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The freedom of conscience and sociological perspectives on dilemmas of collective secular disobedience: the case of Israel

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This paper analyses the transformation of the conscientious objection patterns that occur in a large number of countries, and Israel (discussed in this paper more profoundly) is one of them. Paradoxically, pacifist conscientious objection, which often lacks acknowledgement by the civil society, has received legal recognition in various countries, whereas conscientious disobedience, which is usually justified by a large number of 'legitimate' civil society organizations and groups, as a rule is not assigned any recognized status by the legal authorities. The broadening of conscientious disobedience and the rise in a number of civil society groups that evidently express their disagreement with the state authorities' current policy certainly demonstrate a decline in the extent of the legitimacy of the state and its institutions. The changing sociopolitical reality and the transformation of conscientious objection require a redefinition of the phenomenon of conscientious disobedience by the legal and legislative authorities.

Introduction

Being one of the basic liberties of the individual, the right to freedom of conscience is thus represented in all international conventions concerning human rights. It is unlikely, however, that any acts of collective (and not only individualistic) secular (and not only religious) objection can be advocated in the light of the principle of the freedom of conscience. Moreover, the connection between the freedom of conscience and other rights, such as the freedom of thought, as well as the connection between conscientious objection and civil disobedience are debatable as well. Michael Walzer has mentioned that it is illogical to find a secular state allowing conscientious objection on religious grounds only. The transformation of the conscientious objection patterns takes place in a large number of countries, and Israel (discussed in this paper more profoundly) is one of them. Contemporary conscientious objection is likely to be secular rather than religiously based, to be a widespread rather than a marginal occurrence, and to include service people in uniform as well as those who avoid conscription.

In this paper I would like to strengthen the argument that John Rawls's and Joseph Raz's distinction between conscientious objection and civil disobedience, which often serves as an ostensibly legitimate basis for ignoring secular patterns of conscientious disobedience, is very problematic. Paradoxically, the pacifist conscientious objection, which often lacks acknowledgement in the civil society, has received legal recognition in various countries, whereas conscientious disobedience, which is usually justified by a large number of 'legitimate' civil society organizations and groups, as a rule is not assigned any recognized status by the legal authorities.

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I would like to claim that the broadening of conscientious disobedience and the rise in a number of civil society groups that evidently express their disagreement with the state authorities' current policy demonstrate a decline in the extent of the legitimacy of the state and its institutions. As a result, state authorities use the force of law in order to de-legitimize the patterns of conscientious disobedience that can really endanger their status in society. Although religious objectors constitute only an insignificant minority of the total number of conscientious objectors in any European country, in no society have the state authorities ever recognized secular grounds before religious motives as the basis for accepting conscientious objection and exempting COs from combatant military service. In order to manage this paradoxical situation adequately, the current definition of conscientious disobedience should be re-formulated. The changing sociopolitical reality and the transformation of conscientious objection require the adoption of a relevant definition of the phenomenon of conscientious disobedience by the legal and legislative authorities.

Freedom of conscience and the transformation of conscientious objection

Being one of the basic liberties of the individual, the right to freedom of conscience is thus represented in all international conventions concerning human rights. Article 18 of the Universal Declaration of Human Rights states:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

A similar formulation appears in Article 18.1 of the International Covenant on Civil and Political Rights, which was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 on 16 December 1966 and entered into force in March 1976. Article 18.2 of this convention prohibits any coercion directed at deprivation of a person's right to have or adopt a religion or belief of his/her choice:

> Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or in private, to manifest his religion or belief in worship, observance, practice and teaching. No one shall be subject to coercion which would impair freedom to have or to adopt a religion or belief of his choice.

The recognition of the right to freedom of conscience, as it appears in the UN Declaration of 1948, is quoted also in Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was signed by the Foreign ministers of the members of the Council of Europe in Rome on 4 November 1950 (and entered into force in 1953). According to this Convention, 'Everyone has the right to freedom of thought, conscience and religion'. Article 12.2 of the American Convention on Human Rights, which has been in legal force since 1978, also prohibits any oppression of persons as a result of their faith: 'No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.' Article 27 of the American convention is concerned with the state's privilege to limit some human and civil rights in

case of a war or national emergency, ensuring, however, the right to freedom of conscience even in these extreme circumstances:

> In time of war, public danger, or other emergency that threatens the independence or security of a state party, it may take measures derogating from its obligations under the present convention . . . . The foregoing provision does not authorize any suspension of the following articles: . . .; Article 12.

Freedom of conscience is guaranteed to everyone, with no distinction as to race or nationality, by the International Convention on the Elimination of All Forms of Racial Discrimination,[1] which entered into force in 1969, and by the Teheran Proclamation of the International Conference on Human Rights held in 1968. According to this Proclamation (Article 5), every state is to guarantee the right to freedom of conscience without discrimination based on race, nationality, language or political belief:

> The primary aim of the United Nations in the sphere of human rights is the achievement by each individual of the maximum freedom and dignity. For the realization of this objective, the laws of every country should grant each individual, irrespective of race, language, religion or political belief, freedom of expression, of information, of conscience and of religion.

