

The State's Interest in Recognizing the Right of Objection – The Israeli Case

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INTRODUCTION

As far as conscientious objectors¹ are concerned, when it comes to violating the law in relation to issues related to national security, one would expect the state to seek to severe punishment for violators – since the state generally sanctifies the rule of law and seeks to punish lawbreakers.² In practice, however, it would seem that the state demonstrates some degree of ambivalence in response to conscientious people who seemingly act in a negative way, in violation of the law. In this article, I hope to identify state interests other than punishing

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1 For the purpose of this paper, and in accordance with the International Covenant on Civil and Political Rights, a conscientious objector can be considered to be an individual who has claimed the right to refuse to perform military service on the grounds of freedom of thought, conscience, and/or religion. A broader definition could include any refusal to comply with state laws on such grounds.

2 The principle of the rule of law is usually discussed in the context of the obligations it imposes on the government – to be fair, to avoid legislation that cannot be upheld (such as retroactive legislation), and so on. The second aspect of the rule of law, to which I refer, relates to citizens' obligation to obey the law.

lawbreakers, which cause the state to refrain from fully prosecuting conscientious objectors.

I argue that the arrangements that address conscientious objection effectively achieve more goals than merely upholding the law (for example, social peace). Therefore, to the answer the question of how the state should deal with conscientious objectors, we should adopt a broad systemic point of view that considers governance and other principles, rather than a narrow legal perspective.

The following theoretical discussion is based on an analysis of case law, primarily Supreme Court judgments. The Supreme Court, the highest court within the judicial hierarchy in Israel, and whose decisions are binding on the lower courts, is the court most frequently involved in public policy issues.³

THE PRICE OF PROTEST AND EXIT

Economist Albert Hirschman uses tools of economic analysis to understand political phenomena.⁴ He introduces and examines several economic concepts from a political perspective. Two key terms in his work are “voice” and “exit”.

Voice, or protest, used by a customer or a member of a group, represents an attempt to change the practices, policies, and outcomes of the firm from which the customer makes a purchase, or of the group

3 From a methodological point of view, an analysis of court rulings may be approached in various ways. One may examine a large number of rulings and try to identify trends and patterns. One may examine a limited number of important decisions, or key precedents and try to deduce general conclusions. These and other possible methods offer methodological advantages and disadvantages. Considering these, the topic in question and the fact that there are few court rulings on the issues discussed herein, I adapted the methodological methods to my constraints.

4 Albert Hirschman, *Exit, Voice and Loyalty – Responses to Decline in Firms, Organizations and States* (Cambridge, MA: Harvard University Press, 1970).

to which she belongs. Protest is, therefore, any attempt to change an undesirable situation, as opposed to an attempt to evade or avoid such a situation. Protest may be voiced in the form of a personal or a collective communication directed to the responsible management, a petition to a higher authority designed to force a change in management, or other means of action and protest, including those designed to sway public opinion. The purpose of the protest is to alert the firm or the group to its failures, but also to give the management or group an opportunity to respond to pressure and rectify the failure.

Hirschman argues that the choice we frequently face is a choice between protest and exit (leaving the group, organization, or state to which we belong). However, in many cases, there is no real exit option. This is typically the situation in basic social groups such as the family or the state. Therefore, the role of the protest increases as exit options diminish. At the point where exit is no longer possible, the protester bears all the responsibility for alerting the management to its failures.

In cases where an exit option is available, the decision to leave or to stay will largely depend on the anticipated effectiveness of the protest, among other things. If a firm's customers believe that their protest will be effective, they may postpone or even reject the exit option. Note that once the exit option has been selected, one can no longer make use of protest, although the opposite is not true. Exit will, therefore, be a last resort, after protest has failed.

Hirschman shows that, compared to an exit strategy, protest is an expensive option that is dependent on the bargaining power or influence of customers or group members on their firm or group. Therefore, protest is likely to be used as an active mechanism in more expensive acquisitions and with regard to more significant groups.

The existence of an exit option appears to significantly reduce the chance that protest will be widely or effectively used; arguably, protest can play an important role in groups and organizations only if an exit strategy seems to be to be impossible. In many organizations, one of the two mechanisms, exit or protest, is dominant: competitive business organizations, for example, maintain quality based primarily

on exit and only rarely on protest (dissatisfied customers will transfer to competing businesses rather than protest against the product that caused their dissatisfaction). In primary human groups such as an individual's family, religious community, or country, exit is not only inefficient (just as protest is not effective in the economic world), it is considered an act of betrayal, desertion, and even a criminal act. In such primary groups, some form of protest is the only way a member can express her dissatisfaction with the how the group manages its affairs.

Hirschman introduces a third concept – “loyalty”. Loyalty raises the price of exit and makes it more difficult. Does the existence of loyalty also affect the use of protest? Hirschman's response is yes.

Two factors affect the willingness to make use of protest when an exit option exists:

- (a) The extent to which the firm's customer or the group's members are willing to swap the certainty associated with exit with the uncertainty associated with the expected improvement in the faulty product or situation if protest is used, and
- (b) The customers' or group members' estimates about their ability to influence the organization.

The first factor, directly related to the member's special relationship with her group, I call loyalty. It can be argued that the probability that protest is selected over exit increases with loyalty. Furthermore, one cannot overlook the fact that these two factors are interdependent: A group member who is strongly connected to a group (or a customer to a product) often looks for ways to make himself influential, especially when the group is managed in what appears to be an incorrect manner. The other side of this coin is that a member who has (or thinks she has) power in the organization, and therefore believes that she can “redirect the organization to the right path”, is likely to develop strong relations with the organization in which she has influence.

As a rule, then, loyalty discourages exit and encourages protest. A dissatisfied group member who does not hold a position of influence in the group will remain loyal to the group only if she believes that

someone will act or that *something* will happen and things will improve. Hirschman states that the paradigm “Our country, for better or worse” is not valid if one expects “our country” to do nothing but be “bad” forever. This expression implies the expectation that “our country” might do “a little bad”, but will eventually revert to the right course of action. Hirschman emphasizes the word “our” since it is this relationship that offers the possibility of influence. This potential, along with the expectation that good will ultimately prevail, is what distinguishes loyalty from faith.

Loyalty, then, may fill an important social function of preventing the dissolution of a group, firm, or state before all barriers to exit are destroyed. By raising the price of the exit option, loyalty helps balance the situation by allowing the individual to find new ways to influence the group and exert pressure to promote recovery.

The analogy to the topic of this paper should be obvious. A citizen who is unhappy with her government’s policy has several options to deal with her dissatisfaction: All these options fall within the ambit of Hirschman’s concept of protest, including the extreme case of conscientious objection when the citizen’s protest is manifest as non-compliance. As long as the citizen knows that there is a chance that her protest will lead to change, she is likely to prefer this option to the alternative, exit, which might take the form of emigration to another country, for example.

A practical examination of the “price” of exit is possible using the broad, diverse empirical work in Margaret Levi’s research.⁵ Levi presents an empirical analysis that spans three continents and many years, and which, in my opinion, supports Hirschman’s views of protest and exit presented above.

Levi makes several hypotheses:

- (a) The less credible a government is perceived as being in the minds of its citizens, the greater the probability that citizens will

5 Margaret Levi, *Consent, Dissent and Patriotism* (UK: Cambridge University Press, 1997).

express their conditional objections to the government's policy and its directives.

