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## THE FEMINIST BATTLE FOR CITIZENSHIP: BETWEEN COMBAT DUTIES AND CONSCIENTIOUS OBJECTION

Daphne Barak-Erez\*

\*Tel Aviv University , barakerz@post.tau.ac.il

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# THE FEMINIST BATTLE FOR CITIZENSHIP: BETWEEN COMBAT DUTIES AND CONSCIENTIOUS OBJECTION

Daphne Barak-Erez

## **Abstract**

Military service has traditionally been considered one of the most distinctive signs of full citizenship. Accordingly, the exclusion of women from military service has been inseparable from their lower civic status. Struggles for inclusion in the army, and particularly in positions of combat duty, have therefore been part of the feminist agenda, at least for those who associate it with equal opportunities. The article explores the dilemmas around military service of women by focusing on the struggles around full inclusion of women in the army in Israel. The Israeli context is special in this regard due to two factors: the application of mandatory service to women on one hand and the centrality of military service in the country on the other hand.

The controversy in this matter reached the Israeli Supreme Court only at a relatively late stage – by two petitions that, *prima facie*, represent sharply conflicting struggles. One petition was aimed at expanding equal opportunities for women in the army by changing the historical policy of accepting only men to the air force's prestigious pilots' course. In contrast, the other petition was aimed at exempting the petitioner from army service for reasons of conscience, with reference to the prolonged Israeli rule in the occupied territories. This petition was based on a special legal provision not applicable to men. The article explores these petitions and the judgments which followed them and then evaluates their relative contribution to the struggle for equal citizenship of women.

Despite large differences in the background and the aims of these petitions, they share strong resemblances. Both, ostensibly so far apart, acknowledge the centrality of military service to Israeli citizenship. The petition for full inclusion in the air force highlighted the importance of military service for equal opportunities in professional and public life. The petition for exemption from service opened the door for the participation of young women in the Israeli political discourse. Both petitioners understood that full citizenship in Israel, as opposed to merely formal citizenship, goes through the army or at least through taking a stand with regard to military service.

# THE FEMINIST BATTLE FOR CITIZENSHIP: BETWEEN COMBAT DUTIES AND CONSCIENTIOUS OBJECTION

DAPHNE BARAK-EREZ\*

## I. INTRODUCTION: CITIZENSHIP AND MILITARY SERVICE

Military service has traditionally been considered one of the most distinctive signs of full citizenship, and the exclusion of women from military service has been inseparable from their lower civic status.<sup>1</sup> Accordingly, this article evaluates legal struggles waged in the context of military service of women through the perspective of citizenship.

Struggles for inclusion in the army, and particularly in combat duties, are identified with liberal feminism, which strives for equal opportunities for women in all areas of life and, particularly in positions previously reserved for men.<sup>2</sup> Other variations of feminism have adopted a critical view of these struggles. Cultural feminism opposes the fighting ethos represented by army service—particularly in combat units—arguing that feminism should be identified with anti-war activity<sup>3</sup> and with a contribution to conflict resolution.<sup>4</sup> Radical feminism criticizes the aspiration to be part of patriarchal institutions such as the army. Nevertheless, women's army service in combat duties is still considered an accomplishment of

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\* Stewart and Judy Colton Professor of Law, Chair of Law and Security, Faculty of Law, Tel-Aviv University, e-mail: barakerz@post.tau.ac.il. I thank the participants of the Feminism and the Law Workshop at the Faculty of Law of the University of Toronto for their comments and Batya Stein for the translation of sources and the editing.

<sup>1</sup> See, e.g., Susanne Baer, *Citizenship in Europe and the Construction of Gender by Law in the European Charter of Fundamental Rights*, in GENDER AND HUMAN RIGHTS 83, 94 (Karen Knop ed., 2004) (“[A] particularly long-lasting vision of citizenship was based on the conjunction of citizenship and the defense of one's mother country. The formula of citizenship and participation was fight and vote”).

<sup>2</sup> Catharine MacKinnon related rather cynically to this struggle, describing a hypothetical heavenly encounter between a women combat soldier and a feminist activist, “The feminist says to the soldier, ‘we fought for your equality.’ The soldier says to the feminist, ‘oh, no, we fought for your equality.’” Catharine A. MacKinnon, *Difference and Dominance: On Sex Discrimination*, in FEMINISM UNMODIFIED 32, 35 (1987).

<sup>3</sup> See SARA RUDDICK, *MATERNAL THINKING: TOWARD A POLITICS OF PEACE* (1989).

<sup>4</sup> This approach was distinctively demonstrated in Resolution 1325 of the Security Council, which recognizes women and children as the main victims of wars and calls for the participation of women in conflict resolution and in the promotion of peace processes. See WHERE ARE ALL THE WOMEN? U.N. SECURITY COUNCIL RESOLUTION 1325: GENDER PERSPECTIVES OF THE ISRAELI-PALESTINIAN CONFLICT (Sarai Aharoni and Rula Deeb eds., 2004).

symbolic significance. In general, the early 1970s marked a turning point in women's army enlistment in western countries consistent with the struggle for equality, which was high on the agenda at the time.<sup>5</sup> This change then led to efforts that focused not only on the integration of women in the armed forces, but also on securing them equal opportunities for military education and combat duties.<sup>6</sup>

Controversies around women's military service usually stem from a legal background that does not make enlistment compulsory, as it does for men. The result is that women's military service is voluntary and reflects a career choice. In *Rostker v. Goldberg*,<sup>7</sup> the United States Supreme Court affirmed the decision of Congress not to register women for the draft. The Court held that, because of the combat restrictions incumbent on women, men and women were not "similarly situated" concerning draft registration. The Court also upheld the congressional judgment that the potential administrative and military complications resulting from drafting women for non-combat roles were great enough to justify this restriction. Similarly, the European Court of Justice refrained from intervening in decisions of member states concerning the limits of their compulsory military service.<sup>8</sup> In contrast to this typical scenario, this Article focuses on the special case of Israel, which requires its women to register for military service. Despite the compulsory nature of their service, however, women still had to fight for full inclusion. This is particularly interesting given the centrality of military service in Israel, responding to the country's sensitive security situation since its establishment.

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<sup>5</sup> See CYNTHIA ENLOE, MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN'S LIVES 47-48 (2000).

<sup>6</sup> On the history of the struggle for women's military service in the United States, see Linda K. Kerber, 'A Constitutional Right to be Treated Like... Ladies': Women, Civic Obligation, and Military Service, 1993 U. CHI. L. SCH. ROUNDTABLE 95 (1993). The decision of the Supreme Court of the United States in *United States v. Virginia* 518 U.S. 515 2264 (1996) marks an important victory in this regard. In this decision, the Court struck down the long-standing male-only admission policy of the Virginia Military Institute. The Court held that the Institute had violated the Fourteenth Amendment's equal protection clause because it had failed to show "exceedingly persuasive justification" for its gender-biased admissions policy. In an attempt to satisfy equal protection requirements, the State of Virginia proposed a so-called "separate but equal" parallel program for women, called the Virginia Women's Institute for Leadership located at Mary Baldwin College, a private liberal arts school for women. The Court, however, held that this alternative would not provide women with the same type of rigorous military training, facilities, courses, faculty, financial opportunities, or alumni reputation and connections that the Virginia Military Institute affords male cadets. In Europe as well, women strove to attain the employment possibilities offered by the military. In two different cases, the European Court of Justice held that the United Kingdom and Germany were obliged to open up their professional military to women. See also Cases C-273/97 *Angela Maria Sirdar v. The Army Board and Secretary of State for Defense*, [1999] E.C.R. I-7403 and C-285/98 *Tanja Kreil v. Federal Republic of Germany*, [2000] E.C.R. I-69.

<sup>7</sup> 453 U.S. 57 (1981).

<sup>8</sup> The European Court of Human Rights issued this decision in the matter of a German man who argued he was a victim of discrimination because the draft in his country was limited to men. See Case C-186/01, *Alexander Dory v. Federal Republic of Germany*, [2003] E.C.R. I-2508; Beate Rudolf, *European Union: Compulsory Military Service*, 3 INT'L J. CONST. L. 673 (2003).

Despite Israel's basic choice to make military service compulsory for women, the legal and public position concerning women's equality as it emerges from the law is far more complex. In fact, the obligation of Israeli women to serve in the military is both a distinctive symbol of women's equality and an illuminating example of the differential attitude toward them. Women's service in the Israeli army is a symbol of equality because regular service for women is not an accepted norm in other countries and adopting a law that required this was considered a revolutionary step.<sup>9</sup> At the same time, different attitudes toward women and men are evident from the exemptions and unique restrictions which limit women to non-combat duties.<sup>10</sup> The military service of women in clerical and auxiliary duties, while exploiting their capacity to "add a note of charm,"<sup>11</sup> also contributes to their inferior status in Israel's civic society,<sup>12</sup> particularly when accompanied by sexual harassment and exploitation at the hands of their commanding officers.<sup>13</sup> Against this backdrop, the article will explore the legal battles waged around the scope of women's military duties in Israel and their significance in the struggle for women's equal rights.

The scope of women's military duties was at the center of a heated controversy when the Defense Service Law was originally enacted.<sup>14</sup> According to a status quo that evolved at a later stage, women's military service was different in character and length from that of men. Public discussion about the meaning of this compromise has gradually receded, except for recurring references to the matter of religious women not serving, which underwent change through the introduction of legislative amendments.

Only at a relatively later stage did the controversy reach the courts in two rulings that, *prima facie*, represent sharply conflicting struggles. On the one hand

<sup>9</sup> Women's service in the military became compulsory soon after the creation of Israel in 1948.

<sup>10</sup> Nitza Berkowitz, 'Women of Valor': *Women and Citizenship in Israel* [Hebrew] 2 ISRAELI SOCIOLOGY 277, 309 (1999)

On the one hand, women are called to contribute like men and actively participate in national/collective tasks. The idea of equality comes to the fore here in the equality of duties. On the other hand, their contribution and their mode of participation differ from those of men. They are defined as 'others' but the 'otherness' does not marginalize them from the Israeli collective altogether but rather directs them to a different course of participation, one that passes through family/domestic roles. *Id.*

<sup>11</sup> The acronym for the Women Corps forms the Hebrew word "charm."

<sup>12</sup> Dafna Izraeli, *Genderizing in the Israeli Military*, [Hebrew] 14 THEORY & CRITICISM 85, 86 (1999) ("The gender regime of the Israeli army, which is based on division of labor and on a genderized power structure, establishes and affirms the role women have been assigned as a natural matter of course—to be 'a help to match.'").

<sup>13</sup> See HCJ 1284/99 *Anonymous v. Chief of General Staff* [1999] IsrSC 53(2) 62. The problem of sexual exploitation of women soldiers was also depicted in the literature and in movies. See, e.g., MICHAL ZAMIR, *A SHIP OF GIRLS* [Hebrew] (2005).