Although various countries have made great efforts to advance the freedom of conscience in their political cultures, it seems that there is no agreement as to whether any acts of collective (and not only individualistic) secular (and not only religious) conscientious objection can be advocated in the light of this basic principle. Moreover, the connection between freedom of conscience and other rights, such as freedom of thought, as well as the connection between conscientious objection and civil disobedience, are debatable as well.

According to Ruth Gavizon, freedom of conscience is a particular instance of the freedom of thought. Freedom of conscience is the freedom to hold certain opinions, particularly of a moral nature. Commitment to freedom of conscience means that there must be no compulsory intervention to prevent an adult from forming his/her own responses to moral issues (Gavizon 1994: 45). At the same time, according to a more reduced definition:

> Despite their closeness and similarity, freedom of thought and belief is not identical to that of conscience and religion. Freedom of thought and belief includes research and political activities aimed at the formation of a social framework in accordance with a general world outlook. Political activity undoubtedly has nothing to do with freedom of conscience and religion. (Shelach 1990: 48)

Hugo Adam Bedau has even stated that civil disobedience and conscientious objection 'differ in their primary purpose'. The primary purpose of conscientious objection 'is not public education but private exemption, not political change but (to put it bluntly) personal hand-washing' (Bedau 1991: 7). Peter Singer has presented a similar point of view: 'The distinctive feature of the disobedience of the person usually called a "conscientious objector" is . . . that it is neither an attempt to force the majority to alter its decision, nor an attempt to gain publicity, or to ask the majority to reconsider its decision' (Singer 1974: 7).

This distinction is rooted in John Rawls's and Joseph Raz's definitions of conscientious

objection and civil disobedience. Rawls describes conscientious refusal as 'noncompliance with a more or less direct legal injunction or administrative order' (Rawls 1972: 368). Rawls's point is that an administrative injunction or order, unlike a law, is addressed to the objector personally and, normally at least, the refusal does not escape the notice of the authorities. For Rawls, conscientious refusal may be grounded on an appeal to a shared conception of justice but need not be; civil disobedience, however, must be so grounded by definition. Raz characterizes conscientious objection as 'a breach of law for the reason that the agent is morally prohibited to obey it', whereas civil disobedience is described as 'a politically motivated breach of law designed either to contribute directly to a change of law or to express one's protest against, and dissociation from, a law or public policy' (Raz 1979: 263). Undoubtedly, this distinction, accepted by legal authorities (that often recognize only religiously predetermined patterns of conscientious objection), is rather comfortable for the state, which can grant 'freedom of conscience' without feeling that its own policies are being challenged. Moreover, as Raz maintains, 'in a liberal state there can be no right to civil disobedience which derives from a general right to political participation. One's right to political activity is, by hypothesis, adequately protected by law. It can never justify breaking it' (Raz 1979: 273). I shall not concentrate here on the critics of this statement in part because Raz himself mentioned that 'a liberal state was defined in a rather technical and narrow sense. It is simply one which respects the right to political participation and may contain any number of bad and iniquitous laws, and sometimes it will be the right to engage in civil disobedience to protest against them or against bad public policies' (Ibid., 274). I would like to argue, however, that the distinction between conscientious and civil disobedience, which often serves as an ostensibly legitimate basis for ignoring secular patterns of conscientious disobedience, is, at least, problematic.

Usually, as civil disobedience is designed to bring a change in the policy or the principle served by the law being disobeyed, and as conscientious objection is not intended to achieve these goals, disobedience of the latter type is not acknowledged as political. This gives expression to an excessively narrow conception of what is political, a conception according to which only acts of disobedience accompanied by full intentions of achieving political results are indeed political. As has been stated by Chaim Gans (1992: 138–139):

> There is no justification either for this conception, or for the conclusion following from it that conscientious objection is not political. It is difficult to see why acts of disobedience, which are likely to affect the realization of the principles and goals served or expressed by the laws being disobeyed, shouldn't count as political even if they aren't intended to achieve these effects. This is especially true with reference to conscientious objection based on an objection which is conceived of by the objector as applying to humanity in general or at least to his fellow society members.

Moreover, disobedience which is based on such an objection is political even if it does not, or is unlikely to, have any actual effect on the realization of the goals of the law being disobeyed. Such disobedience is political as it is, by definition, based on an objection of universal validity, and thus its performer cannot lack an interest in affecting the realization of the goals of the law in question. Many acts of conscientious objection, at least the ones placed at the centre of public attention in the course of the last two decades – the selective conscientious objection against wars such as that waged by the USA in Vietnam, and that waged by Israel in Lebanon – were acts of disobedience based on objections that were, by their very inner logic, of universal or general social validity. Due to this, and due to the

results which it was reasonable to expect of them, and which they indeed had, they were political in nature, though they were not necessarily also acts of civil disobedience.

