schools within Israel proper, and it is an arbitrary fact that the case that was most ripe for litigation was from the territories, it might be a defendable decision to pursue the case. Organizations might well prioritize their causes, or weigh the potential benefits against the possible drawbacks of winning a given antidiscrimination campaign.

Matters are different when it is courts who take such considerations into account, and decide to deny a discrimination claim because it has a discriminatory residue (as was the case in De Moscoso). Courts, as I show, are poorly equipped to adjudicate matters that fall outside the concrete dispute brought before them. As a matter of institutional division of labor between government branches, attempting to reduce deeper structures of inequality (outside the context of a concrete legal dispute on whether a certain practice is discriminatory) falls within the roles of the legislative and executive branches, who have the means to design in-depth mechanisms to prevent or reduce discriminatory structures.

Second, RADARs should only block those petitioners who have the power to do away with the discrimination cited by the RADAR. As demonstrated earlier,33

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33 See Part III.D., supra.
it was wrong to use RADAR against the Spanish female applicants who were powerless to abolish the practice of nobility titles. If titles are indeed problematic in the hierarchies that they sustain, then neither men nor women should inherit them. Thus, only the Spanish government, which monitors titles succession and keeps a record of them in a registry, was in the position to cancel titles altogether, and, therefore, it was wrong to accept Spain’s RADAR against the female applicants. This consideration is particularly strong when it is the State who invokes RADAR to rebut an antidiscrimination claim. State formulated RADARs should be held in suspicion since it should not be allowed to benefit from its own failure to remedy deeply established discriminatory structure.

Indeed, this consideration may retreat in extremely unjust situations, where overall human rights violations are so severe that not taking the larger context into account might be deeply flawed morally. Consider, for example, South African apartheid or Nazi Germany. It would be inappropriate to examine even a just claim against sex-discrimination among whites in apartheid South Africa, without taking into account the normalizing and legitimizing effects of examining the issue as if business is as usual. Therefore, in such exceptional cases it would be appropriate to accept RADARs that point to the harmful outcomes of examining the merits of an antidiscrimination claim while disregarding its residue.

Finally, I believe that RADARs provide a good opportunity to understand the dynamics of antidiscrimination law. Wide “judicial brush strokes” are not the appropriate means for ameliorating discrimination. Advancing less discriminatory social arrangements is an incremental process, often involving a patchwork of litigation victories and losses, alongside legislative and administrative reforms. Courts cannot, and should not, aspire to reduce discrimination alone. Aiming to expand the judicial gaze over too wide an area might seem at first as a progressive move that serves the cause of antidiscrimination law, but eventually prove to lead to conservative decisions that sustain the status quo. RADARs cast too heavy a burden on discrimination plaintiffs to “purify” their claim from discriminatory residue, and they should be met with suspicion by courts, which are generally ill-equipped to cope with them.\(^{34}\) This is what happened in *De Moscoso*, the case with which this Article opened, and it should not happen in other cases in which RADAR claims might be easily formulated.

\(^{34}\) I am aware that my quite suspicious stance toward RADARs might lead to overly narrow examinations of discrimination claims, and thus, in turn, to regressive outcomes. This risk is certainly worthy of additional consideration, which I hope will be the subject of future research.