<sup>14</sup> Defense Service Law (Consolidated Version), 1986 (Isr.). This version of the law, which is currently binding, is a later rendition of the law first enacted as Defense Service Law, 1949, and its first consolidated version, the Defense Service Law, 1959 (Consolidated Version). All references to the different versions appear in this article under one common name: Defense Service Law. When the distinction between the different versions is important, it is explicitly noted.



is the *Miller* ruling,<sup>15</sup> issued on a petition to expand equal opportunities for women in the military and, more specifically, to change the historical policy of accepting only men to the Air Force's prestigious pilots course. On the other hand is the *Milo* ruling,<sup>16</sup> issued on a petition to exempt the petitioner from military service for "reasons of conscience." These rulings were issued in cases where the petitioners had raised opposite demands: one asked to serve in full combat duty as a pilot, the other refused to serve in the military in any form. The legal claims raised in these two cases seem to be incompatible. Alice Miller requested that a norm of regular service similar to that applying to men be applied in her case as well. By contrast, Laura Milo rested her demand for release from military service on one of the provisions granting special exemptions to women—specifically, on a provision granting exemption for "reasons of conscience" to women but not to men. The article will first explore these petitions and the rulings issued on them. Next it will evaluate the contribution of the battles waged on this matter—by a woman pilot and by a woman as conscientious objector<sup>17</sup>—to the equality of women in Israel.

## II. STRUGGLES SURROUNDING THE LEGISLATION OF THE MILITARY SERVICE LAW

The Defense Service Law included a message of equality at the time of its enactment, though it was inseparably entangled with differential arrangements for men and women. The egalitarian message came to the fore in a provision that, in principle, made obligatory military service incumbent on both men and women. This provision was considered revolutionary and was enacted despite the strong reservations of traditional circles, which resisted the notion of women serving in any compulsory framework outside the family or the community. Similar reservations also evoked strong controversy at a later stage, when the national service alternative was discussed.<sup>18</sup> The fundamental egalitarian principle, however, was restricted by provisions that included special exemptions from duties applying only to women such as requiring women to serve for shorter periods and setting a lower maximum age for them to remain within the reserve forces. More

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<sup>15</sup> HCJ 4541/94 *Miller v. Minister of Defense* [1995] IsrSC 49(4) 94 [hereinafter *Miller*].

<sup>16</sup> HCJ 2383/04 *Milo v. Minister of Defense* [2004] IsrSC 59(1) 166 [hereinafter *Milo*].

<sup>17</sup> The pilot and the conscientious objector are, in this case, two separate women, unlike the case in the compound "the pilot conscientious objector" that entered public consciousness after a petition signed by pilots was published in 2004, stating their refusal to participate in bombing missions over areas of Palestinian population. Note that in the Israeli Air Force, the Hebrew term "*tayesser*"—the feminine form of *tayas*, or pilot—had until recently referred only to a flight squadron rather than to a woman who engages in flying, because the force had not included women pilots since the War of Independence and until the 1990s.

<sup>18</sup> The National Service Law, 1953 (Isr.), was meant to anchor in law a duty of national service for women exempted from army service for reasons of conscience or religious conviction. Religious circles were opposed to the principle of an obligatory national service for women, and the controversy led the ultra-Orthodox Agudat Yisrael party to leave the government. The conflict resulted in a wording that anchored the principle in law but delayed its implementation. According to Section 21 of the law, "Implementation of this law will only begin after a government decision." The government never made such a decision and, until today, women who choose the alternative of national service do so on a voluntary basis.



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specifically, the exemptions restricted women's duty of service so that it would not apply to married women, to pregnant women or to mothers, nor to women who consider themselves precluded from serving for "reasons of conscience or reasons of religious conviction."<sup>19</sup> Exemption for reasons of conscience or religion was at first granted on the basis of an affidavit submitted by the woman concerned.<sup>20</sup> In 1952, the law was amended to demand proof of these reasons before a committee.<sup>21</sup> After the 1977 elections transferred power to the right-wing Likud party, an additional amendment was enacted to ease the exemption procedure for religious women and reintroduce the method of exemptions on the basis of an affidavit (stating the woman's religious conviction and her religious style of life).<sup>22</sup> This amendment left in place the mechanism of granting exemptions based on a committee decision solely when requested "for reasons of conscience" or "for reasons of the family's religious way of life"—an alternative that was added in this amendment and expanded the religious exemption beyond the realm of religious faith in the narrow sense.

Despite the critiques leveled from time to time against the distinction between the scope of service duties incumbent on men and on women, these differences were generally perceived as reflecting a broad consensus in Israeli society. When a member of the Neturei Karta ultra-Orthodox group who was tried for failing to enlist pleaded that this distinction was discriminatory, the Court dismissed his claim outright. Justice Sussman justified the distinction in the law and explained,

When imposing a duty of service on women, the Israeli legislature expanded the enlistment structure accepted worldwide. At the same time, however, since women cannot serve in all military duties, as well as willing to show respect for the opinions of part of the population, it did not impose on women military duties equal to those of men.<sup>23</sup>

Note that, at the time, the legal doctrine of legislature's sovereignty precluded any claim of discrimination against statutory arrangements,<sup>24</sup> but the Supreme Court chose to reject this argument on its merits as well.

Evidence of the dilemma concerning women's military service appears already in the debates surrounding the enactment of the Defense Service Law in the First Knesset.<sup>25</sup> The original bill submitted to the Knesset<sup>26</sup> included a provision

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<sup>19</sup> Section 11(d) of Defense Service Law, 1949 (Isr.).

<sup>20</sup> *Id.*

<sup>21</sup> Defense Service Amendment Law, 1952 (Isr.).

<sup>22</sup> Defense Service Amendment Law, 1978 (Isr.).

<sup>23</sup> CA 5/51 Steinberg v. Attorney General [1951] IsrSC 5 1061.

<sup>24</sup> This doctrine in Israeli law was absorbed from British constitutional tradition. It began to change only during the 1990s, following the enactment of two basic laws on human rights—Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty. The Israeli Supreme Court interpreted these Basic Laws as enabling judicial review of legislation infringing the human rights protected by them.

<sup>25</sup> Debates on the legislation of the Defense Service Law in the First Knesset are, "Defense Service



imposing a duty of military service on women and, therefore, led to a bitter controversy with the representatives of the religious parties and with Arab Knesset members, who shared a conservative approach on this count.<sup>27</sup> The opposition of religious Members of Knesset (MKs) to women serving in the army was based not only on a halakhic stance but also on a more general outlook on the nature of women and their place in the home and the family. Some MKs expressed fears concerning the protection of women's virtue and also related to the potential implications of military service for the birth rate.

In principle, the bill supported women's enlistment, but it also made highly significant distinctions between the service envisioned for women and for men. The duty of service for women was limited to one year, as opposed to two years of regular service for men. This was a significant disparity considering that, according to the bill, the first year of service was to be devoted to agricultural training after several weeks of basic military training, as part of Prime Minister David Ben-Gurion's view that assigned the army a crucial role in the melting pot of Israeli statehood. In practical terms, this meant that the military service of women was not only meant to be shorter but also largely limited to the civilian aspect of the army—far away from the core of military activity in the narrow sense. This bill also drastically limited the maximum age of military service for women to twenty-six, and included the special exemptions for women mentioned above. When the bill was submitted, Ben-Gurion related to the proposed exemptions: "Concerning women, we have exempted four categories from this duty: a married woman, the mother of a child, a pregnant woman, and a religious woman—Jewish, Christian or Moslem—whose religious conviction prevents her from involvement in the defense service."<sup>28</sup> At a later stage of the discussions on the bill, Ben-Gurion explained that it balances two considerations—on the one hand, the recognition that "a woman is not only a woman but also a personality, just like a man," and on the other hand, the praise to "the woman's special mission, the mission of

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Law, 1949," Session 68 of the First Knesset, 15 August 1949, 2 Divrei Haknesset (DK) 1336-1342; "Defense Service Law, 1949," 29 August 1949, 2 DK 1438-1447; "Defense Service Law, 5709-1949" (continued hearings), Session 73 of the First Knesset, 30 August 1949, 2 DK 1448-1458; "Defense Service Law, 1949" (continued hearings), Session 75 of the First Knesset, 5 September 1949, 2 DK, 1550-1572; "Defense Service Law, 1949," Session 79 of the First Knesset, 8 September 1949, 2 DK 1607-1615; "Defense Service Law, 1949" (end of hearings), Session 79 of the First Knesset, 8 September 1949, 2 DK 1616-1633. [hereinafter Debates on the Law in the First Knesset].

<sup>26</sup> Defense Service Bill, 1949 (Isr.).

<sup>27</sup> See MK Kalman Kahana of the United Religious Front, *in* Debates on the Law in the First Knesset, *supra* note 25, at 1445-1446; Minister of Welfare Aryeh Levin, *id.* at 1446-1447; MK Moshe Unna of the United Religious Front, *id.* at 1522; MK Avraham-Haim Shag of the United Religious Front, *id.* at 1524; MK Seif-El-Din El-Zuebi of the Nazareth Democratic Party, *id.* at 1525; MK Amin-Salim Jarjora of the Nazareth Democratic Party, *id.* at 1528-1529; MK Zerach Warhaftig of the United Religious Front, *id.* at 1559; MK Zecharia Gluska of the Yemenite Association of Israel, *id.* at 1559; MK David-Zvi Pinkas of the United Religious Front, *id.* at 1561-1562; MK Aharon Yaakov Greenberg of the United Religious Front, *id.* at 1608-1609.

<sup>28</sup> Debates on the Law in the First Knesset, *supra* note 25, at 1339.



motherhood.”<sup>29</sup> Ben-Gurion, then, was ready to exempt women from military service as long as this exemption serves the national aim of having children and raising a family. This rationale justified not only the exemption of pregnant women and of mothers, but also the exemption of married women, who would become mothers.<sup>30</sup> Ben-Gurion’s outlook, which largely guided the formulation of the law, was not based on an approach of full equality for women but rather on a view which subjected the equal rights of women to their motherly role.<sup>31</sup>

Of all the exemptions granted to women, only the one based on religious grounds was perceived by Ben-Gurion as a compromise he had been forced to accept. He even expressed the hope that not all religious women would avail themselves of this privilege.<sup>32</sup> This compromise is part of the Defense Service Law to this day, and represents the willingness of the State of Israel to compromise on the full citizenship of women belonging to traditional communities. Indeed, cultural tolerance of minority groups is important, but this sensitivity is troubling in the context of traditional norms concerning women. It is worthwhile mentioning that the exemption from military service to yeshiva students was not made part of statutory arrangements, although the exemption was already in effect when the Defense Service Law was enacted.<sup>33</sup> Ultimately, the law that was enacted included the special exemptions detailed in the bill—for married and pregnant women, for mothers, and for women prevented from serving for religious reasons—but formulated the religious exemption in seemingly broader terms, to include reasons of conscience as well as religious conviction.<sup>34</sup> These arrangements had long-term effects on the scope of women’s participation in military service. More than a third of the women eligible for military service are exempted, and women are only about thirty percent of the enlisted.<sup>35</sup> The main reason for the relatively low rate of women’s participation in the regular service is the exemption granted for reasons of religious conviction.<sup>36</sup>

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<sup>29</sup> *Id.* at 1568-1569.

<sup>30</sup> Ben-Gurion adduced two reasons for exempting married women: first, the desire to allow a married woman “to be joyful with her husband,” and second, “one should not hinder a married woman from becoming a mother.” *Id.* at 1571.

<sup>31</sup> *Id.* at 1569. A similar attitude to the roles of women as mother and as wife is evident in the debates that accompanied the legislation of the Law for Women’s Rights, 5611-1951. See Pnina Lahav, ‘When the Palliative Simply Impairs’ *The Debate in the Knesset on the Law for Women’s Rights*, 46-47 *ZMANIM* 149 (1993) [Hebrew].

<sup>32</sup> Debates on the Law in the First Knesset, *supra* note 25, at 1339.