It was Michael Walzer who remarked that it is illogical to find a secular state allowing conscientious objection on religious grounds only (Walzer 1970: 120–145). Basically, conscience is 'our blanket name for the personal governing principles to which a man is ultimately committed' (Cohen 1968: 270). Thus conscience can also be described as a form of moral knowledge that we share not with God, but with other people – our fellow citizens, for example, or our comrades in some movement, party or sect. Secularization of conscience and modern individualism have been the driving forces in the exponential rise of the resistance to military service. Religious motivation has diminished dramatically in importance. In those Northern and Western European countries where current data are available, religious objectors make up only a small minority of the total number of conscientious objectors; the percentages are remarkably similar even among different nations: 15% in The Netherlands, 18% in Germany, 14% in Norway (Moskos and Chambers 1993: 197). Walzer himself focused on secular conscientious objectors whose claims are not merely personal but based on shared group principles and mutual engagements. Limiting the discussion to objectors' groups – or to individuals belonging to such groups – allowed Walzer to justify conscientious objection by claiming that it is inconceivable to demand of political groups in pluralist democracies to behave contrary to their most intense commitments. Freedom of association virtually guarantees that certain laws will be met with demands for exemption, or for repeal, by groups of associated individuals. Walzer comes to the conclusion that 'as conscientious objection in its Protestant form is the natural product of religious pluralism, so conscientious objection in its secular form is the natural product of political pluralism' (Walzer 1970: 132).

For the purposes of analysis, conscientious objectors can be divided into several subcategories.[2] On the basis of their motivation, conscientious objectors can be religious COs (including variously those coming to their beliefs through historic peace sects, through mainline churches, or through non-mainline denominations) or secular COs (including those with either political or private motives). On the basis of the scope of their beliefs, conscientious objectors can be universalistic COs, who are opposed to all wars (this is the kind most commonly recognized by the state) or selective COs, who oppose a particular conflict or the use of particular weapons (primarily weapons of mass destruction and notably nuclear weapons).

Also distinguishing one type of conscientious objector from another is one's willingness to cooperate with the state, specifically represented by the military or the government's conscription agency. *Noncombatants* are conscientious objectors willing to serve in the military without bearing arms; typically they serve in the medical corps. *Alternativists* agree, in lieu of military service, to participate in civilian alternative service in public or private agencies; most of these COs engage in education, health, or cultural work. In many countries, willingness to perform alternative service has become increasingly the de facto measure of the 'sincerity' of the conscientious objectors. In 1990, 35 states participating in the Conference on Security and Cooperation in Europe agreed to consider introducing alternative service for conscientious objectors in lieu of military service. *Absolutists* refuse to cooperate with the authorities in any way in regard to the conscription system; they decline to participate in alternative service programmes, even if these programmes are unrelated to the military system. The absolutists are the COs who are most likely to be imprisoned in modern democratic states.

It should be explicitly mentioned that the transformation of the patterns of conscientious objection takes place in a large number of countries (Levi and DeTray 1993).

Generally speaking, the contemporary conscientious objection 'is likely to be secular rather than religiously based, to be a widespread rather than a marginal occurrence, and to include service people in uniform as well as conscription avoiders' (Moskos 1992: 21). Concerning the latter category, Gabriel and Savage stress that in a democratic society a resignation from the military, or a request to be relieved of a command position, can be consistent with the officers' code of ethics, moral judgement, and values; it can be an integral consequence of commitment to the profession (Gabriel and Savage 1978, see also Gabriel 1982).

Challenging the state: conscientious objection and civil disobedience in Israel

A similar process of transformation of the patterns of conscientious objection has been taking place in Israel. Up to and through the Six-Day War, almost all instances of refusal had a specific pacifist basis in opposition to violence.[3] However, unlike the pacifist, educational, Zionist and non-political line that characterized the Israeli Association of Conscientious Objectors during the first 20 years of statehood, at the time it had been led by Nathan Hofshi, Toma Schick (who had been an indisputable leader of the group since the Six-Day War until November 1995, when he left Israel) and his followers transformed the association to an ultra-radical political movement.[4] As Shalom Zamir claimed, 'the essence of our struggle is not the exemption of conscientious objectors but the fight against a policy of nationwide discrimination, oppression, humiliation, and the infringement of democracy and human rights' (Zamir 1972: 4). As Michael Walzer stated the argument, 'conscience may well lead individuals like ourselves to challenge the state and refuse to play the patriot' (Walzer 1970: 131). Toma Shick, Uri Davis and their supporters transformed the association into a radical group that was to challenge the political consensus of the Israeli society.

The Six-Day War in June 1967 marked the passage from a nation-state-in-the-making to a de facto bi-national state (Kimmerling 1993); it also opened a new chapter in the history of conscientious objection in the State of Israel. A consensus exists in Israel that the Six-Day War was a just war. As such, no instances of refusal are known to have occurred during the course of the fighting. Four years later, however, after Israel had begun to tighten its hold over the territories conquered in the war, a new pattern of non-compliance emerged: selective refusal, that is, refusal to serve in the captured territories. A new type of objection occurred in this period – political refusal with the intent to influence government policy. It was a definite attitudinal change toward continued Israeli control of the occupied territories. Political objectors were concerned that government policies were not bringing peace any closer.[5] Nevertheless, until the outbreak of the Lebanon War in 1982, there were few refusals on political ground connected with national security. The infrequent refusals after 1967 stemmed from the debate over the future of the territories and were confined to the marginal political left. Refusal during the Lebanon War, by contrast, was a means of protest openly adopted by a few hundred individuals. Some of them were officers, some had served in combat status, and not all of them were identified with marginal political groups. The conscientious objection at the time of the Lebanon campaign (1982–85) and the *Intifada* (1987–93) definitely did not originate either in Dr Schweitzer's legacy of peaceful creation or in the spiritual Zionism of Ahad Ha'Am, Gordon and Buber. Although there exists an argument that civil disobedience did not begin with Socrates, but with the Hebrew Bible, which rejected the supremacy of human law (Hazony 1998), the Israeli

conscientious objection transformed into a completely different story – the story of Israeli followers of Henry Thoreau and Martin Luther King, the story of the citizen's responsibility for the mistakes of government, the story of the appearance of non-violent civil disobedience in the changing Israeli society.