(b) As the proportion of non-compliant citizens in a given population increases, the probability also increases that other members of this population will also refuse to comply.

I. Compliance will increase in direct proportion to the intensity and popularity of ideological opposition to the government's policy, but only if objectors are motivated more by ideological considerations than by cost-benefit considerations.

Levi describes three classes of objectors: ideological objectors, conditional objectors, and opportunistic objectors. The price that conditional objectors are willing to pay for their ideas is greater than the price that opportunistic objectors are willing to pay, but smaller than the price that ideologist objectors are willing to pay. However, ideological objectors are not completely indifferent to cost-benefit considerations. Strong ideological commitment is not always absolute. It follows that:

(a) Conditional conscientious objection can be expected to increase in direct proportion to

1. Lack of confidence in the government;
2. Evidence of opposition in the objector's relevant reference group to involvement in a war.⁶

Given these two –

3. A reduction in the cost ("price") of conscientious objection.

(b) Ideological conscientious objection will increase in direct proportion to membership in pacifist groups.⁷

6 Levi's work focuses on manifestations of conscientious objection in wars such as World Wars I and II and the Vietnam War, since her research deals with the United States, France, and Australia, which had no compulsory military service for long periods except in times of war. This is one of the differences between the situation in Israel and Levi's study, although I think that the French case is somewhat similar to that of Israel, as I specify below.

7 As mentioned, Levi's research concerns the United States, France and Australia, which have pacifist religious sects, mostly as part of the Protestant

Institutional recognition of the concept of conscientious objection (for example, legal recognition of conscientious considerations as grounds for exemption from military service) legitimizes attempts to oppose a war,⁸ stimulates public debate on the war itself, and creates sanctions against anyone who abuses the exemption (opportunistic objectors).

Levi presents a detailed and reasoned analysis of the recognition of the right to conscientious objection in the United States, Australia, and France, and in all cases demonstrates how the cost of military service (especially when war is controversial, as in the case of the Vietnam War for the United States and Australia; and the Algerian War, for France) increased while the cost of refusal declined. In all three countries, the number of conscientious objectors seeking recognition grew as mistrust in the government and its policies increased. Data over time and compared between these countries show that when the cost of conscientious objection was extremely high, as it was during the First World War in all participating countries, and in France until the early 1960s, only absolute objectors were willing to pay the price. As the cost declined, an increasing number of conditional objectors were willing to pay the price for acting on their beliefs.

PLURALISM

Michael Walzer⁹ illustrates how secular-based conscientious objection is a natural product of political pluralism. Walzer believes that the state

church. In Israel, the situation is different, of course. It seems to me that one cannot link these cases to the exemptions granted by law from service in Israel, such as the exemption to Arabs and to ultra-Orthodox Jewish men, as the considerations for these exemptions are different, and are not related to the issue of conscientious objection.

8 Levi's research concerns countries at war.

9 Michael Walzer, *Obligations – Essays on Disobedience, War and Citizenship* (Cambridge, MA: Harvard University Press, 1970). One cannot disregard the fact that Walzer's work was published at the height of the Vietnam War, and takes into account the American public opinion of the time.

not only can tolerate objection, it also should do so to ensure the quality of life in the country, where beliefs that lead to objection can be freely expressed. Democracy depends on the willingness and ability of citizens (all or some of them) to commit themselves to political values and act on them. Membership in ideological groups typically entails obligations, due to the size of such groups and because they are focused on certain issues. Group members are very committed to the values of the group and to the other similarly committed members. When the commitment to the group exceeds commitment to civic duties, we define the group as a rebellious group. This is not a common situation and can usually be resolved one way or another between the group and the state. As long as channels remain open for disagreement and political opposition, rebellious group members usually uphold the laws they oppose (payment of taxes, for example, even when they object to the allocation of these funds). To demand that members of such groups take an active part in enforcing such laws, however, places them in an impossible situation in which they are required to act contrary to their deepest commitments. The state then is acting against its own interests, since such a demand undermines the moral base or pluralistic legal system on which the state is based. The state's moral foundation is undermined if members act against their conscience, for genuine pluralism requires conscientious integrity. The legal basis of pluralism is undermined when members refuse to act, generally in the form of civil disobedience, which is often characterized by violations of the law (even if these are limited to conspiracy offenses). Enforcement against conscientious objectors thrusts the group outside the pluralistic system and could possibly drive group members to leave the country. Democratic countries are affected when coercion is imposed on conscience; Walzer believes that it is better to tolerate civil disobedience as long as non-compliance follows some more or less consistent pattern of interpersonal commitment and group action. However, since conscientious objection generally involves groups of young people, we should not interpret the demand for "consistency" too literally, as it is possible that they had no previous opportunity to express their conscience.

Perhaps in the modern world conscience requires liberty rather than tolerance – the liberty to act with minimal restrictions, and not merely exemption from serving the state. Tolerance may be suitable under more utopian circumstances, in a society that is almost egalitarian, where pluralism has a wider social base.

THE NECESSITY DEFENSE

Rawls, de Tocqueville, Dworkin, and others offer various arguments supporting objection as an expression of freedom and the true meaning of the rule of law.¹⁰ Leon Shellef writes:

The situation of the draft conscientious objectors shows that within **the law and out of loyalty to the law** a compromise can be reached that will allow a person to follow his conscience without breaking the law – as the concession in the conflict is made by the state, not as submission to a rampant minority, but out of consideration for the struggling minority ... conscientious non-compliance is not always a basis for social chaos, and the legal way is not always a sure way to guarantee political silence when it comes to searching for a way to correct distortions.¹¹

Shellef suggests looking for a legal solution to the issue of conscientious objection in the criminal defense known as the “necessity defense”.¹² Shellef claims that there are situations in which an individual has the right to violate the law even if he knows that his actions are illegal.

10 John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard, 1971) ; Alexis de Tocqueville, *Democracy in America* (London: Oxford University Press, 1965); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978); Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986).

11 Leon Shellef, *Kol HaKavod* (Voice of Honour) – Conscientious Objection out of Civil Loyalty (Tel Aviv, Israel: Ramot Publishing, 1989) (in Hebrew).

12 Section 34xi of the Israeli Penal Code – 1977.

He argues that this is not only a theoretical, desirable solution, but also one that is legally valid. According to Shellef, the wording of the law allows a person to violate the law and defend himself with the legal argument concerning his right to do so. The necessity defense is based on the normative idea that there may be a justification for a violation of the law when it is based on the consideration that the wrong created by violating this law is smaller than the wrong generated by upholding the law; in other words, when violating the law is the “lesser evil”.¹³

However, Shellef’s arguments failed under the circumstances he himself predicted:

If the criminal law will be drafted again there may be a change in the extent of the current defense so that the word “honor” is omitted ... if that will be the case, a defense of conscientious objection should be offered separately, so that there will be no need to use the problematic “honor” phrase. The right to defend one’s conscience will be determined explicitly – subject, of course, to all the restrictions and conditions of similar defenses.

In March 1992, the Penal Code was amended to include, among other things, a distinction between two forms of the necessity defense. Furthermore, the list of values protected under this section was amended to exclude “honor”. The very next day, the Knesset confirmed the Basic Law: Human Dignity and Liberty. The proximity of the events was not overlooked by Shellef, who wrote,

- 13 Shellef’s comments were made before the recent amendment to the Penal Code. Previously (until 1994), the necessity defense read: “A person can be exempt from criminal responsibility for any act or omission to act if he can show he did not act as he did, but to avoid results that cannot be prevented otherwise and that would have caused serious injury or bodily harm or to his honor or property, or a of body or honor of others whose protection he is responsible for or of property entrusted to him, provided that he did not do more than reasonably had to be done for that purpose and the harm caused by him isn’t non-equivalent to the prevented harm”.