<sup>33</sup> On the history of regulations concerning the military service of yeshiva students, see H CJ 3267/97, *Rubinstein v. Minister of Defense* [1998] IsrSC 52(5) 481.

<sup>34</sup> On the question whether this broader formulation of the exemption is important, see Section IV below.

<sup>35</sup> State Comptroller’s Annual Report (2002) [hereinafter State Comptroller’s Report].

<sup>36</sup> In 2001, the rate of women exempted from military service was about 38%. The rate of women exempted for reasons of religious conviction was about 27%—that is, it reached about 70% of all the exemptions granted to women. *Id.* At a later stage, with the shift to the military career track, we see a further decrease in the rate of women in the army. See ISRAEL WOMEN’S NETWORK, *WOMEN IN ISRAEL: COMPENDIUM OF DATA AND INFORMATION* 2002 117 – 118 (2003). This change derives from other factors, among them the limited openness of military systems to the promotion of women and to their

Although the original bill did not specify the duties to be allotted to women in the armed forces, the period of service that was prescribed for them actually dictated their referral to auxiliary roles rather than to combat duty. The Knesset debates indicate that all the MKs that participated in them assumed, and generally supported, a policy of not assigning women to combat duties. Referring to the opposition to the regular enlistment of women contrary to worldwide custom, Ben-Gurion explained,

We do not intend to enlist women into combat units —though no one can promise that if we are attacked and forced to defend ourselves, heaven forbid, we will not have to enlist everyone—man and woman, young and old.... Women will not be required to serve the second year (which is entirely devoted to military training) unless they volunteer for it, and it is advisable for them to volunteer for special lines of work: the medical service, the signal corps, radio, telephone, as drivers, for clerical work, and so forth.<sup>37</sup>

Directing women to non-combat duties also supported the claim of religious MKs that regular service for all women was unnecessary. As MK Aharon-Yaakov Greenberg of the United Religious Front stated, “Everyone admits they will not take women for combat duties and into the trenches. As auxiliary forces and for special needs, it is not necessary to enlist all women, particularly if one takes into account that not all men will be qualified to fight at the front.”<sup>38</sup> Mapai MK Yehudit Simhoni, who devoted a long speech to the obligation of military service for women, noted that “there are roles for which the army needs women, both to release young men who are needed for other services and also because of women’s greater effectiveness in them.”<sup>39</sup> Her statements predicated on the assumption that women would serve in positions other than those of men. In the debates on the bill in the plenum, Ben-Gurion adduced an additional, image-related reason for not assigning women to combat duty: the fear of relaying the message that the country

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inclusion in diverse tracks, an issue discussed in Section III below. On the limited practical significance of exempting married women, as opposed to its symbolic meaning, see Dafna Hacker, *Beyond ‘Old Maid’ and ‘Sex and the City’: Singlehood as an Important Option For Women and Israeli Law’s Attitude Towards This Option* 28 TEL AVIV UNIV. L. REV. 903, 932-934 (2005) [Hebrew].

<sup>37</sup> Debates on the Law in the First Knesset, *supra* note 25, at 1570. Ben-Gurion’s negative view of combat duties for women had already been presented at the debates of the Foreign Affairs and Defense Committee, which had been the forum for the preliminary discussions on the wording of the law. The quotations are from the Committee’s discussions, available at the Israel State Archives. At the Committee’s meeting of May 11, 1949, Ben-Gurion clarified, “There certainly are duties that women will fulfill more successfully than men, but there will not be combat units of women. They will also be in combat-related services: communications, driving, intelligence.” Session of the Foreign Affairs and Defense Committee, May 11, 1949, at 26. At the meeting held on June 6, 1949, he added and emphasized, “We will not send women to combat units, there will be no women in the infantry corps, and no women in the artillery corps. We will not send women to war, it is not imperative, it is not necessary, and there is no reason for it, nor is this acceptable practice anywhere in the world.” Session of the Foreign Affairs and Defense Committee, June 6, 1949, at 11.

<sup>38</sup> Debates on the Law in the First Knesset, *supra* note 25, at 1609.

<sup>39</sup> *Id.* at 1451.



is in a situation of emergency. In his view, “A misleading impression might be created in the world and among us that our condition is so critical we must enlist women into combat units, something we did not do even during the time of war and something we do not intend on doing now.”<sup>40</sup> This explanation is inaccurate, given the involvement of women in the battles of the War of Independence—even if the extent of women’s participation had been lower than that of men and had largely included women who had previously been members of underground movements.<sup>41</sup>

Some supporters of military service for women expressed concern that their shorter period of service would not allow them enough time to train even for auxiliary duties. Yosef Sapir of the General Zionists said, “Women have fulfilled vital roles in non-combat duties. When will women train for these roles if they spend nine months in a laundry somewhere?”<sup>42</sup> The bill set an eighteen-month term for women’s regular service, lessening the problem but not eliminating it. MK Hannah Lamdan, of the Mapam left-wing party, proposed a two-year term of service for both men and women, and added a warning,

Girls will not be able to acquire the necessary professional, military, administrative, and social training if they are to serve only six months in their second army year. A girl will be unable to attain the required qualifications if her term of service is only half a year. No serious officer or instructor will be willing to invest efforts in her training so that she might become a worthy signal operator or learn to fulfill an administrative role in the army. He will repeatedly put her off and waste her time for nothing.<sup>43</sup>

Most MKs, however, including Ben-Gurion, who presented the government’s position, supported limiting women’s terms of service to twelve months, as was eventually stated in the original version of the law.<sup>44</sup>

An amendment was introduced to the Defense Service Law in 1950 extending women’s terms of service to two years. This amendment, however, also authorized the minister of defense to enact regulations limiting the army roles open to women.<sup>45</sup> The need for this authorization emerged only when the term of

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<sup>40</sup> *Id.* at 1618.

<sup>41</sup> A ruling indirectly reflecting this reality is CA 8704/99, *Ben Zion v. ha-Histadrut ha-Klalit shel ha-Ovdim* [2003] IsrSC 58(1) 120, dealing with the commemoration arrangements for a female soldier from the Harel brigade killed in battle in the War of Independence.

<sup>42</sup> Debates on the Law in the First Knesset, *supra* note 25, at 1441.

<sup>43</sup> *Id.* at 1612-1613.

<sup>44</sup> Section 6(c) of Defense Service Law, 1949.

<sup>45</sup> The reference is to the Defense Service Law (Amendment), 1950. The extension of women’s military service resulted in the updating of Section 6(c) of the Defense Service Law of 1949. The power of the minister of defense to define in regulations the duties open to women in the army was included in the new Section 6(f)(2), which stated, “The regular service of a female person after the period of agricultural training, will be devoted to duties to be prescribed in the regulations.” Defense Service Law, 1950 (Isr.). The explanatory notes to the proposed amendment—Defense Service (Amendment) Bill, 1950—stated. “According to Section 6(c) of the current law, regular military service for a female person lasts a year. The bill extends the period of regular service for a female person to two years and states that the period of service, after the period of agricultural training, will only be devoted to duties that the minister of defense will prescribe in regulations.” *Id.*

service of women was extended beyond the first year, which, according to the law's original intent, had been intended for agricultural training. Relying on this provision, the Defense Service (Duties of Women in Regular Service) Regulations, 1952, were enacted. These regulations included service and clerical duties as well as professional-technical ones, but not combat duties. The pattern of military service for women was thereby set for years to come. Regular service for men was later extended, whereas for women it never extended beyond two years.

In practice, the policy of excluding women from combat duties was applied even more rigorously than the wording of the regulations suggests. The regulations stated that the service of women in other duties would be contingent on their volunteering for it. But the army's policy was that a woman's consent to volunteer, even when given, was not accepted. Not only did the regulations require women to volunteer but they also reflected the army policy on the duties female soldiers would be assigned, even when they wanted to volunteer for others, as shown in the *Miller* affair.

Although the provision that had served as the basis for the regulations defining the military duties open to women was later annulled, military practice did not change accordingly. The annulment was a random occurrence rather than the result of public debate, reflecting a more general change in the arrangement concerning agricultural training in the army. It replaced the general rule on agricultural training with an arrangement enabling women to devote part of their terms to it.<sup>46</sup> But the army's general policy restricting the positions open to women—particularly combat duties—remained in place. These limitations were also included in the military code.<sup>47</sup>

### III. THE STRUGGLE FOR EQUAL OPPORTUNITIES IN COMBAT DUTIES

The special limitations concerning the service of women remained in place for many years. Women soldiers served a shorter term, mainly in clerical duties as well as in some technical and professional roles, a pattern that affected their chances of inclusion and promotion in the standing army. Traditionally, the senior woman officer in the army was the commander of the Women's Corps, who was responsible for dealing with service conditions for women soldiers and with the protection of their rights. New positions were opened up to women from time to time but the basic conception, whereby the service of women was limited to auxiliary and professional non-combat roles, did not change.<sup>48</sup> This approach was

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<sup>46</sup> Defense Service Law, 1987 (Amendment No. 2), which replaced Section 21 of the Defense Service (Consolidated Version) Law, 1986. The new Section 21(a) of the Law stated, "The Minister of Defense may, with the consent of the Foreign Affairs and Defense Committee of the Knesset, prescribe in regulations that a period not exceeding the first twelve months of regular military service will be devoted, following initial military training, to agricultural training or another pioneering form of training."

<sup>47</sup> *Miller*, *supra* note 15, at 105.

<sup>48</sup> The main directive concerning the service of women soldiers was the order of the General Staff



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accepted without question by almost all the parties concerned, and individual requests by women soldiers who asked to be assigned to other duties brought no change. This reality was reflected in all references to women's army service, of women, including in the courts. In a Supreme Court ruling dealing with the punitive measures imposed on women who evaded army service through a false affidavit concerning their religious convictions, Justice Landau explained that women's army service is important "in order to enlarge the manpower pool available to the IDF, and thereby release their brothers from military duties that girls can also fulfill."<sup>49</sup> The nature of the roles fulfilled by women soldiers was also used by religious circles in support of their continued opposition to women's service, which they portrayed as redundant, negligible, and even dishonorable.<sup>50</sup>

In the first half of the 1990s, more than forty years after the enactment of the Defense Service Law, the special arrangements concerning the service of women soldiers became the focus of a public polemic following Alice Miller's struggle to be accepted to the pilots' course of the Air Force. Her petition did not question the statutory arrangements applying to women's service and, in fact, could not

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2.0701 "Service of Women Soldiers in the IDF (Women Corps) – Assignment, Duties, Training, and Service Conditions." This order regulated both the institutional aspect—monitoring service conditions for women soldiers in the army within the framework of the Women's Corps and the individual aspect—assigning soldiers to specific duties. Concerning the institutional aspect, it was determined (in Section 12 of the order)—that an officer from the Women Corps would be assigned to every unit, whose duties would be, "To advise the commander of the unit and instruct its officers and its soldiers in all that concerns the orders related to the women soldiers in the unit;" "To ascertain fulfillment of the army's orders in all that concerns the service of women soldiers;" "To monitor duty rosters, furloughs, issues of discipline and sanitation, and service conditions incumbent on women soldiers in the unit;" "To follow up on the functioning of women soldiers, their promotion, assignment, and the correlation between their actual performance and the definition of their duties;" and also "to judge women soldiers, according to the army code." The commanding officer of this organizational structure was the Chief Women Corps Officer—Section 13 of the order. Concerning the individual aspect of assigning women soldiers to their duties, Section 4 of the order stated, "Women soldiers in the IDF will be assigned to all military duties defined in the 'list of military duties' as duties to which women can be assigned, except for those duties defined in the combat file, taking into account their qualifications, their abilities, and their special service conditions." Beside this principle, Section 5 of the order stated the following exception, "A woman soldier is allowed to volunteer for duties beyond those defined in Section 4 above, after signing a suitable declaration to that effect, and after her volunteering for this duty is ratified by the Chief Officer of the Women Corps and the Head of Personnel Directorate." These instructions implemented the arrangement of the Defense Service Law and its regulations, and were instituted in the military code. They abide by the principle of setting aside specific duties to women soldiers, subject to the possibility of their volunteering for other duties as well. Neither the order of the General Staff nor the regulations were sufficiently clear on the scope of duties open to women soldiers and on the policy of the army concerning the response to the requests of women soldiers to volunteer for other duties. This order of the General Staff was abolished only in January 2003, but not because the principle that women would not be assigned to many military duties was abandoned. As clarified below, additional positions were indeed opened up to women soldiers, but without rescinding the principle that some would not. The order had to be annulled mainly due to the institutional changes affecting the service of women soldiers after it was decided to abolish the separate Women's Corps. The traditional role of advising the General Chief of Staff on women's service was assigned to the Advisor to the Chief of Staff on Women's Issues, a woman officer with the rank of Brigadier General. Contrary to the former Chief Officer of the Women Corps, the Advisor no longer heads a corps of women officers monitoring women's service conditions.

