

Equality with a Vengeance—Women Conscientious Objectors in Pursuit of a "Voice" and Substantive Gender Equality

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This article examines the story of female draft resisters in Israel. The story serves as a case study that can provide important insights into the inherent constraints of contemporary legal discourse in promoting substantive gender equality and into the relationship between specific legal arrangements and the invisibility of women in the public sphere. This case study also sheds a more complex light on the nature of separate legal arrangements for women, and raises important questions about the appropriate feminist agenda for social and legal change.

I. The Gendered Construction of Conscience

A. Exemptions from Military Service: The Israeli legal Framework

Israel was the first—and is still the only—Western democracy to have mandatory conscription of women. The Defense Service Law mandates military service for both men and women while differentiating between the sexes in terms of conditions of service. Furthermore, as far back as 1949 the Defense Service Law created a gender-based distinction regarding the legal grounds on which a person could be exempt from military service. The Law granted women exemption from military service on three main grounds: family status (marriage, pregnancy or motherhood), religious belief and conscientious objection. These exemptions continue to apply to this day to all women who might otherwise be called to serve in the military.¹

Similar exemptions from regular and reserve military duty have not been formulated for men. Rather, the only legal basis for exemption of this kind is pursuant to a different section in the Defense Service Law which grants the Minister of Defense a general discretion to exempt "a

¹ The relevant provisions of Article 39 of the Law read as follows:(a) The following persons shall be exempt from the duty of defense service – (1)The mother of a child (2) A pregnant woman. (b) A married woman shall be exempt from the duty of a regular service.(c) A woman of military age who has proved in such manner and to such authority as shall be prescribed by regulations, that reasons of conscience or reasons connected with her family's religious way of life prevent her from military service shall be exempt from the duty of that service.

person of military age" from the duty to perform military service for "*other reasons*" (emphasis added).²

B. Historical Background and Normative Context

Why did the law create this distinction between men and women with regard to their military service? A close analysis of the legislative history of the Defense Service Law reveals that the structure of the law reflects a great deal of ambivalence towards women's military service and women's equality in general. Formally speaking, the founding fathers of the State of Israel saw themselves as obligated to the principle of gender equality. The Proclamation of Independence stated that the State of Israel "will ensure complete equality of social and political rights to all its citizens irrespective of religion, race or sex." However, as even a cursory examination reveals, despite the declarative statements regarding equality, the political establishment and the legal system were guided by deeply-rooted stereotypical and patriarchal perceptions of gender and gender roles. Women were perceived first and for most as mothers and wives and as persons whose primary role was the bearing and rearing of children.

It is against this backdrop of tension between, on the one hand, deeply entrenched beliefs regarding the distinctive differences between men and women and, on the other, the pronounced commitment to the principle of equality in general and to sex-based equality in particular, that one should understand the structure of the Defense Service Law. This Law, first enacted one year after the establishment of the State of Israel, was in fact the first law which had to cope with this tension and to accommodate it legally. Thus, we find that the Defense Service Law imposed the draft on women and men alike. On the other hand, married women, pregnant women and mothers were exempt from military service, with hardly any secular or religious members of the Knesset (the Israeli legislature) protesting against this all-

² The relevant provisions of Article 36 read: "The Minister of Defense may, by order, if he sees fit to do so for reasons connected with the size of the regular forces or reserve forces of the Israeli Defense Forces or for reasons connected with the requirements of education, security, settlement or the national economy or for family or *other reasons* (1) exempt a person of military age from the duty of regular service or reduce the period of his service; (2) exempt a person of military age from the duty of reserve service for a specific period or absolutely..."

inclusive exemption or initiating a critical debate on the gendered assumptions underlying this exemption.

Yet while Knesset members from secular parties still endorsed a mandatory draft for some women, representatives of the Jewish religious parties objected to the conscription of women altogether. The strong objection of all religious members of the legislature to any form of military service for women led to the creation of the second type of exemption for women, an exemption on the grounds of religious belief. However, some religious Knesset members still declared that the specific exemption provided for religious women was not satisfactory in their eyes. The more Zionist oriented among the Religious members of Knesset were worried that a specific exemption would stigmatize religious women as a group. They therefore suggested that the religious exemption should be included in a more general category of exemption, that would refer to all forms of conscientious objection to the draft, and not limited to religious grounds.