Probably the most landmark case was that of Gad Elgazi in 1979. Gad Elgazi was one of the group of 27 high school seniors who published a letter objecting to the occupation of the West Bank and Gaza Strip and stating that, when called to military service, they would refuse to serve in the occupied territories. They added that by so refusing they believed they contributed to peace in the Middle East. It should be mentioned that from 1971 till 1979, the Ministry of Defense pragmatically allowed such selective objectors, when drafted, to serve within the 'green line' separating Israel from the occupied territories (Epstein 1999). The case-by-case effort to resolve the issue of refusal through various means without raising public awareness continued for years. Elgazi asked the army to consider his request for selective exemption. However, in contrast with its previous policy, the Ministry of Defense rejected doing so. Elgazi considered the army's rejection of his petition to be a case of illegal discrimination. After serving three consecutive one-month prison sentences, he appealed to the Supreme Court, claiming discrimination in the light of former exemptions given by the Ministry of Defense.[6]

The IDF was unable to deny the petitioner's claims. Instead, the army's counsel explained:

> Army authorities had given objectors a guarantee that they would be stationed according to their wishes, within the borders of Israel, as long as refusal was an isolated phenomenon. Now policy has changed. What had once been sporadic instances of refusal with which the IDF was prepared to live, has changed in character and become an organized protest whose aim is to turn the IDF – the national army, necessarily disengaged from any political or ideological arguments – into the battleground for a kind of confrontation which the army cannot be associated with.[7]

The Supreme Court left no question concerning its position in regard to the individual's obligation to perform military service: 'No military organization can tolerate the existence of a general principle according to which individual soldiers can dictate their place of service, be it for economic or social reasons, or for reasons of conscience'[8]. Although Justice Cohen, who wrote a separate opinion, expressed dissatisfaction with the lack of a clear policy by the army regarding service in the occupied territories, all three Justices agreed that this was not a reason to consider as discriminatory the change of practice according to which soldiers were now compelled to serve in the occupied territories. The principles to which Justices Levin and Beiski referred, especially the need to leave questions of military policy to the army, were essentially consequentialist: 'We believe we had better refrain from stating an opinion as to the utility-calculations of the authority when it implements its policy; this is a matter for the respondents and their experts to handle and we see no legal reason to contradict its calculations'[9].

Consequentialist arguments were dominant in Yaakov Shain's case as well. In 1983, Yaakov Shain was called up for one month's military service in southern Lebanon. Shain refused, claiming that, in his view, 'the IDF presence in southern Lebanon is unlawful and inconsistent with basic notions of justification of belligerent acts'. He was put on disciplinary trial and given 35 days' detention. He was later sentenced to 28 days more for refusing another reserve service call-up order. On receiving a third order for reserve duty, Shain appealed to the Supreme Court. He submitted a petition to the Supreme Court,

maintaining that the second summons was not dictated by the 'military needs', as specified in the Defense Service Law, but was inflicted on him as a punishment. The state attorney claimed in response that the practice of calling objectors to duty after they had been punished for their refusals stemmed from the need to overcome the phenomenon of refusal to serve in Lebanon, which had severely jeopardized the foundations of military discipline and the morale of soldiers serving there.

The Supreme Court rejected Shain's claim that his second summons was not in line with military and security needs, and that the military instructions, updated in 1983 regarding summon objectors who had already been punished, were illegal.[10] In the decision, written by Justice Menachem Elon, consequentialist arguments were adopted as well: 'The purpose of the updated instructions is to insure that every reserve soldier fulfills his duty and provides military service in accordance with the military and security needs of the IDF, which are determined by the IDF authorities' consideration'[11]. Justice Elon added that the petitioner was not entitled to determine the military policy and to decide what the army's security needs were. He surveyed responses to the selective conscientious objection, i.e. objection to serve in a specific war for ideological reasons, in England and the USA, where this was seen as infringing upon the process of democratic decision making and as constituting a real danger of applying unequal criteria in military recruitment. He claimed that this danger existed in the case in front of him; moreover, he made sure to differentiate between the Israeli context, with its higher stakes and unique utility considerations, and that of other countries:

> The whole great complex affair of law on the one hand and conscience on the other, of the duty and need to maintain military service in order to defend the sovereignty of the state and the well-being of its inhabitants on the one hand and refusal to go to war for reasons of personal conscience on the other, must be reviewed in light of the particular circumstances of time and place; but the difficult security situation of Israel does not resemble the security situations of other states, securely ensconced within their borders. This material difference is also a major and important consideration in elucidating the issue before us[12].