<sup>49</sup> According to 886/80 *Levanon-Kotkovsky v. The State of Israel* [1981] IsrSC 35(2) 421, 423.

<sup>50</sup> See, e.g., Tamar Rapaport, Anat Pinso, and Yoni Garb, *Religious-Zionist Girls Contribute to the Nation*, 7 THEORY & CRITICISM 223, 229 (1995) [Hebrew].



challenge their binding validity due to the constitutional tradition of the legislature's sovereignty.<sup>51</sup> It was confined to attacking the policy of the army, which rejected the possibility of volunteering for duties that had not been defined as open to women. When the petition was submitted, this policy no longer relied on statutory arrangements but on the discretion of the defense authorities. The pilots' course in which Alice Miller was interested is a service track that men, too, enter as volunteers. Contrary to the consideration given to men's applications in her situation, however, Alice Miller's request was rejected out of hand because she was a woman. Formally, Alice Miller submitted a private petition intended, above all, to help her realize her professional potential and desires. To a large extent, however, it was managed and perceived as a public petition against the army's policy, which discriminated against women as a group.<sup>52</sup> In this context, the petition claimed that the army's policy was detrimental to the social image of women, to their prospects for promotion, which are often contingent on their combat record, and to their chances of civilian employment, influenced also by one's army record—and particularly in regard to flying, given the policy of El-Al Airlines at the time to employ pilots who had served in the Israeli Air Force.<sup>53</sup>

Potentially, the petition could be a challenge to the overall army policy of placing constraints on the service of women. In the end, however, the arguments were confined to a very narrow realm, due to the tactical stance adopted by both parties. The petitioner's lawyers refrained from presenting the case as a general critique of the army's policy, and focused their attack on the sweeping disqualification of women for combat duties.<sup>54</sup> For its part, the Air Force presented its position as founded on "planning considerations," that is, on the concern that including women in the pilots' course would prejudice the army's ability to plan its deployment for combat, given that women serve for shorter terms and are eligible for exemptions in the course of their lives, as married women and as mothers. The social reservations concerning the possibility of women serving in combat duties and, in this context, the public significance of women being taken as prisoners of war, were not discussed in the ruling after it was stressed that they had not been taken into account. Accordingly, the Court refrained from addressing them.

Given the narrow parameters of the controversy as defined by the representatives of both parties, the Court's task was relatively easy. The Court

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<sup>51</sup> As noted *supra* note 24, this tradition changed during the 1990s, but the possibility of conducting a judicial review of infringing legislation was expressly restricted in the Basic Law: Human Dignity and Liberty to new legislation enacted after 1992. See Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

<sup>52</sup> Alice Miller was represented by Adv. Neta Ziv, of the Association for Civil Rights in Israel (ACRI) and Adv. Rachel Benziman, of the Israel Women's Network.

<sup>53</sup> *Miller*, *supra* note 15, at 106. On the influence of inequality in the army on civic inequality, see also Iris Jerby, *The Double Price: Women Status and Military Service in Israel* (1996) [Hebrew]; Izraeli, *supra* note 12; and Ruth Halperin-Kadari, *Women in Israel: A State of Their Own* 155 (2004).

<sup>54</sup> *Miller*, *supra* note 15, at 106.



pointed out that the army's position rested on hypothetical concerns about the inability to enjoy the long-term service of women who would volunteer to serve as pilots, although no data was available on this topic. In these circumstances, the majority justices could accept the petition without actually interfering with the professional discretion of the army's authorities. It was not argued or proven that women have lesser abilities as pilots. Fears were raised only concerning planning, without submitting any evidence for them. Hence, the army could be compelled to accept women to the pilots' course, even if only on a limited experimental basis, subject to the implementation of follow-up procedures on the success of the experiment.

Immediately after the *Miller* ruling was issued, it was celebrated as a feminist achievement. The ruling was considered an achievement for obvious reasons. It abolished a form of discrimination that violated equal rights for women in an area of great symbolic importance, given the nature of the military establishment as a male stronghold and its centrality in the Israeli employment market as well as in Israel's public life. The symbolic value of the ruling was even more prominent because it had breached the Air Force; the most prestigious bastion of combat forces. At the practical level, the ruling encouraged the army to take steps to open up many more military options to women, including combat duties,<sup>55</sup> subject to their volunteering to extend their term of service, where necessary.<sup>56</sup> At the same time, action was taken to broaden the assignment of women to the reserve forces as well, contrary to the previous policy of discharging most women from reserve duty immediately upon conclusion of their regular service.<sup>57</sup> In the broader context of feminist activity, the *Miller* ruling served as a source of inspiration and encouragement for further struggles and as supportive evidence in other demands for equality submitted to the government and to the courts.<sup>58</sup> The precedent set in

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<sup>55</sup> The State Comptroller's Report cites 2,325 additional types of military duties open to women, in areas of maintenance, technical, and combat. Together with these data, the report criticizes the army's inadequate deployment for the inclusion of women in some of these duties—the late adaptation of the “efforts ruler,” refraining from interviewing women at the pre-enlistment selection stage in order to test their fitness to serve as combat soldiers as opposed to the norm regarding men who are eligible for enlistment, and so forth. See State Comptroller's Report, *supra* note 35, at 137-43.

<sup>56</sup> *Id.* at 143.

<sup>57</sup> Nevertheless, the State Comptroller's Report points out that most women fail to reach the lowest level of rifle shooting proficiency in the course of their basic training and, therefore, cannot be assigned to many vital reserve duties that require this. See State Comptroller's Report, *supra* note 35 at 143-44. For a discussion on the reserve service of women, see also Ze'ev Lerer and Liora Rubinstein, *Women in the Reserves* 394 MA'ARAKHOT 80 (May 2004) [Hebrew].

The requirement that service in duties demanding training be contingent on extending the length of the regular service and on reserve service is justified, but raises an additional dilemma: striving for equality means assuming additional burdens and renouncing privileges—given that a reduced burden of service is in fact a kind of privilege. In practice, women assume such burdens, although they continue to bear other social burdens that have yet to be removed from them, such as discrimination at work targeted against women who are mothers, more than against men who are fathers. See Frances Raday, *On Equality*, 24 MISHPATIM 241-62 (2004) [Hebrew].

<sup>58</sup> On the importance of the ruling as a legal precedent in litigation and in public struggles, encouraging activities intended to promote women's rights, see also GAD BARZILAI, COMMUNITIES AND





*Miller* influenced legislation as well. An important amendment was introduced in 2000 in the Equal Rights for Women Law<sup>59</sup> that included, *inter alia*, a reference to equal rights in the army. According to Section 6D(a), which was added to the main law, “every woman who is eligible for service in the defense forces, or who serves in them, has a right equal to that of a man to serve in any duty, or to be assigned to any duty.” A similar provision was also added to the new Section 16A of the Defense Service Law.<sup>60</sup>

The contribution of *Miller* should also be examined in light of the critiques leveled against it, both by those who identified with Alice Miller’s struggle but were disappointed by the limitations of her legal victory, and by those who had questioned the value of this struggle *ab initio*.

First, insofar as Alice Miller’s struggle was meant to annul discrimination in the military service of women, the petition was only partially successful. The ruling did not dismiss the legitimacy of the distinction between men and women in their assignment to combat duties but only moderated its implementation, while compelling the army to examine the applicants’ fitness in various contexts. Indeed, the petition could hardly have achieved any more than that given the cautious remedies it had requested, as a result of a tactical preference for advancing one step at the time. This stance, however, though possibly vital to the petition’s chances of being accepted, exacts a price. The policy drawing fundamental distinctions between men and women remained in place. Moreover, since the petition was concerned with administrative decisions, the distinctions between men and women written into the Defense Service Law itself were never discussed. These distinctions, however, involve implications for the cost-effectiveness of assigning women to duties requiring a long period of service and expensive training.

Second, the petition further strengthened the model making women’s service in combat duties conditional upon their volunteering. According to *Miller*, women remain in the category of individuals who should not ordinarily be assigned to combat duty. The ruling opens up the option of serving in such duties to volunteers, and thereby strengthens the perception of these women as different and exceptional. For men too, joining a pilots’ course is indeed voluntary, but not so for other combat duties such as the armored corps or the artillery corps. Similarly, the legislative amendments in this regard, in the Equal Right for Women Law and in the Defense Service Law, relate to the woman’s right rather than to her obligation to serve in any particular role.<sup>61</sup>

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LAW: POLITICS AND CULTURES OF LEGAL IDENTITIES 195-96 (2003).

<sup>59</sup> Equal Rights for Women (Amendment No. 2) Law, 2000 (Isr.).

<sup>60</sup> Defense Service (Amendment No. 11) Law, 2000 (Isr.).