It so happened, that in one day the Knesset decided that, according to the criminal law, there is no longer any justification to defend a person who fought for his honor; On the other hand, honor was recognized as “one of the fundamental values of the constitutional Israeli legal system”.¹⁴

Shellef believes that “it may turn out that there is a significant difference between the recognition of the right to violate the law—according to the necessity defense [the old version – IR]—and reliance on the Basic Law: Human Dignity and Liberty to justify the act of breaking the law”.¹⁵

DEFINITIONS

During Alice’s meeting with Humpty Dumpty, in chapter six of Lewis Carroll’s *Through the Looking-Glass, and What Alice Found There*, she wonders whether words can be associated with many different meanings. The witty dialogue between the characters demonstrates the importance of precisely defining the words and concepts we use. Therefore, in the following paragraphs, I define the terms I use in this article.¹⁶

Conscientious objection – Many people confuse conscientious objection and civil disobedience, and therefore it is important to distinguish the two terms. Conscientious objection is a violation of the law for **moral** reasons. This is **a private** act of a person who wishes to prevent a moral injustice resulting from obedience to what he believes is a law that is morally wrong, in part or in its entirety. Conscientious objectors believe that they are **morally** prohibited from obeying that law, that is, they

14 Leon Shellef, “The Legislator’s Word of Honor and the Judge’s Freedom of Interpretation”, *Legal Studies* 13.1 (1996): 265-74 [Hebrew].

15 *Ibid.*

16 See Hemi. Ben-Nun, *Civil Disobedience* (Israel: Yaad Publishing, Tel Aviv, 1992), which also discusses the definition of rebellion and protest. Ben-Nun refers to the problematic nature of attempts to define the term “civil disobedience”. He concludes that civil disobedience cannot be defined precisely or unequivocally because it depends on the circumstances of each case.

believe that breaking the law is based on some higher moral principle to which the law is also subject. This supreme principle may be a religious and or humanist-atheistic principle.¹⁷ In any case, the conscientious objector believes that because the state is subject to the same supreme principle, it cannot be the ultimate authority on issues concerning an individual's fundamental values. For the conscientious objector, the state's laws originate in nothing more than an agreement between the individual members of a human collective, and therefore these laws cannot claim for themselves the validity of absolute authority.¹⁸ Notably, literature and court rulings make a distinction between general conscientious objection and selective conscientious objection. General conscientious objection is founded on a conviction of non-violence while selective objection generally derives from ideological or political reasons to refrain from acting against certain groups or in certain places.

Civil disobedience may also arise from moral reasons. However, as the term implies, civil disobedience is primarily a public form of civil protest stemming from civil obligation, designed to change a law or policy that the protester opposes. Maintaining personal moral integrity may be one reason for civil disobedience, but it is not a necessary motive. In contrast, for the conscientious objector, protecting her moral integrity is inherent to her objection. In contrast to the conscientious objector, the civil disobeyer does not adopt a different value system to that of the existing rule of law. The fact that civil disobedience is a political act – a **public** act aimed at a **political** outcome – also distinguishes it from conscientious objection, which is a private moral act.¹⁹ Moreover, a conscientious objector acts directly against the law while civil disobedience may also entail indirect action. The civil disobeyer does not necessarily act against the objected law; he may violate any law

17 Walzer, *Obligations*.

18 Rawls, *A Theory of Justice*; Chaim Gans, *Compliance and Refusal – Philosophical Anarchism and Political Disobedience* (Israel: Kibbutz Meuhad Press, 1996); and others offer a different point of view.

19 Rawls expresses similar ideas.

likely to raise awareness of the objectionable law, and may violate a law to arouse public opinion against the policy in question.

ISRAEL'S LAW: THE CURRENT SITUATION

Exemption from military service under Israel's law is mentioned in the provisions of Section 36 of the Defense Service Law [Consolidated Version] – 1986. The law gives the minister of defense, or his representative, the authority to issue an exemption from regular or reserve service for various reasons, including “other reasons” – an expression that, according to court rulings, includes reasons grounded in conscientious objection. In 1995, an exemptions committee was established to assist military officials in applying Section 36 exemptions.

In addition to the general exemption in Section 36 that applies to all citizens, a special exemption can be found in Section 39(c) of the law. This section refers to women who may receive an exemption from military service under certain circumstances, including by demonstrating that “reasons of conscience” prevent them from serving. Seidman notes that proposals to include reference to both men and women in this section were rejected during the discussions on the formulation of the law.²⁰ Among other things, these proposals were rejected because Section 36 (or its original version, Section 12) already gives the minister of defense broad discretion to grant exemptions, and there is no reason that an exemption should not be granted by the minister for reasons of conscience. The legislative committee felt that there was, therefore, no need to create a “conscience-based exemption” category in a special section in the law.²¹

20 Guy I. Seidman, *The Right to Conscript and the Authority to Recruit* (Tel Aviv: Perlshtein-Ginossar, 1996) [Hebrew].

21 A fact that does not conform to the inclusion of such a clause in relation to women.

A review of Supreme Court rulings shows that few cases of conscientious objectors came to be heard by highest courts of the State of Israel, despite the many years that have passed since Israel's declared independence, and despite the numerous armed conflicts during which the army played a major role in Israeli life. This may indicate the marginal status of the phenomenon.²²

In the following pages, I review the main rulings on this issue.

The Steinberg affair: In the early days after independence, the Supreme Court heard the case of **Haim Steinberg**, an Orthodox Jew and member of the Neturei Karta group, who appealed his conviction by the District Court in Jerusalem of failure to comply with an order instructing him to report for registration and medical examination prior to conscription. Most of the ruling written by Justice Sussman is irrelevant to this article. The Court does mention the issue of conscientious objection, which was raised by the appellant as a reason for his actions, but merely wonders whether

there should not exist in this country a general arrangement for determining the fate of “those who object to service for reasons of conscience” ... such as Article 5 of the English law on the National Service (Armed forces) ... but as long this has not been done, our duty is to uphold the law in its current form.

The Court further determined that the appellant is not even a conscientious objector, but rather that he rejects the authority of the state because it is not based on the Torah.

22 In fact, research for this paper included a review of Supreme Court rulings, rulings of the Military Court of Appeals, and published literature on the topic. Only ten cases (all mentioned in this article) were found. The number of soldiers who were tried in lower courts, according to the literature cited in the article, does not exceed several dozen or several hundred, over the entire period of Israel's independence. It is difficult to explain or to justify the lack of publicity of related cases using the usual arguments against publicity (protection of privacy, protection of the rights of minors, etc.); I do not believe that the lack of publicity can even be justified in the interests of national security. The small number of cases and limited publicity may attest to, I believe, marginalization of the issue by the state and government institutions.