Although denying the possibility of one's selective disobedience, Justice Elon confirmed one's right to be fully exempt from the military service for reasons of conscience. He stated:

> The reasons of conscience can serve as one of possible arguments the authorities consider, in order to exempt one from the obligation to serve in the military. The recruits having a pacifistic outlook asked – and got – such exemptions individually, after they had personally appealed to the Defense minister.

And yet 143 reserve soldiers refused to join their units in their assigned military mission in Lebanon (Linn 1986). The first cases of refusal became known to the public on 22 September 1982, following the quasi victory of the war – the evacuation of the PLO terrorists from Beirut. The IDF spokesman announced that morning that three reserve soldiers had been tried for refusing to serve in Lebanon for moral reasons. In the following months, there were on average three refusals per month, reaching a peak in one month (May 1983) of 27 objectors. One also has to account for the phenomenon of hidden refusal, which grew during that period. The total number of 143 includes only those soldiers who actually refused to obey the order and were sentenced to jail for from 14 to 35 days (about 15 of them went to jail two or three times throughout the entire war – from

June 1982 to June 1985 – when facing additional drafts). The number noted above does not include the potential objectors, whose request not to serve in Lebanon was granted by their immediate sympathetic commanders; in her study on the conscientious objectors during the period of the *Intifada*, Ruth Linn found that 27% of the objectors unsuccessfully tried to avoid service using various excuses such as illnesses or job difficulties (Linn 1996: 98). More than 1470 *'Yesh Gvul'* ['There Is a Limit'] members signed declarations stating that if called up, they would refuse to serve in Lebanon.[13] Therefore, the real number of objectors was significantly larger. In 1986, Lt Gen. Moshe Levi, approaching the end of his tenure as chief of staff, admitted that refusals to serve in Lebanon had played a role in Minister of Defense Moshe Arens's decision to begin a withdrawal of the IDF from Lebanon (Peri 1993: 155).

Even though refusal in the *Intifada* was more of an option than the Lebanon war, the number of objectors within its first four years of existence, namely 165, does not suggest that the process of refusal was easier on the individual reserve soldier than it was in Lebanon (Linn 1995). An even more significant change appears in the social background of the conscientious objectors. The civilian background of the *Intifada* objectors was similar to that of the Lebanon war objectors: both groups come from the elite of society, one-quarter are *kibbutzniks*, one-quarter are officers, and a disproportionate number are university graduates. According to Ruth Linn's data, the 'ideal type' of the contemporary Israeli conscientious objector refers to a secular, 30-year-old male of European origin (ages 21–49, mode = 34), who lives in a city (92%), is highly educated (79% have already finished at least their BA studies, 48% hold MA or PhD degrees), and is a member of the liberal professions (92%); most of them (52%) actively participated in protest groups prior to their refusal. The *Intifada* objectors appear to be experienced military officers (27%) and soldiers (73%); half of them (50%; 61% among the Lebanon objectors) had participated in previous wars in a combat role (Linn 1996: 88–91).

The protestors were not pacifists, but they maintained that political dialogue with the Palestinians was the sole means of achieving peace. War was only a last-resort means of ensuring survival. In their view, attacks on civilians represented the dehumanizing element of wars conducted with the aim of occupying territories rather than thwarting an existential danger. *'Shalom Akhshav'* ['Peace Now'] preached a peace initiative, including dialogue with both PLO-affiliated and other Palestinian delegates. Most of its several thousand members, repudiating the Israeli consensus, deemed the Palestinian national movement legitimate. Most of the media advocated dissent, leading protestors to hope that the government would accede to their demands.

The last decade's objectors do not belong to those sectors of Israeli society that have traditionally been estranged from the army. The opposite is true: they represent groups whose contribution to the state's military security has traditionally been high (Per 1993: 155). The political background of the conscientious objectors has also changed: this group now comprises those from the 'legitimate' parts of the political left. What is more, organizations of the non-radical left have expressed either their support for or, at least, an 'understanding' of the refusal to fight against the *Intifada*. Even though the overall numbers of objectors are not large, the shift in attitude is significant. A survey of high school students' attitudes to military service found that 53% justify, to one extent or another, refusal to serve in the territories. Thus there exists a paradox: pacifist conscientious objection that lacks any recognition in civil society has received the recognition of various Israeli state institutions,[14] whereas conscientious-civil disobedience, which is justified by a large number of 'legitimate' civil society organizations and groups, has not been assigned with any recognized status by the legal authorities.

It should be explicitly mentioned that since 1973 political protest and civil disobedience have also become the tools of Israeli right-wing radicals (Sprinzak 1991: 18). In the mid-1990s the idea of civil disobedience for reasons of conscience became an essential part of the political philosophy of Israeli extreme right organizations. Ehud Sprinzak argues that 'many young Israelis learned for the first time about the civil rights movement, Martin Luther King Jr, and the struggle against the Vietnam War' from the extreme right '*Zo Artzenu*' ('This Is Our Land') leaders' interviews to the media in 1995 (Sprinzak 1999: 271). The chairman of '*Zo Artzenu*', Moshe Feigelin, argued that only a real struggle, i.e. uncompromising civil disobedience and the readiness of a large number of people to be arrested, could mobilize the masses against the government and effectively stop the Israeli–Palestinian peace process.[15] Elyakim Haetzni, a prominent secular leader of the Judea and Samaria settlement movement, was the first to introduce the language of personal delegitimization into the struggle dictionary of the radical right. Since 1992 he has devoted most of his intellectual energy to the development of a settler version of civil disobedience.