<sup>61</sup> Frances Raday holds that the solution of opening up to women the possibility of volunteering for combat roles, in contrast to subjecting them to such duties, is a sensible compromise. She explains, “Were the army to institute absolute equality, then women, who are in any event the oppressed class, would suffer even greater oppression. The dual burden of career and family, which many women still bear, would become a triple burden: career, family, and military service. The women’s prospects of

Third, the ruling did indeed create precedents for women pilots and navigators but did not yet lead to significant quantitative changes in the Air Force in the decade after it was issued. The ruling had educational and formative value and, therefore, together with other factors, helped to open up positions that had previously been barred to women.<sup>62</sup> And yet, core duties in combat units still remain closed to them. Even women soldiers trained for combat duty positions find that their assignment options are at times limited. The amendment to the Equal Rights for Women Law, enacted after *Miller*, is open to flexible implementation insofar as it states, “it will not be considered a violation of this right if demanded by the nature or character of the position.”<sup>63</sup> The same is true of Section 16A of the Defense Service Law, which allows for distinctions between men and women according to the nature or character of the position, and entrusts to the Minister of Defense the authority to issue regulations defining types of positions for which women soldiers will be able to volunteer. The regulations that were promulgated<sup>64</sup> include classic military duties outside the pilots’ course, such as “light infantry trooper” and “border police trooper,” but still preserve the basic approach whereby not all military duties are open to women. Thus, for instance, the regulations refer to a “shallow waters diver,” thereby clarifying that they do not apply to other forms of diving. About nine years after Alice Miller’s trailblazing petition, a female officer in an anti-aircraft unit, Ya’ara Stolberg, submitted another petition when her request to be assigned to a more advanced unit was rejected because she was a woman. Interestingly, the role of “combatant in the anti-aircraft unit of the air force” was one of the positions that the new regulations had opened up to women. Opening up a military profession to women then does not ensure them options of assignment and promotion identical to those of men who were trained for the same profession. The hearings on the petition did not proceed because the legal proceedings extended beyond the expected date of the petitioner’s release from the army. Although the Israel Women’s Network had joined as a public petitioner, the petition was in the end withdrawn on the Court’s advice.<sup>65</sup>

The critique of Alice Miller’s petition has so far been presented from a

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joining the elite of the military hierarchy and enjoying the accompanying socio-economic advantages would still remain minimal.” Nevertheless, “women also pay a heavy price in the loss of opportunity and in the injury to their image because they are not fully included in the army, despite the fact that entire populations of men do not serve at all, and only a minority among the men who serve in the army are assigned to combat duty.” In light of all the above and for the time being, she argues that “we must be satisfied with opening up a voluntary track, as has been done, without equality in the duty of service.” Frances Raday, *The Army: Feminism and Citizenship*, in *ARMY, SOCIETY AND LAW* 185, 216 (Daphne Barak-Erez ed., 2002) [Hebrew].

<sup>62</sup> The legal limitation concerning the service of women in the Border Police was also changed at this time. Defense Service Law (Amendment No. 7 and Temporary Regulation) (Service in the Police and Recognized Service), 1995 (Isr.).

<sup>63</sup> As noted at the end of Section 6D(a) to the Equal Rights for Women Law, *supra* note 59.

<sup>64</sup> Defense Service (Defining Duties for the Voluntary Service of Women) Regulations, 2001 (Isr.).

<sup>65</sup> HCJ 6757/03, *Ya’ara Stolberg v. The Minister of Defense* [2005] (unpublished). The ruling noted only that “the petitioner accepted our proposal and informed us about the petition’s withdrawal.”



perspective that identifies with her basic aspiration for equal opportunities in the army. Since it focused on the petition's inability to achieve its aim, this critique was "internal." Other critiques leveled against the petition were "external" to the struggle for equal opportunities within the army, and questioned its value and significance vis-à-vis other feminist struggles. At the center of the controversy was the claim that the struggle to open up the Air Force's prestigious pilots' course to women is only relevant to the daughters of elite sectors of the population, who could be eligible for prestigious courses of this kind in the first place. This critique was presented mainly by feminists of the Mizrahi extraction, who saw Alice Miller as a "privileged princess," whose only missing "toy" was participation in the glamorous pilots' course. In their view, Alice Miller fought against the only form of discrimination she had ever experienced, as a member of a social elite that benefits from numerous privileges which are not the lot of poor and uneducated women, mostly of Mizrahi origin.<sup>66</sup> This critique was obviously also relevant to the perspective of Israeli Arab women citizens who do not serve in the army to begin with, and probably do not identify with aspirations to serve in combat duties because of the special complexity of the Arab community's attitude to the army.<sup>67</sup> Other critiques were influenced by the viewpoint of cultural feminism and its resistance to war,<sup>68</sup> as well as by radical feminism and its criticism of the army as a patriarchal institution.<sup>69</sup>

An additional critical perspective on *Miller* relates to the question of choice between different struggles for equality: was it correct to focus on the closure of certain options to women when most of the women who enlist are not interested in them, or should the focus have been on other, more common problems, of unequal treatment of women in the army? More specifically, this criticism suggests that, until then, no legal-feminist struggle had addressed the phenomenon of sexual harassment and sexual exploitation of women soldiers by their commanding officers, which is another prominent and more frequent instance of inequality

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<sup>66</sup> See Henriette Dahan-Kallev, *Feminism between Mizrahi and Ashkenazi Identities*, SEX GENDER AND POLITICS 217, 243 (1999) [Hebrew].

<sup>67</sup> See Hassan Jabarin "Toward Critical Approaches of the Palestinian Minority: Citizenship, Nationality, and Feminism in Israeli Law" ARMY, SOCIETY AND LAW 217, 243 (Daphne Barak-Erez ed., 2002) [Hebrew].

<sup>68</sup> Over the years, many women's peace movements have been active in Israel, including "Women in Black," "Watch: Women's Fund for Human Rights," and "Shuvi." See, Sarah Hellman & Tamar Rapaport, "Women in Black": *The Challenge to the Social Order*, 10 THEORY & CRITICISM 175 (1997) [Hebrew]. In this context, note also the Equal Rights to Women Law, Amendment No. 4 (2005), which prescribes proper representation of women in public committees and in other teams shaping national policy, including the areas of "prevention, management, or solution of a political or international conflict, as well as in the conduct of negotiations, including the signing of an intermediate agreement or a peace treaty."

<sup>69</sup> Similar dilemmas accompanied the debates within the homo-lesbian community concerning the struggle for inclusion in the army. Compare Aeyal Gross, *Sexuality, Maleness, Army, and Citizenship: Homosexuals and Lesbians in the IDF from a Comparative Perspective*, in ARMY, SOCIETY AND LAW 95, 173-181 (Daphne Barak-Erez ed., 2002) [Hebrew]. For a further critique emphasizing the problems attached to struggles focusing on inclusion in militaristic structures without challenging their basic assumptions, see Barzilai, *supra* note 58, at 197.



within the army. At least quantitatively, this problem was far more pressing for women soldiers than their inability to volunteer for the pilots' course. A few years after *Miller*, this issue moved to the forefront of the public concern following a petition submitted by a discharged soldier against the promotion of Brigadier General Nir Galili because of his sexual relationship with her when she had been his direct subordinate.<sup>70</sup> This criticism, concerned with the choice between different struggles, did not address Alice Miller as a private individual, but rather focused on the women's organizations that chose to place her petition at the front of the struggle for women's equality in the army.<sup>71</sup> Partially, this criticism could be answered by pointing to a link between the circumscription of women soldiers to clerical and auxiliary duties and the habitual attitude toward them as objects of sexual exploitation. Fixating women in secondary roles that serve the genuine combatants indirectly contributes to a dismissing attitude toward them and, sometimes, to a further expectation of "additional services." In any event, as noted, from the end of the 1990s the struggle against sexual harassment both within the army and outside it became a central topic in Israeli feminist consciousness.<sup>72</sup>

#### IV. THE STRUGGLE FOR CONSCIENTIOUS OBJECTION

The various critiques notwithstanding, for several years after it was issued *Miller* represented the dominant voice in the women's struggle regarding military service, which focused on inclusion and equal opportunities. About ten years later, Laura Milo's petition reached the courts. This petition also placed at its center the scope of women's participation in military service, but from the opposite direction. The petitioner, a high-school graduate eligible for enlistment after a year of voluntary service in a development town, asked to be exempted from army service altogether for reasons of conscience "given her opposition to the IDF policy in the territories."<sup>73</sup> She based her request on the special legal provision regulating women's exemption from military service "for reasons of conscience or for reasons of the family's religious way of life." According to the law, a woman objecting to military service for these reasons is entitled to an exemption, as long as she can show proof of her reasons to the satisfaction of the exemptions committee.

The exemptions committee that considered Laura Milo's request refused to grant her an exemption since it regarded her critique of the army's policy in the territories as a political, as opposed to conscientious, objection. This decision of the exemptions committee was consistent with the army's policy concerning men

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<sup>70</sup> *Anonymous*, *supra* note 12. See also H CJ 106/01 *Second Lieutenant Moed v. General Avital* [2002] IsrSC 56(2) 145.

<sup>71</sup> Hassan Jabarin mentions that, contrary to Alice Miller's struggle, the petition against the promotion of Nir Galili enjoyed the sympathy and identification of Arab feminists too, because they saw it as "a struggle of women without quotation marks." See Jabarin, *supra* note 67, at 69.

<sup>72</sup> An important turning point in this regard was the legislation of the Prevention of Sexual Harassment Law, 1998 (Isr.).

<sup>73</sup> See *Milo*, *supra* note 16, at 170.

who refuse to serve and are exempted from serving only when they object to military service in general for reasons of pacifism. Not so, however, when their objection to serve is related to the government's policy concerning specific battle areas or concerning the aims of combat—for instance, objection to the Lebanon war or objection to serve in the territories.<sup>74</sup>

The legal debate which was evolved by the petition had to address the fact that the Defense Service Law does not include a general provision on exemptions for reasons of conscience and, ostensibly, does not acknowledge exemptions for these reasons when men are concerned. Proposals to include such an exemption in the law were raised during the legislation proceedings of the Defense Service Law in its original version, but were rejected.<sup>75</sup> Nevertheless, as already indicated, as a matter of policy, the defense authorities do grant exemptions to men who refuse to serve as long as they are opposed to all forms of military service—that is, they are not “selective” objectors. On this count, they rely on the authority of the minister of defense to grant exemptions from service “for other reasons”—according to Section 36 in the current version of the law. By contrast, regarding women, the Defense Service Law includes an explicit provision of exemption from service “for reasons of conscience.” The question is how this provision should be interpreted. Does the exemption according to Section 39, granted only to women, apply only to pacifist conscientious objectors—following the general policy with regard to men—or to other conscientious objectors as well? Moreover, had the law intended to grant women an exemption for reasons of conscience that is separate and independent from the exemption granted for religious reasons?<sup>76</sup>

The wording of the Defense Service Law appears to differentiate between an exemption for reasons of conscience and an exemption for religious reasons. The

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<sup>74</sup> See HCJ 734/83 *Schein v. The Minister of Defense* [1984] IsrSC 38(3) 393 and HCJ 7622/02 *Zonschein v. the Military Attorney General* [2002] IsrSC 57(1) 726.

<sup>75</sup> MK Rachel Cohen-Kagan of the WIZO Women's Party related, *inter alia*, on this issue, “I cannot but accept reasons of conscience, and not necessarily religious reasons. Men also have reasons of conscience that do not allow them to serve in combat duty.” See *Debates on the Law in the First Knesset*, *supra* note 25, at 1519. Relating to the same point, MK Yizhar Harari of the Progressive Party stated, “I do not accept the assumption that the matter of conscience and religious conviction applies only to women,” but he intended to oppose a full exemption for reasons of conscience. In his view, a person who is opposed to bearing arms can serve in the army in other duties and share in the responsibility. *Id.* at 1625. Ultimately, it was decided not to state in the law an explicit exemption for reasons of conscience. At the same time, the general authority of the minister of defense to exempt from service was extended to include individuals claiming conscience objections to army service. When the bill was submitted to the plenum after debates in the Knesset's Foreign Affairs and Defense Committee, MK Zalman Aharonowitz, the Committee's chair, noted, “Various questions were raised in the committee concerning the law that should apply to parents of large families, to people who are opposed to army service for reasons of conscience, and so forth. The answer to these and similar questions is included in Section 12, which deals extensively with matters of exemptions and postponements.” *Id.* at 1607.