The Elgazi affair: The first case brought before the Supreme Court sitting as the High Court of Justice was the case **Gadi Elgazi**.²³ The basis of this affair was a letter sent to the minister of defense in July 1979, subsequently published in the press by several high school students, objecting to the “occupation and oppression of the Palestinian people everywhere”, and announcing that they would refuse “to serve in the Occupied Territories”. Daniel Oren, a signatory to the letter, refused to participate in basic training in a boot camp located in the Territories, after enlisting in November 1979. After serving three terms of imprisonment of 35 days each and having been declared unfit for combat, he was discharged from the army. This was also the case with two other signatories to the letter. Gadi Elgazi enlisted in February 1980, and underwent basic training at a base inside the Green Line. When he was assigned to a service unit located in the Territories, he refused, and was repeatedly sentenced to prison. Elgazi petitioned the High Court of Justice, alleging discrimination, claiming that similar requests not to serve in the Territories had been accepted in the past.

The Supreme Court rejected the petition although Elgazi’s response contained an affidavit signed by Major General Moshe Nativ, then chief of the IDF’s human resources branch, describing the military’s policy regarding draft resisters in detail. According to this affidavit, the military’s policy was guided by the following principles:

- (a) Until 1980, it was military policy to accept genuine individual requests not to serve in the Occupied Territories, as long as the problem was seen to originate in motivated individuals, based on their personal conscience; exemptions were issued subject to “military needs”.
- (b) The military changed its policy in the early 1980s (shortly after Elgazi’s recruitment) and no longer granted exemptions from

23 HCJ 470/80 *Elgazi v. Minister of Defense* (unpublished). For a comprehensive analysis of the rulings in this case, see Yoram Shachar, “The Elgazi Trials – Selective Conscientious Objection in Israel”, *Israel Yearbook on Human Rights* 12 (1982): 214.

service in the Territories. The change was imperative, according to the military, due to the emergence of “organized protest groups”, a phenomenon that endangered the ideological and political neutrality of the military and the discipline necessary to achieve its purposes.

(c) The personal desires of all recruits are taken into consideration when assignments are determined. While the military does not exclude in advance the possibility of recognizing conscientious objections to military service in the Occupied Territories, military needs take precedence over personal requests when the two conflict.

In summary, as long as conscientious objection remained a marginal individual phenomenon, the military demonstrated readiness to accept requests and avoid open confrontation with applicants. When an application is collective, official policy changes and such requests are categorically denied. This policy is reinforced when the collective application is made publicly. However, when the application is supported or submitted by a political group represented in the Knesset, the military will tend to hand over the decision to the political system. Law enforcement procedures are typically used only against individuals who are affiliated with marginal groups that are not supported by political organizations that participate in the political system. With this backdrop in mind, one should consider how the system addressed the case of Yaakov Shine.

The Shine Affair: This case was brought before the Supreme Court in the summer of 1984.²⁴ The facts of the case, described in the decision by Justice Elon, were as follows: Yaakov Shine, a member of the “Yesh Gvul” (There’s a Limit) group and a reservist in the military, was called up for reserve duty in Southern Lebanon in October 1983. Shine refused to report for duty, because his “conscientious view was that the IDF stay in Lebanon is illegal and inconsistent with the fundamental justification of combat operations”. The nature of his refusal, said Shine, “is of

24 H CJ 734/83 *Shine v. Minister of Defense*, PD 38 (3) 393.

the kind of protest known as ‘civil disobedience’”. Shine refused his commanding officers’ request to retract his objection, and received a disciplinary sentence of thirty-five days in prison. An appeal filed to Shine’s divisional commander was denied, but not before the latter also tried to convince Shine to retract his objection.

While Shine was imprisoned, he was issued a new reserve order for the period from November 20 to December 20, 1983. Shine was released from prison on November 11 and when he reported to be discharged from reserve duty two days later (on November 13), he received another order instructing him to report that very same evening for reserve duty in Lebanon. Shine appealed the legality of orders, and the order for that evening was cancelled. The November 20 order remained, and on that day, Shine reported to duty and, once again, refused service in Lebanon. He received a disciplinary sentence of twenty-eight days in prison.

During his imprisonment, Shine filed a petition to the High Court, and amended his petition when, while imprisoned, he received another order for reserve duty. In his petition, Shine argued that the reserve order should be cancelled, and that his time in prison be considered as reserve duty service.

The court ruling largely deals with the Defense Service Law, and does not relate to the subject of this article. The final section of the decision deals with Shine’s claims of conscientious objection. Unfortunately, the meanings of the terms “conscientious objection” and “civil disobedience” are blurred and other important concepts are confused.

According to the state’s response to the petition, as military authorities faced a case of organized and systematic ideological objection to obey legal orders issued to reserve duty soldiers to serve in Lebanon, military authorities decided to enforce the reservists’ legal obligation to serve. The military determined that the period of a soldier’s detention or imprisonment would not be counted as reserve duty if the soldier was imprisoned for refusing to serve in his assigned location. It was also determined that any soldier who did not legally complete his annual reserve duty for reasons of objection, “would be assigned a new date for his active reserve duty”.

Justice Elon expressed a firm stand against conscientious objection: The issue of conscientious objectors has been much debated by jurists and philosophers, and has undergone many developments and different phases. ... Legally, the answer of the Israeli legal system is clear. The Israeli legislator recognizes conscience grounds for exemption only in regard with women's military conscription, who demonstrated in the manner set in the regulations, that reasons of conscience or religion prevent her from defense service ... (Article 30(c) of Defense Service Act [Consolidated Version]). A man does not have a right to be exempt as a conscientious objector ... but it seems that reasons of conscience can be considered one of the reasons that allow the authorities, to exempt from military service at their discretion (Article 28 of the Defense Service Act [Consolidated Version]: "The Minister of Defense may, if he considers it appropriate to do so for reasons related to the size of the regular forces or reserve forces of the military, or for reasons related to education, security, settlement or the national economy or for family or other reasons – (1) to exempt from regular service ... (2) to exempt from reserve duty ...". ... reasons of conscience are not mentioned explicitly, but may be included in "other reasons", and indeed there were probably a few cases, when people who were supposed to serve but held pacifist views sought – and received – an individual exemption after personally contacting the Minister of Defense (see [Elgazi]).

Elon continues to compare the situation in other countries:

The situation is different in quite a few countries, including the United Kingdom and the United States, where there is a legal right to exemption from military service for reasons of conscience However, even in these countries, this exemption only exists when conscientious objection is to military service, since the objector advocates non-violence in general. When the objection is not general, and is rooted in a conscience conviction of non-violence, but is rather selective objection which often arises due to ideological/

political reasons not to act against certain groups or in certain places, such selective objection is not recognized in the United States and in the United Kingdom The US Supreme Court ruled that the only general conscientious reasons of opposition to violence may justify exemption from military service, but not resistance, which is rooted in a political position regarding the circumstances of a particular war, and that there is no right not to serve in the army for reasons of conscience when it is largely ideological/political²⁵ ... recognizing selective objection harms the integrity of the democratic process of decision making, and it constitutes a real risk of discrimination in enlistment.²⁶

Justice Elon concluded that Shine's selective objection²⁷ is "not even recognized in those countries that recognize general objection as exemption from military service, and certainly not recognized in the Israeli legal system, which does not recognize the right to exempt conscientious objectors".

Justice Elon saw fit to comment on the unique position of Israel and its people:²⁸

25 Justice Elon refers to *Gillette v. United States* (401 U.S. 437).

26 See also *U.S. v. Noyd* (40 CMR 195 (1969)), in which the court refused to order an American flight instructor who refused to instruct pilots on flying aircraft of a type used in Vietnam. The Court held: "The 'universal pacifist' may, in fact, agree with the justice and morality of the government position in a particular confrontation or cause, but his conscience still prevents him from bearing arms in support of the country and its causes. His claim for exemption is single definitive, not multiple and myriad; and it is irrelevant to all causes and confrontations. On the other hand, the bases of exemption claimed by the selective objector are inseparable from the daily decisions of constituted authority".