Haetzni's justification of civil disobedience starts with the universal proposition that Western civilization has always recognized limits on citizens' obligation to obey human laws. Eminent thinkers – from Socrates to Gandhi and Martin Luther King Jr – argued that above the law of every state there are higher principles of justice, religion or natural law that make disobedience legitimate and sometimes obligatory. While Socrates associated disobedience with the right to engage in a free philosophical discourse and to educate the young, Henry David Thoreau placed the limit on slavery and lack of human freedom. Charles de Gaulle, in a case analogous to that of Israel, refused to go along with the surrender of homeland territories to the enemy. Martin Luther King Jr believed that the inhumanity of racial segregation fully justified civil disobedience. Even the members of Israel's '*Yesh Gvul*' argued that military service in the occupied territories violated their beliefs and justified disobedience to the law. Drawing on all these precedents, Haetzni asked his readers, friends and foes alike, to respect the right of the settlers to disobey orders involving the surrender of *Eretz Israel* territories. Israel's settlers, he warned, would refuse to evacuate their settlements despite any agreement the government might conclude with the Palestinians.[16]

Haetzni's interpretation of civil disobedience consistently ignored the Palestinian side of the dilemma; neither did it take into consideration the plight of people who had never chosen to live as second-class citizens under Israeli occupation. Haetzni failed to notice that civil disobedience theories were developed by the poor and the powerless, usually against oppressive governments – not by mighty colonizer committed to the sacred Land of Israel as if no people had lived there for generations. What Haetzni had in mind was not an ethical theory of disobedience but an instrument of popular mobilization that would appeal to educated settlers and legitimize efforts to bring down the government in the streets. As Haetzni stated:

> A process [of disobedience] will feed into an internal process of alienation of the people of Israel from the government, will intensify . . . the message of the demonstrators, rioters, individuals who block the roads, founders of settlements on lands owned by the Palestinian land authority, those who put barbed wires around these lands before their return to the enemy, the jailed, the sentenced, the locked. This will be the day when this alien government will collapse and a new dawn sheds light on a new Israel, a better Israel, pure and untarnished. (Haetzni 1994: 25–27)

The initiative to refuse military service by reason of conscience manifested itself at the

extreme right wing in the *Chai Ve-Kayam* ('Alive and Existing') group. This group was established by Yehuda Etzion, the ideologue of the Jewish Underground in the 1980s. In his view, the failure of the state to become Jewish, redeem the land, assert authority against the Arabs, and start building the Third Temple made it illegitimate. While neither engaging in violence against the Palestinians nor physically confronting the Israeli secure forces, *Chai Ve-Kayam* activists (whose number never exceeded three dozen) raised the level of anti-government resistance through incessant efforts to pray as a group on the Temple Mount, an act prohibited by Israeli law. By calling upon the settler community to dissociate themselves from state institutions and to stop paying taxes, *Chai Ve-Kayam* also contributed to the spread of civil disobedience as a strategy among the settler community. At the beginning of November 1993, 11 members of *Chai Ve-Kayam* led by lieutenant (res.) Mordechai Karpel signed an open letter to the Prime Minister declaring their unwillingness to serve in the military, which fulfils the government's orders that endanger the future of the Israeli settlements in Judea and Samaria.[17]

Today the idea of legitimacy of civil disobedience has become an essential part of the Israeli right's intellectual and political vision. In his paper entitled 'The Jewish origins of the Western disobedience tradition', Yoram Hazoni, director of the Shalem Center in Jerusalem (the most prominent right-oriented centre for public policy research and social thought in Israel), argued:

> Today, we are left to operate the state without prophecy. But we do have the heritage of the prophets – a heritage in which individuals possess a 'constitutional' standing as against that of the state, and which removes them a step or two beyond its reach. It is this distance from the dictates of men which affords us the freedom to judge and to abhor, to speak and to demand, and, when necessary, to disobey. Of course, for such a tradition to bear fruit ultimately depends on the strength of individual men. And there always exists the possibility that, when actually confronted with the injustice of the state, the many will simply turn their backs on the disobedience tradition of the West, submitting to the state and 'just following orders', as so many did in Germany not so long ago. Yet the political tradition of the democratic states of our time, as epitomized by their judgment at Nuremberg, continues to hold before us the alternate possibility: That even men who are not prophets can find strength in the disobedience tradition of the Hebrew prophets, and will prove worthy of its legacy when the terrible moment comes. (Hazony 1998: 63)

To my mind, the fact that, based on the freedom of conscience, the idea of civil disobedience has become an essential part of the political ideology and practice of various civil society organizations (on both the right and the left wing) should entail re-examination of the traditional attitude towards the limits and the legitimacy of conscientious disobedience.

Reframing the discussion: towards a recognition of collective secular disobedience

Although conscientious objection may be an act of very few, there appears to be a positive correlation between reliance on conscientious objection and other forms of dissent. Moreover, conscientious objection, unlike other forms of refusing consent, requires an explicit and public statement of opposition to government demands (Levi 1997: 165–199).