<sup>76</sup> The joint reference to freedom of religion and conscience while relating to them as two separate terms appears also in the Israeli Declaration of Independence, which was written at the same time. According to the Declaration, the State of Israel “will guarantee freedom of religion, conscience, language, education and culture.” THE DECLARATION OF THE ESTABLISHMENT OF THE STATE OF ISRAEL.



considerations that led to this wording, however, fail to emerge clearly from the debates transcripts on this law in the Knesset's Foreign Affairs and Defense Committee.<sup>77</sup> On the one hand, the debate on exempting women because of their world view focused on the concerns of religious and traditional women. On the other, some MKs did address at length—some positively and some negatively—the question of whether reasons of conscience adduced by men should also be recognized. Clearly, then, the MKs were not oblivious to the possibility of exemptions for reasons of conscience other than religious ones.<sup>78</sup> MK Moshe Unna of the United Religious Front even proposed that the exemption granted to religious women be included in a general provision of exemption for reasons of conscience.<sup>79</sup> Note that, at this very time, discussions about recognizing conscientious objection were also taking place around the enactment of a military code. The discussions also addressed the possibility of a conscientious objection to serve that is not based on religious grounds.<sup>80</sup> A wording that referred both to “reasons of conscience” and to “religious conviction” was eventually presented to the Foreign Affairs and Defense Committee as proposed by Ben-Gurion's party Mapai.<sup>81</sup> At the same meeting, attention focused mainly on the potential applicability of the exemption provision to traditional Moslem women. The Committee's chairman, MK Zalman Aharonovitz, explained that granting

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<sup>77</sup> In the Defense Service Bill, 1949, the concept of “reasons of conscience” had not yet appeared. Section 11(c) of this bill referred to the granting of an exemption to “a female person of military age who has declared, in such manner as shall be prescribed by regulations, that she is religious and her religious conviction prevents her from serving on defense service.” By contrast, in the version that was adopted, the exemption was defined as one granted to “a female person of military age who has declared that reasons of conscience or religious conviction prevent her from serving in the defense service. . .” Defense Service Law, 1949 (Isr.).

<sup>78</sup> See *supra* note 75.

<sup>79</sup> Debates on the Law in the First Knesset, *supra* note 25, at 1524. MK Moshe Unna then raised the option of some distinction in the arrangements concerning exemptions for reasons of conscience granted to men and to women, but subject to the basic assumption that an exemption for reasons of conscience be granted to men as well. In his view, “it might be justified to draw a distinction between men and women on the question of exemption for reasons of conscience: that a man refusing to serve for reasons of conscience should be exempt only from punishment, whereas a woman relying on this claim should be granted a right to exemption *ab initio*.” *Id.* at 1523.

<sup>80</sup> Section 76 of the Judiciary Code 1948, ratified in the Emergency Regulations (Judiciary Code 1948), Official Gazette, supplement B 105, recognized “reasons of conscience” as grounds for more lenient sentencing. The inclusion of a similar arrangement in the Army Judiciary Code, 1955 was discussed in the Knesset, but ultimately was not adopted. Religious MKs, however, referred to it in an attempt to protect religious soldiers who had received orders clashing with their religious convictions. See Law on the Army Judiciary Code, 1949, 2 DK 1309, 14 (MK Zerach Warhaftig of the United Religious Front); Law on the Extension of Emergency Regulations Judiciary Code 1948, 1950, 6 DK 2522, 30-31 (MK Warhaftig); Law on the Army Judiciary Code, 1954, 16 DK 2012, 19 (MK Kalman Kahana of Po'alei Agudat Yisrael). Secular MKs also related to conscientious objection at the level of principle—both positively and negatively. See, e.g., Law on the Army Judiciary Code, 1954, 16 DK 1998, 2002-03 (MK Yohanan Bader of Herut Movement opposes consideration of reasons of conscience); Law on the Army Judiciary Code, 1954, 16 DK 2020 (MK Yaakov Riftin from Mapam supports consideration of reasons of conscience). For further historical review, see Gadi Algazi, *Listening to Conscientious Objectors*, in THE TRIALS OF THE CONSCIENTIOUS OBJECTORS 11 (Dov Khenin et al. eds., 2004).

<sup>81</sup> Debates of the Foreign Affairs and Defense Committee, 1949.



exemptions only for reasons of conscience would answer the needs of religious Jewish women but, to remove any doubts as to the applicability of this exemption to Arab women as well, an explicit reference to “religious conviction” was added.<sup>82</sup>

Contradictory indications, as to the purpose of the statutory exemption for reasons of conscience, can also be found in the debates on the amendment to the Defense Service Law in 1952. This amendment replaced the arrangement granting exemption for reasons of conscience or religious conviction on the basis of an affidavit with a mechanism of proof before a committee.<sup>83</sup> Ben-Gurion’s statement is consistent with the approach that views the exemption for reasons of conscience as a redundant addition to the exemption granted to religious women, and links them to the religious objection to army service.<sup>84</sup> Although the bill that the Committee submitted to the plenum omitted an exemption for “reasons of conscience” —that had appeared in the 1949 original version of the law—this terminology was reinstated in the bill despite an objection by Mapam MK Yitzhak Ben-Aharon.<sup>85</sup>

After the Defense Service Law was enacted, the army endorsed a practice of granting exemptions to women who objected to serve for reasons of conscience, even when they were not religious. Unlike its response in the case of men, the army authorities have related to women’s requests for exemption as a matter of right, in light of the special statutory arrangement in their regard. In his book about the Defense Service Law, former Military Attorney General Zvi Hadar explained that according to the law, “only women are entitled to exemption from military service for two separate reasons, that is, for reasons of conscience or religion.”<sup>86</sup> He then stated that the law does not explain what would be considered reasons of

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<sup>82</sup> MK Aharonowitz explained this as follows, “The intention is to apply this to the Moslem community, where this is a far more serious issue than in the Jewish religion, so as to enable the government to exempt them from enlistment in certain cases. If we take out the word ‘religious’ we are left without any option. The word conscience means something to Jews but, in the Arab community, the concept of conscience does not overlap religion. Regarding Moslem women, experts on Arab issues have intervened on this matter and have repeatedly emphasized that this could lead to great confusion in the Arab community, and we have therefore left the wording of ‘religious conviction.’ Concerning Jewish women, the concept of ‘reasons of conscience’ remains. Religious people did not want us to write religious conviction either, but they agreed after we set the concept of ‘reasons of conscience.’ The demand for the term ‘religious’ came from the Moslem community.” *Id.* at 2-3.

<sup>83</sup> See *supra* note 20.

<sup>84</sup> Defense Service Law (Amendment), 1952 (First Reading) Session 60 of the Second Knesset, 26 February 1952, 11 DK 1437.

<sup>85</sup> Defense Service Law (Amendment), 1952 (Second and Third Reading) Session 65 of the Second Knesset, 6 March 1952, 11 DK 1558, 1559.

<sup>86</sup> See MENACHEM HOFNUNG, ISRAEL: SECURITY VS. THE RULE OF LAW 1948 – 1991 243 (1991) [Hebrew]. ZVI HADAR, INTERPRETING THE DEFENSE SERVICE LAW (1979) [Hebrew]. The approach that makes the exemption for reasons of conscience independent and separate from the religious exemption was also accepted by other interpreters of the law. Thus, for instance, Menachem Hofnung criticized the new arrangement enabling an exemption for reasons of religion solely on the basis of an affidavit because it contravenes the equality between this exemption and the—separate—one for reasons of conscience.

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conscience for this purpose.<sup>87</sup> Data on the work of the committee dealing with women who seek exemption for reasons of conscience show that most requests were approved, all in all more than a hundred each year.<sup>88</sup> These numbers ostensibly attest to a tradition of tolerance and leniency toward women's requests for exemption for reasons of conscience.

The military authorities' perception of women as less vital to the system probably allowed them to show leniency toward the requests of women who were not interested in serving and claimed a statutory right to exemption for reasons of conscience. Nevertheless, as instances of women's refusal to serve increased, this tolerant attitude lessened.<sup>89</sup> Laura Milo's request for exemption from service,

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<sup>87</sup> HADAR, *supra* note 85. The claim concerning the scope of the exemption for reasons of conscience was discussed in HCJ 269/51 *Horowitz v. General Shimon Mazeh*, IDF [1951] IsrSC 5 1656, but without an extensive discussion of the scope of the provision. In this case, the petitioner claimed that her conscience as a married woman instructs her to avoid army service because it may be detrimental to her family life. The Court rejected the petition stating that, "the legislator had not intended this type of conscience." *Id.* at 1657. On its face, the discussion seems to have been redundant in this case, since the petitioner was entitled not to serve due to the special exemption granted to married women. It is not clear from the decision what were the reasons for the petition in the circumstances of the case.

<sup>88</sup> At my request, the military prosecution provided the following data (on file with author):  
In 2001—119 petitions were submitted. Of them, 97 were accepted by the exemption committees. During this year, 18 cases were brought before the appeal committee of the exemption committees. 17 appeals were accepted and only 1 was rejected.  
In 2002—173 petitions were submitted. Of them, 118 were accepted by the exemption committees. During this year, 28 cases were brought before the appeal committee of the exemption committees. 23 appeals were accepted and 5 were rejected.  
In 2003—167 petitions were submitted. Of them, 60 were accepted by the exemption committees. During this year, 64 cases were brought before the appeal committee of the exemption committees. 47 appeals were accepted and 17 were rejected.  
In 2004—128 petitions were submitted. Of them, 52 were accepted by the exemption committees. During this year, 70 cases were brought before the appeal committee of the exemption committees. 51 appeals were accepted and 19 were rejected.

<sup>89</sup> See *The Military Prosecutor v. Matar*, MT/151/03 (Dec. 16, 2003) (unpublished) (sections of the ruling appear in KHENIN, *supra* note 80 at 203-205). The 2003 "conscientious objectors' trial," in which a group of young men who had refused to enlist were tried in a military court, serves as a landmark of the change in policy. The fundamental attitudes of both the prosecution and the defense as presented in this trial sharpened the military authorities in their resolute opposition to any form of objection defined as selective and related to the policy implemented by the army—unlike pacifism. In these circumstances, it became awkward for the army authorities to allow exemptions to women who also objected on selective grounds. The exemptions that the army had been granting to women whose objection is considered selective emerged in the trial only indirectly. Dov Khenin, the defendants' attorney, explained to me that he had brought up the exemption for reasons of conscience that the army had regularly granted to women selective objectors mainly for the purpose of arguing against the fairness of the proceedings, in order to emphasize the army's unjustified stringency toward the defendants. Interview with Dov Khenin (Mar. 8, 2005) (on file with author). A letter by Hadas Goldman, dated March 11, 2002, who had requested and had been granted an exemption for reasons of conscience, was submitted at the trial. This letter explains at length her conscientious objection to serve in an army that functions as "an army of occupation." See also HCJ 3238/04, *Ben Artzi v. Minister of Defense*, (June 1, 2005) (unpublished). Another conscientious objector, Jonathan Ben-Artzi, argued against the discrimination between men and women practiced by the committee considering exemption requests for reasons of conscience to accept such requests from men as opposed to women. Jonathan Ben-Artzi submitted a petition to the High Court of Justice demanding that his request to be released from the army, which he was eventually granted, should be recognized as an exemption for reasons of conscience as opposed to a discharge as "unfit for service." The ruling issued in his case refers to the discrimination claim but does not discuss it, after it was decided that there are no grounds for interfering



which relied explicitly on her objection to Israel's continued rule in the occupied territories, was rejected, and the scope of women's statutory exemption for reasons of conscience thus came before the Court.