Following those reservations, and due to the fact that all members of Knesset did not regard women as potential combat material but rather as an auxiliary force of relatively marginal importance, the women's exemption section of the Law was further elaborated. To the exemption based on religious belief they added an exemption based on the grounds of conscience. Hence, the new additional exemption based on grounds of conscience was made available only to women, just like the two other types of exemptions.

This legal framework of a separate right of a woman to conscientious exemption is the one that, over the years, shaped the phenomenon of female conscientious objection in Israel, its scope and its substance.

By contrast, the comparable phenomenon of male conscientious objection was defined differently under the law. As mentioned earlier, in addition to the specific exemptions granted to women, the Defense Service Law states generally that the Minister of Defense is entitled "if he sees fit to do so" to grant exemptions from standard military service or from reserve duty to any conscript for "other reasons". Successive Ministers of Defense have taken the position that the phrase "other reasons" permits them, among other things, to exempt men from regular or reserve service for conscientious reasons. Furthermore, the standard legal

approach when handling such cases was that while pacifists ("full objectors"), who object to the framework of the military service as a matter of principle, could be individually exempt from service, the military had to remain apolitical and therefore could not allow "selective objection" based on objections to a specific war or to a military operation. Consequently, non-pacifists objectors have been tried and imprisoned for "refusal to obey orders".

With regard to women, and due to the different phrasing of the relevant provisions of the law, the common practice for many years was to grant an exemption to both pacifists and "selective" conscientious objectors without distinguishing between the two groups. Female conscientious objectors were therefore able to exercise their basic right to freedom of conscience in a much more comprehensive manner than men, and to that extent women have been privileged by the separate legal arrangement to which they have been subject.

The exact number of women conscientious objectors who exercised this right is unclear, yet it appears that in the aftermath of the outbreak of the second Palestinian uprising in October 2000 the phenomenon of "selective" female drafts resisters who declared their opposition to implementing Israeli policies in the Occupied Territories grew in volume. From that time on, the group-based aspects of the phenomenon became more apparent. It was no longer a matter of a few women resisting draft individually, but rather a group of female conscientious objectors with a shared political agenda exercising their right under the law and winning an exemption from military service. Furthermore, after winning their exemption, many of these women volunteered for national service in a civilian setting such as a hospital or a school, thus replacing military service with social action of another kind. This latter practice added value and significance to the actual exercise of this unique feminine right.

D. From a Feminine Right to a Feminist Practice

In Israel, soldiering has always been the highest form of citizenship. The central role of the Israeli military in a state that was formed and developed in the context of an on-going armed conflict and of a national crisis greatly contributed to the formation of an inseparable link between citizenship and military service. Furthermore, as males were assigned the primary role in the nation's defense, militarized manhood became the primary aspect of this gendered understanding of citizenship, which also determined who ultimately exercised power and

even sovereignty in Israeli society. Traditionally, feminist legal activists and other advocates of gender equality have tried to challenge this gender-biased perception of citizenship by referring to an integrationist strategy. The effort was to promote women into combat positions and to equalize their military contribution to that of men, so they could make a valid claim for full citizenship. However, until now this move has not been very successful. The military was only partly receptive to the idea of women in combat roles, and it appears that entrenched chauvinistic masculine traditions such as sexual harassment hinder effective female assimilation. Furthermore, recent feminist literature indicates that women's growing assimilation in the military in fact does not undermine the ideology of gender that pervades all facets of the institution, but rather perpetuates it through various processes in which women combatants internalize this androcentric ideology and later express it in their dress codes, their forms of behavior and their attitudes towards other women. Therefore it seems that, as various feminists have noted, the problem of gender hierarchy might rest in the structures of militarism itself, and it is therefore doubtful whether women's access to these structures in itself has the potential to solve the problem and to change the gender-biased manner in which perceptions of militarized citizenship are defined and enforced.

Against the backdrop of this feminist critique, one should assess the significance of the special right granted to Israeli women to resist the draft on grounds of conscience and to replace it with an alternative civilian community service. Under Israeli law national civilian service is not mandatory for those who are exempt from military service. Yet, in response to the growing dimensions of the phenomenon legislation was introduced to grant those who volunteer for this civilian form of service after having been exempt from military service the same state economic benefits as those who perform regular military service. Initially, the practice of replacing military service with civilian service emerged as a voluntary practice adopted by religious women, but in recent years female conscientious objectors have joined them, gradually changing the significance of this phenomenon. Whereas religious women were motivated by cultural and religious perceptions which objected to women's military service based on patriarchal notions of womanhood and morality, conscientious objectors introduced a much more radical objection to the draft—a direct objection to militarism itself. Under those circumstances one can argue that the fact that the law facilitated these women's

choice to resist the draft and to turn to a civilian form of action by providing them with the same economic benefits as those granted for active military service, had far reaching consequences from a feminist perspective. It contributed to a process by which civilian national service gained status and legitimacy under the law and was gradually established as an alternative path to citizenship, one that challenged the ideal of the citizen-soldier and threatened men's control over citizenship. However, this state of affairs has not been free of obstacles.