27 It is noteworthy that Yaakov Shine was a member of the "There's a Limit" group, which defined its members as selective objectors who are not willing to take part in activities contrary to their conscience, with the full realization that this as a public political act". *The Limit of Compliance*, ed. Dina Menuhin, Yishai Menuhin (Tel Aviv: Exclamation Point Books - There is a Limit Publishing, 1985).

28 See also Alan Arian, *Security Threatened: Surveying Israeli Opinion on Peace and War* (New York: Jaffee Center for Strategic Studies, Tel Aviv

This important and complex area of law on the one hand and conscience on the other, of the need to maintain military service to defend the sovereign state and the welfare of its citizens on the one hand and refusing to go to war for reasons of personal conscience on the other hand, must be considered under the special circumstances of place and time; the security problems of the state of Israel are not similar to that of other countries, existing within secure borders. This essential difference is clearly a significant consideration in the issue at hand.

Justice Elon also offered support from Jewish tradition, and specifically presented biblical arguments for exemption from military service due to economic need or family circumstances. He cited Deuteronomy 20:8 *“Is there any man who is fearful and fainthearted? Let him go back to his house, lest he make the heart of his fellows melt like his own”*, and offered Rabbi Akiva’s interpretation that “fearful” is one who is overcome with fear, while “fainthearted” is one who is not afraid of the horrors of war, but should not fight because he might show mercy for others, including the enemy. Since he might also “make the heart of his fellows melt like his own”, he is exempt from military service. Elon also suggested the interpretation of Rabbi Yossi the Galilean, according to which the “fainthearted” are those who are troubled by their conscience. Nonetheless, the Mishna argues that these exemptions “only concern optional wars; but in the case of a holy war, ‘even a groom should come out of his room, and a bride from her wedding’”. Elon explains,

The arguments are general and inclusive, and relate to man’s character and attitude to violence and war; and are not selective arguments that relate to special circumstances of time and place, and are founded on ideological and social views. And even the general and inclusive reasons apply only to optional wars, and not in an emergency when the war is a holy war.

Yaakov Shine’s petition was denied.

University and Cambridge University Press, 1989), especially Chapter 6, which deals with the principles of national self-reliance.

THE INTIFADA

The Intifada, which erupted in late 1987, challenged Israeli society with a violent, controversial conflict,²⁹ and under these circumstances, the issue of selective conscientious objection emerged more strongly. While selective objection was previously limited to fringe groups with strong political consciousness that completely disagreed with the government's policy in the Territories and in Lebanon, conscientious objection during the Intifada encompassed individuals whose personal view of the government's overall policy was a secondary factor in their objection to serve.³⁰ The stated reason for objection was often an unwillingness to be involved in policing and other acts directed against the civilian population in the Territories. The widening circle of objection in the first year of the Intifada led the executive committee of the Broadcasting Authority, for example, in the summer of 1988, to prohibit coverage of the 1988 summer demonstrations of the "There's a Limit" movement and supporters of the objection.³¹ The attorney general issued a directive to investigate the leaders of the "There's a Limit" movement under suspicion of incitement and solicitation to object to military service.³²

It is difficult to estimate the scope of conscientious objection during the First Intifada. While it was probably much more widespread than during the Lebanon War, "gray objection" was also a common phenomenon. "Gray objectors" are soldiers who seek solutions to their individual circumstances, and do not see themselves as ideological spearheads; they use pretexts to avoid the draft without explicitly resorting to the

29 See also Margaret Levi's reference to changes in the dimensions of conscientious objection during controversial wars (*Consent, Dissent and Patriotism*).

30 . Menahem Hofnung, *Israel—Security Needs vs. the Rule of Law in 1948–1991* (Jerusalem: Nevo Publishing, 1991) [Hebrew].

31 Lily. Galili, "Two Hours of Hypocrisy", *Ha'aretz*, 22.7.1989, B3 [Hebrew].

32 Yehuda Meltzer, "There is a Limit – Proclamation No. 2", *News (daily newspaper)*, 1.13.1989, 13; Gideon Alon, "There is a Limit to Harish's acts" *Ha'aretz*, 1.16.1989, 11.

argument of conscientious objection.³³ The data do not indicate an increase in the number of soldiers who were tried for objection: 160 objectors were imprisoned during the Lebanon War, compared to 127 objectors during first three years of the Intifada.³⁴

Regarding the phenomenon of “organized insubordination”, it is interesting to note that Margaret Levi refers to the Jehovah’s Witnesses as an example of an organized group that seeks absolute exemption on the grounds of its members’ conscientious objection to military service. Menachem Hofnung explains that this phenomenon is hardly known in Israel,³⁵ and six Jehovah’s Witnesses were granted an exemption from military service between 1967 (the Six-Day War) and 1973 (the Yom Kippur War). After the Yom Kippur War, exemptions were no longer issued to members of the Jehovah’s Witnesses sect, due to changes in the conscription policy and the desire to increase military personnel. Sect members who refused to serve in the army faced a disciplinary trial, and most were sentenced to 35 days detention. Because they continued to refuse to serve even after their imprisonment, they were repeatedly tried and sentenced, and some remained in jail for up to 14 months (!). At this stage, the minister of defense decided to review their applications for an exemption. The solution that was finally adopted did not include recognition of the right to conscientious objection, but offered a pragmatic solution by granting sect members a one-year deferral of their military service, which is renewed every year.³⁶

33 Hofnung, *Israel – Security*.

34 *Ibid.* See also: onny Talmor, “White List”, *The City newspaper*, 11.30.90. According to data provided by “There’s a Limit”, 180 soldiers were tried for their request not to serve in operations against Palestinians during the First Intifada (Yaron Unger, *Limits of obedience and objection to military orders*, The Knesset Research and Information Center, January 2010).

35 Hofnung, *Israel – Security*.

36 *Ibid.* See also: Amnesty International Report, 1979, p. 162. In fact, the authority of the Minister of Defense was used a number of times. Seidman (*The Right to Conscript*) presents two notable examples: the **Zichrony** affair and the **Neuman** affair. Advocate Amnon Zichrony informed the military authorities that Neuman is a conscientious objector who refused to swear

In the **Machness** affair,³⁷ Machness argued against the new IDF policy mentioned by the press, according to which IDF objectors will first face legal action and then will be transferred to another unit or location for their service, in a manner that does not contradict their conscientious objection. Chief Justice Shamgar, along with Justices Levin and Kedmi, rejected Machness' petition. The court noted that the military would not accept the dictates of soldiers or groups of soldiers regarding the location of their military service; however, legal and disciplinary action against offenders who refuse to serve in their assigned location would not be undertaken without careful consideration. In a statement endorsed by the court, military authorities noted that every case is reviewed on its merits, and according to its circumstances.