The Supreme Court rejected Laura Milo's petition, adopting a restrictive interpretation of Section 39 in the Defense Service Law. Justice Procaccia, with Justices Matza and Levi consenting, stated that Section 39 grants women an exemption from service only when the conscience reason for their refusal to serve is related to a communal or religious tradition. According to Justice Procaccia, "an exemption for 'reasons of conscience' in the special context of this provision is closely related to reasons of religious, traditional, or ethnic-custom conviction, which prevent a woman from serving in any defense service as such."<sup>90</sup> She then explains, "the statutory exemption for reasons of conscience granted to women was meant to protect the status of women in traditional communities where members find army service incompatible with the protection of the women's honor and chastity, and may even contradict explicit injunctions in the religious commandments incumbent on them."<sup>91</sup> This interpretation attached the "reasons of conscience" in Section 39 to the "reasons of her family's religious way of life" mentioned in the same provision and created one continuum, while erasing the option of an independent exemption for non-religious reasons of conscience based on Section 39. According to this interpretation, the exemption of women for reasons of conscience, insofar as it exists, can be based on the general Section 36, which allows exemption from service for "other reasons" as well, and is therefore identical in scope to that given to men. In sum, according to the Court, despite the special provisions on women in the Defense Service Law, if the army's current policy negates recognition of "selective" conscientious objection that is not pacifist but related to the army's policy or mode of action, the negation of "selective" conscientious objection should also apply to women. Laura Milo's petition for a further hearing on the precedent-setting ruling issued on her case was rejected.<sup>92</sup> Justice Cheshin, who issued this decision, admitted that *Milo* contradicts statements in previous rulings indicating that the exemption of women for reasons of conscience rests on Section 39 of the Defense Service Law. Yet, he held that a further hearing on this ruling would not be justified since these statements were not formal precedents.<sup>93</sup> Moreover, even if it were decided that Section 39 does grant women an exemption for non-religious reasons of conscience, it would be correct to interpret this exemption in light of the distinction between selective objection

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in the decisions made on the matter of the petitioner. The reference to this claim in the ruling is evident in the following general statement: "The petitioner presents statistical data showing that, as opposed to very few men who are exempted for reasons of conscience, willingness to accept this claim in regard to women is far higher."

<sup>90</sup> *Milo*, *supra* note 16, at 186.

<sup>91</sup> *Id.*

<sup>92</sup> HCJ 7802/04, *Milo v. Minister of Defense* (Nov. 7, 2004) (unpublished) [hereinafter *Milo* Further Hearing].

<sup>93</sup> *Id.* at ¶ 9.



and full conscientious objection.<sup>94</sup> Justice Cheshin further held that the unique and special character of the case—an isolated petition by one woman conscientious objector—does not justify a further hearing on the matter.<sup>95</sup>

What is the significance of Laura Milo's petition for the feminist struggle for women's rights and how does the ruling in her case influence this struggle? Ostensibly, it is possible to argue that her petition lacks feminist significance. Her demand for exemption from service for reasons of conscience rested on a world view shared—or contested—by both men and women. In the past, many men in Laura Milo's situation found that their demand for exemption from military service for reasons of conscience other than pacifism was rejected. In this light, Laura Milo's demand seems part of a general civic struggle to protect the right to freedom of conscience, involving men and women alike. Note that the petitioner's public pronouncements did not refer to the meaning of her struggle for women in Israel.

On closer and deeper scrutiny, however, the feminist meaning of Laura Milo's endeavor cannot be ignored. This meaning emerges in light of the reality of women's military service in Israel. As noted, most women serving in the army do not take part in combat duties and are not expected to serve in positions involving direct confrontation with the Palestinian civilian population in the occupied territories.<sup>96</sup> Furthermore, since women are considered less vital to the army because they cannot be assigned to combat duties, it is relatively easier for them to obtain an exemption from military service—obviously, not formally.<sup>97</sup> In these circumstances, the objection of women to serve, even more than that of men, is a political stance and not only an expression of the personal-conscientious distress of someone expected to confront service in the territories.

Laura Milo herself did not make any statements implying that her being a woman was in any way relevant to her petition. But the full public meaning of her struggle is determined not only by her declarations but by the wider context of her actions. This context requires to take into consideration her request to ground her

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<sup>94</sup> *Id.* at ¶¶ 11-12.

<sup>95</sup> *Id.* at ¶ 10. According to Justice Cheshin, "We cannot ignore that conscientious objection—mainly selective conscientious objection—has become more common in recent years. In statistical terms, however, we are still talking of only a few cases at this stage. As for women, we have so far encountered only one case—the petitioner's."

<sup>96</sup> See State Comptroller's Report, *supra* note 35, at 140. According to data on 2002 in the State Comptroller's Report, women combat soldiers were about 1% of all women in regular service. *Id.*

<sup>97</sup> The high rate of women who do not serve in the army deserves note in this context. In 2001, 38% of women were exempted from service. It is worthwhile adding that religious women who are exempted from service for reasons of religion thereby lose the option of expressing protest through their refusal to serve. At the time of the disengagement from Gaza—during the summer of 2005—the possibility that religious soldiers studying at yeshivot would refuse to obey orders was a subject intensively discussed. The focus was again only on the refusal of male soldiers, simply because most young women in the segment of the population that could be expected to refuse in this context do not serve in the army but in national service. Other young women, mainly high school students, did participate and even significantly, in civilian acts of protest and opposition against the disengagement initiative.

exemption on provisions in the Defense Service Law specific to women, her choice to go the hard way of a legal struggle—as opposed to availing herself of the lenient policy applied to women who seek not to serve in the army, and the fact that her struggle was a harbinger of other young women’s declarations of refusal to serve.<sup>98</sup>

The relatively new phenomenon of women conscientious objectors expresses the desire of women in Israel to be part of the public discourse on a crucial topic in the political-security agenda: Israel’s continued control of the occupied territories. Women strive to be full partners to this discourse, no less than men. Conscientious objectors who reject the official policies toward the Palestinians take this step not only in order to avoid actions they find personally difficult for their own conscience, but also to challenge the public agenda. Women conscientious objectors are interested in being part of this. They want to be partners in “the big right to say no,”<sup>99</sup> and thereby challenge the public tradition making only men active agents in the objection discourse—while women were expected to be satisfied with protests in their favor or with demonstrations of concern for them.

Although Laura Milo’s petition has feminist significance, at least in expressing the aspiration for women’s full participation in public life, it also raises difficulties for the supporters of the feminist struggle for equality. The petition was based on a legal provision granting exemption from service “for reasons of conscience” only to women. In other words, it used a legal privilege granted only to women which reflects a paternalistic tradition concerning the special protection society extends to them. Is it fitting to found a feminist struggle on legal provisions based on sweeping and not necessarily substantive distinctions between men and women?<sup>100</sup> In fact, to ensure that women conscientious objectors attain the political recognition afforded to men conscientious objectors, Laura Milo’s demand to be exempted in circumstances that would not assure such an exemption to men should have been rejected. In this sense, the importance of her petition lies in the very fact that she submitted it rather than in its success. Her failure ensures that, in future as well, women’s objection to service will gain public resonance.

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<sup>98</sup> See Yael Shoshani, *Woman’s Liberation* HA-IR, November 18, 2005 [Hebrew]. Some women objectors do tie their attitude toward military service to a feminist stance as opposed to militarism and to patriarchal systems. This approach, however, was not evident in Laura Milo’s struggle and is not shared by all conscientious objectors. It featured prominently in the struggle of another conscientious objector, Idan Halili, who refused to serve at a later time. She explained her resistance to army service as based on feminist reasons of objection to the army as a patriarchal, oppressive, and compartmentalizing organization.

<sup>99</sup> Paraphrasing a poem by the well known Israeli poet - Nathan Zach, *Shir no tipusi* [A Typical No Poem], in ANTI-MEHIKON 59 (1984) [Hebrew]. The right to sign a petition was denied in the past to Yuli Tamir, a female peace activist (and since 2006 Israel’s Minister of Education). As a young woman, Tamir asked to add her signature to the officers’ letter of the Peace Now movement but was refused because she had not served as a combat soldier, although she had been an officer during her army service. See TZALY RESHEF, PEACE NOW: FROM THE OFFICES’ LETTER TO THE PEACE NOW 20-21 (1996) [Hebrew].

<sup>100</sup> Another way of posing the question is whether, from a feminist perspective, it is not preferable that women objectors also be sent to jail and pay the price of their objection as men do in these circumstances, as part of the public struggle that conscientious objection is meant to promote.

Justice Procaccia's ruling largely reflects the feminist dilemma evoked by Laura Milo's petition. Justice Procaccia, as noted, rejected the assumption that the special statutory exemption granted to women extends to the kind of conscientious objection that is not recognized for men. According to her judgment, both women and men can be exempted for reasons of conscience only when they refuse to serve for reasons of conscience that are not "selective." To reach this result, she opted for a restrictive reading of the special statutory exemption granted to women. In her view, the exemption applies only when the hindrance to service is in religious reasons of conscience. Justice Procaccia wrote an egalitarian opinion. Her decision expresses a world view close to that of liberal feminism, which is hostile to arrangements that draw distinctions between men and women, even if in the short run they are ostensibly beneficial to women. In practice, however, the *Milo* decision did not lead to genuinely egalitarian service arrangements for men and women because it was issued in the context of a legal situation granting significant exemptions only to women—due to their family circumstances or religious world view. The failure to acknowledge an exemption to women for reasons of so-called selective conscience led to equality between men and women objectors, but did not really influence the picture concerning women's military service and its perception as "something different." In addition, it perpetuated the view that the rules applying to women should conform with the rules applying to men (rather than vice-versa), and sharpened the law's differential approach to religious and secular women.

Justice Procaccia's reading ignores the basic difference between the extant service arrangements for men and women. In the current regime of the Defense Service Law, an interpretation that recognizes a statutory exemption for women resting on secular reasons of conscience could be logical, even in the absence of a parallel exemption for men. Although this is not easy to acknowledge, the underlying assumption of the Defense Service Law is that women are less vital to the army, and therefore it can dispense with their services in the name of important social interests. Recognizing a problem of conscience regarding army service is also an important social interest, which could be considered a justified reason for exemption no less than a religious problem. This argument is not intended to justify the distinction between men and women adopted in the Defense Service Law, but only to point to the difficulty of ignoring it in the process of interpretation.

#### V. ISRAELI FEMINISM AND THE STRUGGLE FOR FULL CITIZENSHIP

The two famous struggles hinging on the implementation of women's duty of military service in Israel are usually depicted as opposites. Alice Miller strove for the ultimate form of inclusion as a pilot whereas Laura Milo aspired not to serve at all. Alice Miller identified herself with the Zionist ethos and its values, whereas female conscientious objectors like Laura Milo did not feel obligated to realize an

extremely important component of the Zionist perception of citizenship—Army service.<sup>101</sup> Alice Miller asked the Court to restrict the distinctions between men and women in all areas regarding their Army service. In contrast, Laura Milo rested her petition on a provision that grants women broad exemptions from army service—the very exemptions partially responsible for barring women such as Alice Miller from combat duties. Alice Miller’s success was linked to the results of her litigation because her petition was accepted. By contrast, the success of Laura Milo was connected to the very act of submitting her petition rather than to the results of her litigation. To some extent it is even linked to the fact that Milo’s petition was *not* accepted. Therefore, the question now is: did these women follow incompatible struggles, or did their efforts also share common elements?