II. On Law, Gender and "Voice"

At first sight, the specific case of Israeli female conscientious objectors appears to be a clear case of giving "voice" to women; women were formally granted a right to speak. They were granted the right to voice conscientious objection to military service and to avoid the draft. Furthermore, the actual practice of objection that women were able to develop under the protection of the law seemed to enhance the significance of their "voices" in the public domain, since this practice facilitated the promotion of a feminist agenda regarding women's path to equal citizenship. Yet a second look at the relevant legal dynamics under which the right was exercised and enforced reveals that the role of law with regard to women's voices is in fact more complicated than it initially appears.

As discussed earlier, male and female conscientious objectors were subject to separate legal rules that differed substantially in their scope and content. While women's freedom of conscience was broadly protected, the same right was substantially restricted where men were concerned. This restriction diverted the legal treatment of those men to the judicial arena, due to the fact that male objectors who were adamant about their refusal to perform military service were initially subjected to disciplinary proceedings and eventually tried in a military court for their refusal to obey orders. Such legal proceedings which were the object of intense media coverage provided significant additional meaning to the masculine act of resistance, since it resulted in the male objectors having a right to counsel and an opportunity to make their arguments at length in a public forum. In other words, the official trial during which the male objectors were requested to answer and defend the accusation of refusal to enlist in the IDF supplied them with a legal platform from which to expound their moral position regarding military service. This public expression of the individual political and moral stance

of each objector transformed the nature of his protest from a private issue to a public phenomenon. Furthermore, it can be claimed that the fact that these proceedings ended with the all-too-real punishment of incarceration contributed to the glorification of the masculine act of dissent in an additional sense. Incarcerating male conscientious objectors contributed to building the conflict between the men and the state in confrontational masculine terms of force against force. The male objectors themselves were also partners in this process of constructing the objection discourse in those masculine terms. It is not without reason that one of the objectors' movements that opposes military service in the Occupied Territories calls itself "Courage to Refuse" and makes mention of the military rank and combat experience of its members as an important factor that legitimizes their voice of dissent. "Courage" as a masculine trait that the military cultivates and builds upon, together with central military symbols such as rank and combat experience that typically belong in the masculine domain, were now recruited by the male objectors. They tried not only to portray their willingness to pay the price of their resistance to the draft in terms common in the militaristic arena, but also relied on the most obvious masculine symbols as a source for legitimization. In this respect, it seems that both legal discourse and the male conscientious objection discourse that grew within it are nurtured by a similar normative foundation that draws upon "masculine" terms such as "courage," "force" and "heroism," and that reinforces their importance and significance in the public sphere. It also becomes clear, then, that although conscientious objection to the draft is usually perceived and portrayed as a social phenomenon that aspires to demilitarize society, in the particular case of Israeli male conscientious objectors the opposite process occurred: militarism and manhood became essential for the public recognition of the act of objection, and with this the centrality and importance of militarism as a masculine ideology was reaffirmed.

All these effects—glorification of the conscientious act of objection, an official legal forum to express their "voice" of resistance and the opportunity to demonstrate publicly a highly acclaimed personal trait such as heroism—were not available to female objectors. They were excluded from these legal practices completely, and this exclusion silenced their parallel struggle of conscience and constructed it in insignificant and marginal terms. In this sense, women's potentially subversive actions were deradicalized. While women were given the

opportunity to carry out a much more significant act of resistance than were men, the fact that this act was not visible publicly made it almost nonexistent and therefore hardly influential.

Under these circumstances it is of particular interest to examine the latest legal development with regard to women's separate right to conscientious objection, namely its subjection to judicial review in light of considerations of gender equality.