Many countries have made allowance for conscientious objectors in their conscription

laws. However, the acceptance of the right to conscientious objection by the government does not occur uniformly in every country. The USA was the first to allow some right to conscientious objection at the national level. This took place in the mid-nineteenth century during the Civil War. Britain in 1916 was the first European nation to grant official recognition to conscientious objectors while at war. The Netherlands in 1924 was the first to accept selective conscientious objection and the first European nation to establish civilian alternative service. In the late 1950s, the Federal Republic of Germany was the first country to move toward a massive alternative civilian service programme for conscientious objectors. By the 1980s Denmark became the first country in which alternative service was made less onerous than peacetime military service (Sorensen 1993). Conscientious objection and alternative service have been recognized in France (1963; re-formulated in 1983) (Martin 1993), in The Netherlands (1924; re-formulated in 1964 and 1978) (Jan Van Der Meulen 1992), in Italy (1972) (Nuciari 1992), in Austria (1975), in Poland (1988) (Modzelewski 1994) and in almost all other liberal democratic countries. In some of these countries, especially in Denmark and in Germany, conscientious objection has now become the 'normal behaviour' of the young man (von Bredow 1992). However, even in Scandinavian countries, where non-religious objection was furthest advanced, secular criteria for conscientious objection followed closely after the de facto recognition of religious motives. In no society has the state ever recognized secular grounds before religious motives as the basis for accepting conscientious objection and exempting COs from combatant military service.[18]

It is sometimes said that if governments allowed exemption to those who based their judgement on the particular facts of a war, this would in some way be allowing the objectors' assessments of the facts to prevail over the assessment of the government itself, thus giving legal recognition to the superiority of the dissentient views (Van den Haag 1972: 50). This is a dubious argument, for if allowing an objector's judgement of fact to excuse him from military service accorded legal recognition of the superiority of his views, allowing a pacifist's moral judgement to excuse him should have the same effect. It is in any case not true that to accept a judgement, whether of fact or morality, as a ground for exemption is to accord legal recognition to the soundness of that judgement. In fact, under the laws of most countries, the officials or judges responsible for exemptions are required to test sincerity of conviction, but not soundness of belief.

It looks, therefore, as if the discussion on conscientious objection and civil disobedience in legal systems of most contemporary democracies is asymmetrical and its validity is thus limited. Conscientious objection bears an obvious family resemblance to civil disobedience. However, the current discourse is based on the assumption that a state has the exclusive right to legislate and determine its policy and lays the burden of justification of objection on the individual. In order to obtain a comprehensive discussion on the issue, the responsibility for justification should be divided between the individual and the state. Coercion is always in need of justification, and coercing a man to do something contrary to his most deeply held moral beliefs (which he is normally encouraged to follow) requires special justification. The state also has to show that its laws and policy are consistent with the goals and culturally determines values of the society.

The difference between state's and civil society's justifications of controversial political issues conceptually corresponds to the difference between legality and legitimacy.[19] The legality of a policy is defined by the state authorities; as has been claimed by Max Weber, one of the essential characteristics of a modern state is the institutionalization of citizenship defined by legal and rational criteria. On the other hand, the extent of the legitimacy of a state policy is defined by the civil society according to the accepted cultural values.

Thus not every initiative of the regime is likely to be taken for granted as legitimate, the extent of the civil protest against the authorities indicating the degree of legitimacy of the state and its institutions.

A democratic state is enormously dependent on the willingness and ability of its citizens to commit themselves to political values and to act consistently in their name. The Government, writes Ronald Dworkin:

> Will not re-establish respect for law without giving the law some claim to respect. It cannot do that if it neglects the one feature that distinguishes law from ordered brutality. The law must state, in its greatest part, the majority's view of the common good. The institution of rights is therefore crucial, because it represents the majority's promise to the minorities that their dignity and equality will be respected. If the Government does not take rights seriously, then it does not take law seriously either. (Dworkin 1978: 205)

However, it should be mentioned that citizens' commitments are generally made in groups, where values are collectively worked out and the strategy and tactics of political action are debated. Such moral positions as obedience and refusal are usually constructed and manifested in connection with other people. In the words of Michael Walzer, 'disobedience, when it is morally, religiously, or politically motivated, is almost always a collective act, and it is justified by the values of the collectivity and the mutual engagements of its members' (Walzer 1970: 4). The 'connected' moral critic is a person who has ties to a particular culture; his/her sense of justice emerges from shared understandings or agreements with other individuals who are aware of their historical moral selves and who form part of that society (Walzer 1988). As has already been stated,

> Protest behavior by a military professional is not necessarily an act of mutiny or disobedience. In fact, if compliance and obedience are one side of military professionalism, reservation and protest may be the other. While the former behavior is the rule as long as military decisions and operations are considered 'legitimate', the latter is called for when legitimacy is questionable. (Gal 1985: 560)

Human rights that can be promoted by regional and global institutions, on the one hand, and by citizen movements, on the other, represent the two main structural challenges to the primacy of the state in world affairs. These challenges to statism suggest the relevance of levels of analysis above and below the level of the state and call for a more complicated image of 'actor' with respect to human rights.