This article argues that despite large differences in the background and the aims of their petitions, Alice Miller and Laura Milo’s struggles share several strong resemblances. Both petitions, ostensibly so far apart, acknowledge the centrality of military service to public life in Israel. Alice Miller’s petition highlighted the importance of military service for equal opportunities in the professional and public spheres. Laura Milo as well asked to influence public discourse in Israel by adopting a stance in regard to military service. Had Laura, a girl just out of high school, not made known her refusal to serve in the army, she would not have greatly impacted Israel’s public discourse. Both petitioners thus understood that in Israel, full citizenship as opposed to merely formal citizenship, is attained through army service.<sup>102</sup>

Moreover, both Alice Miller and Laura Milo expressed high commitment to Israel. Alice Miller’s petition emphasized not only the injury to her self-realization but also her will “to contribute her share to the country’s defense.”<sup>103</sup> Laura Milo was no less committed to making a contribution to Israeli society, though outside the army. Before enlisting, she spent a year in the development town of Yeruham as a member of a youth movement, and she also asked to continue her community work in a national service framework to be performed as an alternative to army service. In the letter expressing her refusal to serve in the army, she wrote,

Despite my sharp and far-reaching criticism of the State of Israel, I feel it is my obligation to change it and shape it. My role as a citizen of this state is to continue struggling against all manifestations of injustice. This I now choose to do in the realm of economic-social-cultural gaps in Israeli

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<sup>101</sup> For a comparison between Zionist feminism, which fights for equality of opportunities in state institutions, and non-Zionist feminism, which criticizes the collective and its institutions, see ORIT KAMIR, *ISRAELI HONOR AND DIGNITY: SOCIAL NORMS, GENDER POLITICS AND THE LAW* 179-212 (2004) [Hebrew].

<sup>102</sup> See Moshe Lissak & Barukh Knei-Paz, *Israel Towards the Year 2000: A Changing World, in ISRAEL TOWARDS THE YEAR 2000: SOCIETY, POLITICS AND CULTURE* (Moshe Lissak and Barukh Knei-Paz, eds.) 408, 432 (1996) [Hebrew] (describing the link between army service and citizenship in Israel) (“The absolute identification between army service and the normative message that army service makes one a ‘perfect citizen’ is a central ethos of Israeli-Zionist society.”).

<sup>103</sup> Miller, *supra* note 15, at 106.



society.<sup>104</sup>

These statements denote full commitment to Israeli society, although they do not share the traditional Zionist discourse.

The two petitions have another common characteristic: neither one of the petitioners was critical of the basic distinctions drawn in the Defense Service Law between men and women, and conducted their struggles within the parameters of these distinctions. Indeed, formally speaking, they were precluded from raising claims against the statutory distinctions between men and women, due to the limitations on judicial review with regard to old laws,<sup>105</sup> but their choice to refrain from expressing any unease concerning these legal distinctions cannot be ignored. Both petitioners were actually willing to accept the legal norm which privileges women in all that concerns their military service.

Alice Miller confined herself to the claim that the Defense Service Law does not prescribe distinctions between men and women concerning assignment to combat duties. She did not request that the current distinctions concerning the service of women be abolished altogether. Her demand was much more modest: to compel the army to consider the requests of women who volunteer for certain combat duties—for instance, service as a pilot. The operative consequence of the *Miller* decision not only prohibits the discrimination against women, but also grants them an additional privilege, beyond those given by law. Women, unlike men, will now be able to choose certain combat duties but will not be obliged to serve in others, which for men are not voluntary. For example, women will be able to choose the pilots' course, but will not be required to serve as ordinary infantry soldiers. Alice Miller's achievement thus helps women to attain self-realization, but does not bring about an overall change in their civic status. The *Miller* litigation focused on duties that are not part of the "hard core" of the army's daily activities. Following the *Miller* decision, many positions in the army opened up to women but, in a wider perspective, women soldiers are still considered less vital than men. In the course of the public debate over the demands of religious soldiers who did not wish to serve with women in combat units, the service of women still seemed less important than that of the religious men.<sup>106</sup> The success of women who serve in combat duties is not necessarily perceived as proof of the qualifications of women in general to fulfill such duties, but instead as an expression of these women's uniqueness—and preferable advantage—vis-à-vis most women

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<sup>104</sup> The quotation is from Laura Milo's letter to the army authorities requesting exemption from service, entitled "a letter of conscience" (hereinafter Milo letter). I am grateful to Adv. Smadar Ben-Nathan who represented Laura Milo in her petition to the High Court of Justice and allowed me to read the full letter, of which passages are cited in the ruling.

<sup>105</sup> Section 10 of Basic Law: Human Dignity and Liberty protects older laws from judicial review.

<sup>106</sup> See *I Was Discharged Because I Was a girl*, YEDIOT AHARONOT, May 25, 2005, at 27 (telling the story of Hadas Miller, a combat soldier who was transferred from an artillery regiment where she had successfully served after a full course of training, due to the arrival of religious soldiers who objected to serving next to a woman).

soldiers.<sup>107</sup> Similarly, although in a different context, Laura Milo's petition was also entirely based on the preservation of women's privileges during their army service.<sup>108</sup>

The similarities in the social profile of the two petitioners—educated young women belonging to society's elite groups—are also worth noting. A more detailed scrutiny reveals even further commonalities: neither of the petitioners was born in Israel and both grew up in western countries—Alice Miller in South Africa and Laura Milo in France.<sup>109</sup> In both cases, the petitions were submitted by young women who ostensibly had everything, except for full equality of opportunities with men. Alice Miller's struggle, as noted, was criticized by feminists representing women from weaker groups in Israeli society, who would not be eligible for the prestigious pilots' course in the first place.<sup>110</sup> How should feminists from these groups relate to Laura Milo's struggle? Her endeavor seems closer to theirs because it deviates from the social convention that supports the army service, typical among hegemonic groups.<sup>111</sup> In truth, however, her struggle is also far removed from the reality of disempowered Israeli women. Conducting a struggle such as that of Laura Milo requires education, political awareness, and emotional leisure. Furthermore, such a struggle can only be waged by someone who the army

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<sup>107</sup> See Orna Sasson-Levi, *Subversiveness Within Oppression: Gender Identities for Women Soldiers in 'Male' Roles*, in WILL YOU LISTEN TO MY VOICE? REPRESENTATION OF WOMEN IN ISRAELI CULTURE 277, 289-292 (Yael Atzmon, ed., 2001) (a study focusing on the attitudes of women soldiers who served in combat duties, which found that they tended to isolate themselves from other women, whom they perceived as weak and spoiled).

<sup>108</sup> Note that, on the margins of his decision rejecting the petition for a further hearing on *Milo*, Justice Cheshin added that it would be worthwhile when considering the petitioner's punishment—were she to persist on her objection—to take into consideration the special arrangements set in the Defense Service Law concerning the service of women. According to Cheshin,

Needless to say, I do not discuss the question of the petitioner's fate and whether it would be appropriate to bring her to justice and send her to jail. This question was not placed before me and I will therefore not decide upon it. Let me note, however, that we cannot ignore the fact that concerning the matter of enlistment, the law stipulates special arrangements for women, different from those incumbent on men.

*Milo* Further Hearing, *supra* note 92.

<sup>109</sup> *Miller*, *supra* note 15, at 103 (noting Alice Miller's background as an immigrant who had grown up in South Africa in the factual part of the ruling. This reference was important to explain her background in civilian aviation, "Since her youth in South Africa, she has shown great interest in flying. She trained for it and received a pilot license recognized as valid in many countries, but has not yet fulfilled the requirements for a civilian aviation license in Israel."); *Milo* letter, *supra* note 104. Indirectly, Alice Miller's background as a new immigrant strengthens the distinctively Zionist character of her petition. The ruling on Laura Milo does not refer to the petitioner's personal background, and hence does not mention that she had spent part of her youth in France. Laura Milo herself referred to her youth in Paris in the letter she wrote to the army authorities, "Since my childhood in Paris I have been a member of the Ha-Shomer Ha-Tsa'ir youth movement, where I learned to criticize the State of Israel and, particularly, to think about what I want to change within it and in the world in general." *Id.*

<sup>110</sup> See Sasson-Levi, *supra* note 107, at 282 (noting that the available study on women serving in "combat" duties in the army confirms the claim that a decisive majority of them are of Ashkenazi extraction and from middle or upper-middle classes).

<sup>111</sup> See SAMI SHALOM CHETRIT, *THE MIZRAHI STRUGGLE IN ISRAEL: BETWEEN OPPRESSION AND LIBERATION, IDENTIFICATION AND ALTERNATIVE* 132 (2004) [Hebrew]. For instance, most members of the "Black Panthers" movement, which led the Mizrahi struggle for equal rights during the 1970s, had not served in the army. *Id.*



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would want to have in its ranks. Mizrahi girls from development towns are often not enlisted because the army claims it does not need them. In fact, such a struggle could only be waged by someone who does not need the army to enlarge her social and economic opportunities.<sup>112</sup>

Because of these resemblances, the two petitions also raise common questions. The first touches on the issue of representation and the complex matter of conducting a struggle “in the name” of all women. Would it be fitting for a woman such as Alice Miller, who wishes to pursue a military career, to ask for the annulment of a privilege granted to all women, when the majority of this public is apparently not interested in rescinding this privilege? Furthermore, is it not problematic to submit a petition on women’s conscientious objection in a way that, indirectly, could lead to a restricted reading of the current interpretation? An even more central issue is whether feminist struggles can be waged without attacking the basic distinction between men and women drawn in the law. Is the equality of women in all that concerns military service possible when the law defines the service of women as something so “different,” and perhaps as a kind of luxury afforded only to single secular women?

Alice Miller and Laura Milo are women who dared to lead a struggle against the “system” but, in a deeper sense, accepted the “rules of the game” adopted by the military and political establishments. Both emphasized their willingness to contribute to the country. Both came from the educated and affluent group of Israeli society, and both acted within the parameters of the widespread assumption concerning the centrality of military service. Neither has challenged the preservation of different arrangements concerning the military service of women. Both struggles, then, were a priori limited in their ability to bring about fundamental change.

The stress on the limited character of the two petitions is not a critique of the petitioners and their supporters. Rather, it is intended to highlight the trap lurking in the attempt to channel social struggles into a legal course. From a formal legal perspective, neither petitioner could attack the legality of the basic distinction between men and women as established in the law. Furthermore, the more radical the claims submitted to the Court, the lesser the chances of their’ acceptance. Thus, for instance, had Alice Miller absolutely opposed all the limitations placed on women’s assignment to combat duties, the Court would have been inclined not to take up the challenge. Here, then, is the dilemma: is it proper to lead struggles that accept the rules of the system? Such struggles are a priori limited in their ability to make great revolutions and may stamp problematic assumptions with a seal of legitimacy. As Audre Lourde writes, “For the master’s tools will never dismantle the master’s house. They may allow us temporarily to beat him at his own game,

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<sup>112</sup> See YAGIL LEVY, *THE OTHER ARMY OF ISRAEL: MATERIALIST MILITARISM IN ISRAEL* (2003) [Hebrew] (characterizing the army as a means of social mobility for marginal groups in Israeli society).





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but they will never enable us to bring about genuine change.”<sup>113</sup> Such struggles, however, do hold some prospect of bringing about mini-revolutions, which could serve as a basis for further reforms at a later time. The answer to this dilemma is largely political and subjective. In any event, as long as lawyers go on acting in the service of social revolutions, even the most heroic struggles will assume a gradual and moderate garb.

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<sup>113</sup> See Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, in *SISTER OUTSIDER* 110, 112 (1984).