III. The Equality Crisis: Female Conscientious Objection between Formal and Substantive Equality

A. The Sex-Specific Right is Taken to Court

More than twenty years ago, Wendy Williams, a feminist scholar and activist, tried to evaluate to what extent the court system was an appropriate forum for promoting women's demand for equality. Her basic assumption was that to the extent that women shared predominantly male values or aspired to share that world on its own terms, resorting to the courts had, since the early 1970s, proven to be the most efficient, accessible and reliable mode of redress. Hence, the argument was that in all cases taken to court feminist lawyers had to adhere to the principle of equal treatment based on the masculine standard of law if they wanted to present to the courts a coherent theory of equality.

These feminist notions concerning the limits and possibilities of judicial discourse in dealing with gender-equality issues provide an interesting starting point for the analysis of the latest development in regards to women conscientious objectors.

The first instance in which the demand for gender equality in all matters relating to conscientious objection was raised was during the military trials of the male conscientious objectors. Their claim was that, just as the army exempts from military service women objectors who base their request for exemption on both selective and universal grounds of conscience, a similar broad exemption opportunity should be given to men. Consequently, the Military declared that henceforth it would be strict in its application of a similar distinction between universal and selective conscientious objection claims made by women. As a direct result of this new policy, in 2004 the military denied the request of Laura Milo, a conscientious objector, to receive an exemption from military service due to her specific objection to the military occupation of the Territories. Following her adamant refusal to

enlist, she was sent to prison. Consequently, Laura Milo filed a petition with the Supreme Court aimed at regaining the broader right for freedom of conscience that was now denied to women. In her appeal to the Court, Milo challenged the new egalitarian policy of the military, arguing that, given the different legal provisions that applied to each group under the law, it was inappropriate to grant equal treatment to men and women with regard to selective conscientious objection

B. Women Conscientious Objectors are Equalized with a Vengeance

As a result of Milo's line of argument, the Supreme Court was for the first time called upon to deal with the appropriate interpretation of the different legal arrangements found in the Defense Service Law concerning the conscientious objection of women and men. The Supreme Court, it appears, was not in doubt as to the correct outcome. The Court not only rejected Laura Milo's appeal, but also struck the unique right of women to be exempt from military service on grounds of conscience, subjecting women to the stricter provisions which until then had applied only to men. This denial of a separate right for women was rationalized and justified mainly on the basis of arguments of gender equality. The Court explained that with regard to matters of conscientious objection, men and women were similarly situated and therefore arguments of gender equality required that women should be subject to the same legal treatment as men. Furthermore, the Court added, the subjection of women to the "masculine" exemption system, which was stricter, actually contributed to a more egalitarian recognition of women's contribution to the armed forces in Israel. Surely, whoever constitutes a vital element of the military is not likely to be easily excused from military service.

C. Laura Milo between the Court and Feminist Lawmaking

This legal outcome seems to confirm the assumptions made by Williams over two decades ago regarding the masculine limits of the courts. As Williams predicted, "courts will do no more than measure women's claim to equality against legal benefits and burdens that are an expression of white male middle-class interests and values".

However, a second look at the case of Laura Milo leads one to wonder whether the feminist pragmatic predictions regarding the potential products of judicial discourse are not self-fulfilling. Certainly, when all parties to the judicial process adhere to the belief that the courts

can never be a source of social change, visions of social change are not even introduced in court, and the existing legal order remains undisturbed. In this context it is therefore important to remember that the critical feminist notions concerning the limits and possibilities of judicial discourse in dealing with gender equality issues, in addition to the strategic decision to refer to the courts as instruments of change, have in fact contributed significantly to the nature and substance of constitutional sex-equality case law. This becomes more apparent if one examines, for instance, all American constitutional sex discrimination cases heard by the Supreme Court in the last three decades. Many of these cases were the product of feminist initiatives and they all involved plaintiffs who tried to highlight the discriminatory nature of sex-specific classifications, demanding their replacement with the equal treatment of men and women. In Israel, where feminist efforts to promote gender equality have been guided by the American example, a similar process occurred. All leading cases initiated as part of feminist efforts to establish the principle of sex-based equality involved women seeking the same treatment as men. This is not to say of course that feminist litigation in the last several decades in the U.S. or in Israel has been limited to struggles that adopted and implemented the formal and masculine definition of equality. Rather, the argument is that feminist forces in both places played a role in the formulation of sex-equality case law and the definition of gender equality that underlies this case law. Moreover, the feminist causes of action, as well the legal arguments that were raised to defend them, should be understood in light of pragmatic perceptions regarding the limits and the possibilities of the courts.