In the **Epstein** case (1995), the Supreme Court heard the matter of a petitioner who argued against the military's refusal to exempt him from service although he allegedly satisfied the conditions for a conscience exemption.³⁸ The petitioner began his recruitment process in 1991, and after several deferrals of service, the petitioner applied for exemption on grounds of conscientious objection. His request was denied after a committee concluded that the petitioner was not a pacifist, but rather had his own personal reasons for preferring not to serve.

an oath of allegiance, and offered to serve in an alternative civil framework. In June 1954, he began a hunger strike, which last 24 days, while he was in prison and in a military hospital. Eventually, Prime Minister Moshe Sharett intervened, and Zichrony served in the military as a translator and magazine editor. Some twenty-five years later, a similar incident occurred, when Giora Neumann refused to complete his recruitment procedure and swear allegiance to "an army of occupation". He underwent a disciplinary trial and was imprisoned for several periods, which totaled about 150 days. In the end, he was sentenced by a military court to eight months' imprisonment. Following his release from prison, Neumann swore allegiance and served his military service in a medical archive (not in uniform, by the way). The court that convicted Neumann stated that freedom of conscience does not grant immunity from obedience to the laws of the Knesset, which represent the majority will of the people and establish norms of behavior.

37 H CJ 630/89 *Machness v. Chief of Staff* (unpublished).

38 H CJ 4062/95 *Epstein v. Minister of Defense*, Takdin Elyon 95 (2) 479.

The Supreme Court ruling repeated the distinction in the Security Service Act between men and women with regard to exemption for reasons of conscience. The court also referred to the influence of the Basic Laws enacted in the early 1990s on the issue of conscientious objection. Justice Levin wrote,

There is no doubt that imposing military service on civilians violates personal liberty, but this harm is created by law; even if we could examine the legality of the law by the tests contained in Basic Law: Human Dignity and Liberty (which we cannot, in light of the provisions of Article 10 of the Law), we would be required to confront the rights referred to in this law with other values, as stated in Article 8 (the limitation clause).

He also stated,

Indeed, had an exemption from military service been refused to all those who hold a pacifist view, then there was reason to examine whether authorities forces have made proper use of their discretion, under Section 36 of the Law; but in this case, it seems to us, the state is right in claiming that it is not a question of principle, but weighing the petitioner's circumstances.

Under the particular circumstances of the case, the court upheld the committee's considerations in denying the petitioner's request for an exemption.

The aforementioned cases illustrate that the Israeli justice system recognized, to some extent, the right not to serve in the military on the grounds of pacifism, and that military authorities have the discretion to exempt individuals, in certain cases, from military service, in whole or in part. The Supreme Court stated that the issue requires competing values to be balanced: Values related to state security and service duty on the one hand, and the violation of personal liberty and other individual rights, on the other hand.

SELECTIVE OBJECTION

The issue of selective objection initially emerged in the Shine affair, but it seems this issue has received a more clear and detailed discussion in court rulings in the past decade.

The Sonnescheine affair: The leading ruling on the issue of selective objection appears to be the Sonnescheine case.³⁹ This case concerns the refusal of eight reserve soldiers to serve in the Territories. In his decision, Chief Justice Barak summarized the parties' arguments: The petitioners argued, "There should be no distinction between general and selective objection, since both are based on the individual's freedom of conscience, and in a democratic country this freedom should be granted exemption from service in these situations". On the other hand, the Military Advocate General argued, on behalf of the state, "Selective objection does not constitute fair use of the freedom of conscience, and should not be recognized in the reality that exists in Israel, as this shall almost certainly cause harm to national security. Moreover, the military should not consider politically disputed selective objection".⁴⁰

The court examined the normative framework, the balance between the conflicting considerations – the principle of freedom of conscience derived from the democratic nature of the state and the central role of human dignity and liberty in Israeli law – and the consideration that it is not right nor just to exempt part of the public from a general duty imposed on all, all the more so when the exemption may harm national security and may result in inequity and discrimination. The court concluded that "It is appropriate – regarding exemption from military service – to give greater weight to considerations of conscience, personality development, humanism, and tolerance, than to conflicting considerations" (Section 11 of the decision).

What did the court have to say on the issue of selective objection? The fundamental starting point for the court's discussion was "that the refusal

39 HCJ 7622/02, *Sonnescheine v. MAG* PD 57 (1) 726.

40 Ibid.

of selective objector to serve in a particular war is based on genuine conscientious reasons, as with the objection of the ‘general’ objector” (Section 12 of the decision). After a brief comparative discussion including references to the Shine and Machness cases, the court concluded that “On our metaphorical scales, the weight of conscience, personal development and tolerance tips the scale towards an exemption from military service, not only for ‘general’ objectors, but also for the selective conscientious objector” (Section 15 of the decision). That is, the court was willing to recognize the right to selective conscientious objection and by doing so explicitly departed from previous decisions.

Nonetheless, in balancing the conflicting considerations mentioned above, the court distinguished between “general” conscientious objectors and “selective” conscientious objectors: “The phenomenon of selective conscientious objection is inherently broader than the general one and it arouses intense feeling of discrimination” (Section 16 of the decision). Additionally, the court believed that this debate has implications for security considerations, and recognition of selective objection might “loosen the ties that bind us together as a people” and cause “the army of the people to become an army of groups comprised of different units, each of which has areas in which it may act consciously, and others in which its conscience forbids it to act” (Section 16 of the decision).

The court thus conceived that it might be possible to limit the conscientious objector’s conscience, whether the objector is a general or selective objector, only if there is almost certain real harm to the public interest. However, under the circumstances of the case, the court was convinced that the state’s balancing of the interests was reasonable and proportionate, and therefore denied the objectors’ petition.

Ben-Artzi: One year after the *Sonnescheine* case, a military tribunal heard the case of **Yonathan Ben-Artzi**,⁴¹ indicted for refusing an order, an offense under Section 122 of the Military Code, 1955. Ben-Artzi refused to follow orders and begin his recruitment procedure in order to serve in the IDF.

41 MT 129/03 *IDF v. Ben-Artzi*.

The court discussed the parties' arguments and stated that "There is no doubt at all that freedom of conscience is one of the cornerstones of a democratic society" and that "it certainly is true in Israel", but "the rule is ... that freedom of conscience is not an absolute right", as stated in Supreme Court rulings – and the formula that determines the balance between conflicting values, freedom of conscience on the one hand and public safety on the other, is the "close to certainty" test.

It is interesting to note that the military court held a discussion on whether Ben-Artzi was a pacifist—an issue that was discussed, and rejected, by the military's Conscience Committee. Although Ben-Artzi petitioned the High Court of Justice on this matter,⁴² the court rejected the petitioner's criticism of the committee's operations, and although the military court was not required to rule on a question that had already been decided by the relevant committee (a decision that was subsequently certified by the Supreme Court), the court was impressed by the sincerity of Ben-Artzi's pacifistic belief. This decision of this court was not inevitable, and one may find an explanation in the court's comments on why it chose to engage in this discussion although it could be avoided: "We decided to allow expansion of the discussion for several reasons, all of them in order to allow the defendant to defend every possible argument against his attributed guilt" (Section 6.2 of the decision). I am willing to assume that had the court believed that its decision would be affected by a discussion on whether Ben-Artzi was or was not a pacifist, the court might have been more hesitant to rule against the committee's decision (which was upheld by the Supreme Court). In practice, the court determined that it could not intervene or overturn the decision, and therefore Ben-Artzi's recruitment was legal.

Adopting the court's recommendation that the committee reconsider Ben-Artzi's case, the committee reconvened in February 2004 and recommended to grant him an exemption from military service on grounds of "general unsuitability for military service". Ben-Artzi once

42 HC 1380/02.

again petitioned the High Court of Justice,⁴³ which decided in the summer of 2005 that the question of whether someone is a conscientious objector or not is a question of belief in the petitioner's claims and is based on an understanding of the evidence presented to the committee, and therefore refrained from intervening.