The negotiation process between individuals and state over the meaning and practices of citizenship ensues from changes in the logic of the state. Such a change took place in the state's practices during the war in Lebanon. As has been claimed by Sara Helman, 'a change in the logic of the state, as this change was perceived and interpreted by groups and individuals during the war in Lebanon, caused crises of state legitimacy and social motivation. Conscientious objection evolved as an ultimate expression of both crises' (Helman 1993: 2). I would like to argue that the rise in a number of civil society groups that evidently express their disagreement with current state authorities' external or/and internal policy certainly demonstrates a decline in the extent of legitimacy of the state and its institutions. Therefore, because the broadening of conscientious disobedience indicates the reduction of the legitimacy of the state policy, state authorities use the force of law in order to de-legitimize those patterns of conscientious disobedience that can endanger their

status in the ruled society. The phenomenon that is stigmatized as 'selective conscientious objection' provides a significant illustration of such an attitude – in the USA, in the European countries, and also in Israel.

An entity like 'humanity' acquires some 'collective conscience', and in fact, since the Second World War, it has been accepted that democratic law is subordinate to higher values of human dignity and civil freedoms, and that under certain extreme conditions a citizen must refuse to obey a law. As has been stated in Henry Thoreau's famous lecture, published one hundred years before the Nuremberg trials, majority rule by itself is not identical with justice. As argued by Richard Falk, 'Human rights are not, in the main, legal or moral abstractions. They are embedded in historical process' (Falk 1981: 6). In the words of Noam Chomsky, 'After the lesson of Dachau and Auschwitz, no person of conscience can believe that authority must always be obeyed. A line must be drawn somewhere. Beyond that lines lies civil disobedience' (Chomsky 1969: 201). In the third section of his book on Non-Violent Resistance (Satyagraha), Mohandas Gandhi explicitly stated:

> Civil disobedience becomes a sacred duty when the State has become lawless. . . . It is possible to question the wisdom of applying civil disobedience in respect of particular act or law; but the right itself cannot be allowed to be questioned. It is a birthright that cannot be surrendered without surrender of one's self-respect.[20]

The liberal democratic state must recognize this basic principle; therefore, the current definition of conscientious disobedience should be re-formulated. The changing sociopolitical reality and the transformation of conscientious objection require the adopting of a currently relevant definition of the phenomenon of conscientious disobedience by the legal and legislative authorities.

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Notes

1. 'In compliance with the fundamental obligations to the Convention, States Parties undertake to prohibit and eliminate racial discrimination in all its forms and guarantee . . . the right to freedom of thought, conscience and religion'. *International Convention on the Elimination of All Forms of Racial Discrimination*, Article 5.
2. This analysis presented below is based on Charles Moskos, 'The secularization of conscience'. International

workshop on *Conscientious Objection: from Religious Pacifism to Political Protest* papers (Zihron-Yakov: Israeli Institute of Military Studies, 1992), 20–42.

3. See Blatt *et al.* (1975). The most famous case – that of Amnon Zichroni (1954) – has been recently analysed by Keren (1998).
4. For further details see Epstein (1998).
5. For further discussion see Scheleff (1989).
6. For more detailed discussion see Shachar (1982).
7. *Proceedings of the Supreme Court*, 24 September 1980; cited in Peri (1993).
8. H.C. 470/80, *Elgazi* v. *Minister of Defense and Others* (unpublished; State Archives), 5.
9. Ibid., 6.
10. The discussion of this case is based on Klosko *et al.* (2000).
11. H.C. 734/83 *Shain and the Israeli Association for Civil Rights* v. *the Minister of Defense and Chief of Staff*, P.D. 38 (3), 399.
12. Ibid., 403; translated into English and cited in Barzilai, 1996.
13. *Ha'aretz*, 29 November 1983.
14. Responding to Epstein's appeal, the General Attorney informed the High Court that in the light of the freedom of conscience, given to the citizen in a democratic state, one ought to be exempted from the military service if the latter contradicts his/her consciousness, faith and world outlook. Though there is no explicit recognition of men's right to be exempted from the military service for reasons of conscience, certain officials within the military are assigned a recognized authority to exempt a man from military service for these reasons [General Attorney's Response to H.C. 4062/95 *Epstein* v. *The Minister of Defense* (submitted to the Supreme Court on 23 July 1995), section 10 and section 13]. In another case Justice Heshin explicitly stated that there is no doubt that the Defense minister is authorized to exempt a recruit military service for reasons of religion or conscience. The Defense Minister has been assigned this authority by paragraph 36 of the Military Service Act, 1986 [H.C. 2700/96 *Baranovsky* v. *the Minister of Defense* (unpublished), 5].
15. See Feigelin (1994); discussed by Sprinzak (1999: 273–274).
16. See Haetzni (1993); discussed by Sprinzak (1999: 226–228).
17. See Objection for the sake of the rescue of *Eretz-Israel*, *HaIr*, 5.11.1993 (in Hebrew).
18. For further details see Noone (1993).
19. For further discussion of the issue see D'Entreves (1967); Dyzehnaus (1996).
20. Cited in Crawford (1973).

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