Within this framework of analysis, it is therefore important to examine more critically not only the Supreme Court's decision in *Laura Milo* but also the role of the plaintiff in contributing to the manner in which the court eventually resolved the issue of gender equality. *Laura Milo*, it should be remembered, was trying to defend a sex-specific law that was certainly discriminatory. In addition, in her efforts to defend a right that was unique to women, *Laura Milo* adhered to technical formalities and neglected any substantive argument she might have raised. She did not claim that the sex classification promoted the equal citizenship of women or compensated them for practices of exclusion and subordination in the military. Instead, she asked the court to allow her and other women to continue enjoying the broader conscientious exemption from military service they traditionally enjoyed, simply

because the existing legal arrangement granted women a different, and in this case advantageous, treatment than men. However, after years of feminist groups and organization petitioning the courts to eliminate all legal distinctions between men and women and to equalize the status of women to that of men, it is not surprising to learn that this appeal was perceived by the Court not only as having no legal basis but also as undermining the principle of gender equality. Moreover, the fact that the Court decided to bring the status of women in line with that of men and not the other way around does not seem unexpected under these circumstances. In her petition, Laura Milo not only refrained from raising any substantive arguments in defense of the sex-specific classification she tried to hold on to; she also avoided any normative reference to the concept of equality that could be applied here and did not argue that it was also possible to apply the remedy of "extension" and extend the broad right for conscientious objection to men as well without interfering with the right women enjoyed. In the absence of other critical perspectives regarding the desirable outcome of the case, a result that could not only respond to Milo's claim but also properly implement principles of equality, the Court was left to apply the only perception of equality prevalent in legal and judicial discourse.

Why was Milo's petition constrained to such narrow and formal argumentations? One can only suspect that it was a by-product of the pragmatic approach to the courts. Clearly Laura Milo and her feminist lawyers believed they were referring to the kind of legal arguments that could best serve the feminist cause of preserving the broad right to freedom of conscience women had enjoyed until then. The final outcome in this case indicates that they were wrong, and this conclusion inevitably raises the question whether the Court would have responded differently to a less pragmatic and a more radical vision of gender equality.

IV. Conclusion: The Limits of the Law and its Possibilities

In this article I have tried to outline three major aspects of the story of women conscientious objectors in Israel. The first aspect relates to the historical context in which the special conscientious exemption for women was created. As explained above, this sex-specific law was the obvious product of the "separate spheres" mentality, and the analysis of its legislative history uncovered the patriarchal perceptions of women that originally shaped and rationalized this arrangement. Typically, this kind of normative and historical context would

have made the special exemption granted to women inherently suspect, since the law's differential treatment of men and women under such circumstances is usually perceived as perpetuating rigid sex roles and therefore contributing to women's subordination. However with regard to the special right for conscientious objection granted to Israeli women, there were unexpected dynamics involved. This separate legal arrangement for women evolved to award women a significant right—the right to exercise their freedom of conscience with regard to military service. They won legal recognition of broad grounds for conscientious objection to the draft and this recognition allowed them to undermine the central role of militarism and military service in Israeli society. It also facilitated the creation of alternative paths to equal citizenship that are particularly important for women.

However, as I have further shown, this state of affairs was not free of obstacles. The broad gender-biased right to conscientious objection undermined the feminine act of objection in other significant respects. While enabling women to win an exemption from military service for reasons of conscience and to channel their protest to substantive avenues of action, the prevailing masculine legal order simultaneously interfered with those women's ability to articulate a meaningful public "voice" of protest in terms of visibility and presence in the public domain.

Under these circumstances it was of particular interest to examine the latest legal development with regard to women's separate right to conscientious objection. As I have explained, in response to an appeal filed by a woman conscientious objector, the Court recently abolished women's long-standing separate right to conscientious objection, subjecting women to the stricter masculine standard of law. Hence, when the consequences of this new egalitarian legal order are compared with the old regime of gender separation, it is not clear that women were not better off before.

Furthermore, this latest legal development concerning female conscientious objectors in Israel also suggests that the critical evaluation of the judicial decision cannot focus exclusively on the Court as a separate entity. Feminists should also recognize and rethink the role of the plaintiff in shaping the legal field and its boundaries in sex equality cases.

Above all then, the story of women conscientious objectors is a story not only of the limits of the law, but also of its unexpected results, its less noticeable potential for social change and of the inseparable link between feminist agendas and legal outcomes.