The final legal discussion on the matter of Yonathan Ben-Artzi was held in early 2006, upon the publication of the decision of the Military Court of Appeals that heard Ben-Artzi's appeal on his conviction.⁴⁴ The Military Court of Appeals discussed the sequence of events at length and analyzed the aspects of the military court's criminal judgment. In this analysis, the Military Court of Appeals rejected the use of the necessity defense for conscientious objectors, and not merely because of the doubt whether this defense applies to conscience as part of a person's honor (following the reformulation of Section 34 of the Penal Law in Amendment 39), but also because the remaining conditions of this section were not satisfied, especially the immediacy requirement and the availability of alternative courses of action.

However, in the discussion on Ben-Artzi's "abuse of process" argument, the court criticized the military's conduct in relation to conscientious objection (Section 50 of the decision), but noted the military's willingness to correct its errors (Section 55). The court expressed support for the policy that allowed Ben-Artzi to serve in a national service framework with no military features. Ultimately, the Military Court of Appeals reaffirmed Ben-Artzi's conviction on the offense of refusal to follow orders, and reaffirmed his sentence of two months' imprisonment and a fine.

The Milo affair: In the summer of 2004, the Supreme Court heard the petition of Laura Milo against the army's refusal to exempt her from compulsory military service for reasons of conscience, in light of her opposition to IDF policy in the Territories.⁴⁵ Unlike the other cases

43 H CJ 3238/04.

44 Appeal 58/04 *Ben-Artzi v. Chief Military Prosecutor*.

45 H CJ 2383/04 *Milo v. Minister of Defense*.

discussed above, this matter involved a woman who was called up for service, and as such, was, under Section 39 of the 1986 Defense Service Act (Consolidated Version), eligible for an exemption from military service for reasons of conscience by law, rather than at the discretion of the military authorities.

The court began the discussion by stating that the obligation to obey the law is a legal and a moral obligation, and that in rare, exceptional situations, the law recognizes an individual's right not to comply with the law for reasons of conscience.

The discussion on the duties of a candidate for military service was based on the Supreme Court rulings on the Sonneschine and Ben-Artzi affairs. The court then discussed the special exemption granted to women under Section 39. According to the court, the special exemption in Section 39 requires the satisfaction of two conditions: first, the existence of conscience reasons relating to the military service; second, that these reasons prohibit the candidate from serving. The first condition, the court noted, calls for factual evidence, while the second condition requires legal-normative evidence.

According to the court, the first condition is entrusted to military committees that receive affidavits and testimonies on the petitioner's reasons for requesting an exemption and on the credibility of her version. If the reasons are found to be genuine, the committee determines whether they are reasons of conscience or reasons of another nature. Classification of reasons may be difficult since reasons of conscience may exist in conjunction with other, different reasons.

Regarding the second, legal-normative condition, the court engaged in a philosophical discussion on the status of freedom of conscience as a constitutional principle, and on the distinction between non-violent civil disobedience and conscientious objection. According to the court's distinction, the core of civil disobedience is a desire to change social and political policy, while conscientious objection is centered on the individual.⁴⁶ On the distinction between selective and general

46 David Enoch, "The Verdict of the Military Tribunal of the Five Objectors (following the *Military Prosecutor v. Matar*)", *Law and Government*

conscientious objection, the court characterized general conscientious objection, for the most part, as being rooted in the individual's conscience, while defining selective objection as an essentially conditional objection. The court adopted the Sonnescheine ruling regarding the distinction between the two types of objection, and stated that the minister of defense's determination – that exemption from military service is not justified – was reasonable and proportional. The court carefully clarified that this policy applies to both men and women alike for reasons of equality, and extended its discussion to the entire question of equality regarding military service of men and women.

With this in mind, the court examined Section 39, which provides a special exemption for women. The court concluded that the justification for an exemption for women under Section 39 differs from the justifications for the general authority to grant an exemption for reasons of conscience under Section 36. The court determined that the exemption from military service under Section 39 is basically designed to recognize and respect religious principles, and ethnic customs and traditions that prevent women from serving in the military. Ultimately, the court rejected Milo's petition, for the reasons set out above.⁴⁷

THE DISENGAGEMENT

The nature of the cases concerning conscientious objection changed after the Disengagement Plan of 2005. While most of the of the cases

2 (2005): 701-30. Enoch challenges the normative distinction between conscientious objection and civil disobedience, noting that it seems that the more interesting cases of non-compliance on principle cannot be reduced to simple definitions of types of non-compliance.

47 It is also worth noting the Hasson case (MT/724/06 *Military Prosecutor v. Hasson* (Matkal district court)). Justice Doron Files mentions the various exemptions available to women, including exemption from military service for reasons of conscience, but did not really discuss the issue and rejected the defendant's preliminary argument on the basis of the date on which an affidavit of the defendant's religious status was filed.

discussed by various courts until that time were tied to Israeli operations in the Territories and in Lebanon, what now surfaced were cases of soldiers and officers who found themselves struggling with their conscience against the requirement to take part in the evacuation of settlements and military bases in Gaza and northern Samaria.⁴⁸

The Botavia Affair: In May 2008, a decision was issued by the Military Court of Appeals in the case of Moshe Botavia⁴⁹ after lengthy proceedings that began in the summer of 2005 when Botavia informed his commanders that he was not willing to take part in the evacuation of military bases. A week later Botavia regretted his actions, but by that time his unit's assignment had been completed.

The court stressed the importance of the obligation to obey orders, and noted that it could not accept ideological objection, whatever its reasons (Section 8 of the decision). The court also cited the *Sonnescheine* and *Milo* cases, and repeated the position that rejected recognition of selective objection.

As a side note, the court stated an interesting fact: In only two other cases were officers prosecuted for refusing to obey an order during the Disengagement, and both cases ended in a plea bargain. In the spirit of Justice Rubinstein's ruling in the *Ben-Horin* case, the marginal nature of the phenomenon apparently had an impact on the court's decision.⁵⁰

48 To complete the picture presented in this section, it is worth mentioning the *Malenki* and *Alon Davidi* affairs. In HCJ 1026/02 *Malenki v. Minister of Defense* (October 2004), the Court repeated the debate over the distinction between selective and general objection, and did not reach conclusions that differed from previous rulings. In BSE 4210/07 *State of Israel v. Alon Davidi* (District court of Tel Aviv), 41 residents of Sderot demanded declaratory relief according to which they are exempt from taxes until provided with the security level enjoyed by other citizens. The court compared selective conscientious objection to this "tax revolt", which was a response to governmental activities opposed by a particular group of people.

49 H/144/06 *CMP v. Captain Moshe Peretz Botavia Gonen*.

50 HCJ 1398/04 *Ben-Horin v. Registrar of Associations* (January 2006) – The Supreme Court refrained from ordering the Registrar of Associations to delete an association whose aim was creating recognition of the right of the individual to act according to his conscience, despite the claim of the

The matter of Botavia was brought before the Supreme Court when the Chief Military Prosecutor appealed the military court's decision to demote Botavia but not deny him officer rank.

Chief Justice Beinisch dismissed the motion for leave to appeal (mainly due to the time that elapsed between the date of the offenses and the legal decision), and stated that the conscientious dilemma that Botavia faced could not be considered a mitigating circumstance for the offense of refusal to obey an order, especially in cases of selective, ideological objection. Serious sanctions are needed to deal with cases of selective objection within the military, she stated.

AN OPPORTUNITY FOR CHANGE?

It would seem that all the judiciary tribunals, led by the Supreme Court, offer a uniform position, and support recognition of the fundamental right to freedom of conscience, but reject the practical expression of this freedom in the form of refusal to carry out orders, especially when selective objection is involved. A possible sign of change can be found in recent rulings on this issue as part of the petition filed by Reuven Shvili against the rejection of his request for exemption from military service for reasons of conscience.⁵¹

Justice Procaccia stated that the issue of exemption from security service due to reasons of conscience was not a new one, and in her opinion there were no grounds to reopen the conceptual layers of the discussion for the purpose of this petition: the existing standards, as framed by case law, were valid and relevant to Shvili's case (Section 7 of

petitioners that this encouraged insubordination. The Court's arguments are based on freedom of association, as part of the basic right to freedom of expression. Justice Rubinstein's Obiter Dictum opinion (the majority's opinion was written by Justice Rivlin) is that "Objection is not admissible by law and is also socially and ethically malignant". In his opinion, there is no need to decide the question of whether objection is a criminal act, since the phenomenon remains marginal.

51 H CJ 5587/09 *Shvili v. Minister of Defense*.

Justice Procaccia's opinion). Justice Procaccia repeated the arguments set forth in the Shine, Epstein, Sonnescheine, and Milo cases. In her opinion, the policy exercised by the authorities, which permitted an exemption from service to general conscientious objectors but denied exemption to selective, conditional objectors, was a reasonable policy that properly balanced the conflicting principles related to this issue (Section 13 of the decision).

A slightly different approach was offered by Justice Hayut, who believed that "The ruling on selective objection so far dealt with those who asked not to participate at a given time and a given place in carrying out the policy of the government by the military, because it contradicts their political-ideological point of view" (Section 3 of Justice Hayut's opinion). In this context, the court felt that it could not grant the requests for exemption of such objectors.

However, in Shvili case, the petitioner ruled out any possible identification between himself and the military, and did not request an exemption for political-ideological reasons or reasons related to disputed issues in Israeli society. Since the petitioner did not oppose the use of force by non-military government institutions such as the police, he should not be considered an absolute pacifist but rather a contingent pacifist. Justice Hayut suggested that because of differences between the petitioner and other selective objectors whom Israeli courts addressed in the past, there may be a need to modify the balance between freedom of conscience and the "powerful considerations for not exempting a person from security service". Justice Danziger concurred.

Under the circumstances of this case, Justice Hayut also decided that the petitioner's request for exemption cannot be granted, given the incomplete separation that exists in Israel between the activities of the military and the police, both of which have policing and combat tasks, and given the potential sense of inequality between those who perform mandatory military service and others who are exempt (although this sense of discrimination may be somewhat dulled by a fully functional alternative framework of mandatory civil service, as Justice Hayut noted in Section 5 of her decision). Hayut noted that "One should not

be rule out the possibility that general objection, which establishes a basis for exemption from military service, may not be necessarily driven by pacifism, which located at the far end of the scale of instances of objection” (Section 6 of the decision).

What may be implied by Justice Hayut’s decision is the possibility that, under certain circumstances in the future, the Supreme Court may be willing to recognize even selective objection as grounds for exemption from military service, and thus the court may have created an opening for possible deviations from existing rulings.

In a petition to the Supreme Court for a further hearing in the case of Shvili,⁵² Justice Rivlin repeated the opinions cited above as follows:

The judgment adopts the familiar distinction [between general conscientious objection and selective conscientious objection] and applies it in the present circumstances. Indeed, Justice Procaccia and Justice Hayut have chosen to implement the diagnosis in slightly different ways. Justice Hayut emphasized the difference between this case and other cases discussed in the case law, while Justice Procaccia considered the Petitioner’s objection as the selective objection already discussed in court ruling ... Naturally, judges who are required to implement a familiar legal rule under a certain factual situation may find different ways to implement or interpret the situation itself. This does not cast any doubt on the existence of this legal rule.

The court denied the request for an additional hearing, but the words and spirit of its decision may indicate that it did not rule out Justice Hayut’s interpretation.

52 DHCJ 5977/10 *Shvili v. Minister of Defense*.

SUMMARY

In his book on conscientious objection, Leon Shellef discusses a phenomenon he calls “the dependence of the powerful”.⁵³ This phenomenon, which has been studied mainly in prisons, indicates that despite the guards’ external signs of authority and power, the functioning of the system and the guards actually depends on the “good will” of the prisoners and the extent of their cooperation. Where prisoners lack a sense of duty to obey, guards will find it difficult to control the prison even though they have the power to do so. Shellef quotes Barrington Moore,⁵⁴ who claims that there are similarities between this situation and the process that creates government: This process consists of a set of ongoing “feelers”, where rulers try to impose their authority on the population, while the population explores ways to avoid this authority and to test the boundaries between non-compliance and compliance. Moore explains that this is an ongoing process of negotiation conducted over a space that varies in size: In a stable society, this space is limited, while in a less stable society, the space is larger and its boundaries are more vague.

Compliance, therefore, is not to be taken for granted, and authorities struggle to achieve it “by achievements in action, by proving the benefits it provides, with sympathy they acquire, by creating loyalty and by understanding their opponents”.⁵⁵ As shown above, loyalty displaces exit and leads to the use of protest. When loyalty is absent, the resulting conflict may make disobedience preferable to compliance.

Since the government needs the cooperation of citizens to achieve compliance, it has a clear interest in ensuring cooperation. Cooperation is not possible when one side has nothing to lose; therefore protection and recognition of minority rights is a necessary condition to ensure cooperation of minority groups. Maintaining the right of the moral/

53 Shellef, *Kol HaKavod*.

54 Barrington Moore Jr., *Injustice: The Social Bases of Obedience and Revolt* (White Plains, NY: ME Sharp, 1978).

55 Shellef, *Kol HaKavod*.

conscientious minority to act according to its conscience is, therefore, necessary to ensure the stability of the regime. The situation can be likened to placement of a pressure release valve: As the moral minority knows that it can fight for its opinions without fear, and that it will have the right to act according to its conscience, the minority will respect the “rules of the game” of a democratic framework.

By forgoing the contribution of members of this minority to the war effort, for example, the state earns the support and backing of many (objectors, potential objectors, and their supporters).

Obviously, one should beware of the potential abuse of the exemption approval process, and the risk that opportunist conscientious objection is mistaken for authentic conscientious objection. However, I believe that distinguishing between these two groups is not difficult,⁵⁶ and the social benefits of doing so exceed the immediate costs. Recognition of conscientious objection will also justify fully prosecuting offenders who are not conscientious objectors. Recognition of conscientious objection may be an effective way to prevent faults in advance, before the seeds of destruction mature into dangerous social unrest. Shellef⁵⁷ succinctly concludes that “recognizing conscientious objection would be an exceptional innovation, which will not be easily implemented, but ... I believe it to be both possible and desirable”.

56 We can examine, for example, their lifestyle, their affiliation with social groups, the opinions they expressed in the past, and so on. For “young” objectors who never had an opportunity to express their opinions in the past, one can administer surveys and psychological and other tests to assess their sincerity. Obviously, further consideration is required on this matter, but I think that this is not a complicated task.

57 . Shellef, *Kol HaKavod*.