

1-1-1996

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### Recommended Citation

Frances Raday, *Women in Law in Israel: A Study of the Relationship Between Professional Integration and Feminism*, 12 GA. ST. U. L. REV. (1996).

Available at: <https://readingroom.law.gsu.edu/gsulr/vol12/iss2/4>

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# WOMEN IN LAW IN ISRAEL: A STUDY OF THE RELATIONSHIP BETWEEN PROFESSIONAL INTEGRATION AND FEMINISM

Frances Raday<sup>†</sup>

## INTRODUCTION

In telling the story of women in law in Israel, the preliminary impressions are of integration and success. In this article, I will explore on one hand, the nature and limits of women's integration into the legal profession and their success, and on the other hand, how women's integration into the profession has affected the perception of women's right to equality among members of that profession, including judges.

The socio-economic status of a profession determines the significance of women's integration into the profession. The integration of women into professions is not always an indication of socio-economic flourishing. When a profession is undervalued and underpaid, the integration of women may represent exploitation and not success. In contrast, the legal profession in Israel is sought after and elitist. Women have been prominent partners for some time in the legal profession, and their successful integration reflects socio-economic success in a wider frame of social reference.

In Israel, the judiciary is professional; there are no lay judges in the general courts, but only in specialized courts like the labour courts. Judges are appointed by a committee of judges, lawyers, government ministers, and members of Parliament. There are no jury trials. The judiciary is, therefore, composed almost entirely of members of the legal profession. No separation exists between barristers and solicitors. Furthermore, the legal profession provides both status and economic advantage to its members. Public service lawyers, particularly the lawyers in the offices of the State Attorney and the Ministry of Justice, play a

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central role in safeguarding the rule of law and are held in high esteem. Student demand for places in law schools has been very high for many years. Hundreds of students unable to gain admission to Israeli university law schools have studied law abroad and then have returned to Israel and taken foreign lawyers' exams. In recent years, the demand for law studies has produced a mushrooming of colleges that grant degrees in law. In response to the explosion in the number of law students, a professor of educational planning commented that it is a sad waste of human resources to see so many first class minds going into law "where such high intelligence is not really needed anyway."

### I. WOMEN IN LAW

An overall numerical view of women in the legal profession looks encouraging. Women figure in large numbers in the student body, in academia, in the public service, in law firms, and in the judiciary. Israel has consistently had a woman on the Supreme Court since 1977. Justice Miriam Ben Porat was appointed to the Supreme Court in 1977 and became Vice-President of the Court in 1983. After Justice Shoshana Netanyahu was appointed to the Court in 1982, we have almost consistently had two women justices serving on the Supreme Court. When Justice Netanyahu retired in 1993, Justice Dalia Dorner and Justice Strasbourg-Cohen were appointed. Thus, at the pinnacle of the profession, women are prominent. Four women justices have served on the Supreme Court, with two currently serving. Women serve in the positions of State Comptroller and Solicitor General. The legal advisors to the Civil Service Commission, the Ministry of Defense, the Police Force, and the Histadrut Trade Union Branch are all women.

Although the numbers are encouraging and there are women at the highest levels of the profession, women in the legal profession are, nonetheless, trapped in a pyramid. In the universities, approximately 50% of the student body are women, but only about 20% of law faculty are women. In the court system, 40% of the judges in magistrate courts are women, more women than men serve in the regional labour courts and the traffic courts, 24% of district court judges are women, and two out of thirteen Supreme Court justices are women. In public service, however, women constitute 66% of public service lawyers

and attorneys and 66% of the top seven ranks. However, in the four highest ranks, which are indicated as top-level civil service by statutory provisions imposing restrictions on political party activity on these ranks only, women constitute only 50%.<sup>1</sup>

In the economic hierarchy of the legal profession, women are concentrated at the lower income levels. Women are not very prevalent among partners in the big commercial law firms—the most highly paid sector of the profession. Judges and public service lawyers are not the highest earners in the legal profession. Furthermore, women also pay an economic price for their integration into certain branches of public service. When there is a very high concentration of women in a particular branch of the public legal sector, the salaries women receive appear to be lower.<sup>2</sup>

In spite of this evidence of a residual pyramid, with the encouraging number of women in the legal profession, we should perhaps be able to talk of a feminist bar in Israel. However, this is not entirely the effect that the high participation rate of women in the profession has produced. In substance, the Israeli legal profession, on one hand, has asserted the justice of the case for women's equality, particularly in recent decisions of the Supreme Court. On the other hand, the profession has totally disregarded feminist justice, particularly in its ongoing tolerance of blatant discrimination against women professionals and "consumers" in the arena of the personal law, which is delegated to the jurisdiction of religious courts. Women in law mostly have refrained from feminist identification, and feminist activism has been promoted by only a tiny minority of women lawyers.

## II. FEMINIST LEGAL ACTIVISM

The record of feminist legal activism was fairly sparse until the 1980s. Although women's organizations in Israel, particularly Na'amat,<sup>3</sup> had been very strong in terms of membership

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1. Civil Service Commissioner Report on Statistical Data Relative to the Status of Women in the Civil Service (July 1995).

2. *See id.* Although 69% of public sector attorneys are women, the entire rank is lower paid than other public sector ranks. Similarly, 62% of the State Service lawyers are women, but there is a salary gap between men and women. *Id.* The problem was identified by L. Efroni in her analysis of the 1993 figures. L. Efroni, *State Service Employees by Professional Rank and Sex—Main Data and its Interpretation*, NETO PLUS, June 1993, at 103.

3. The Histadrut General Federation of Employees in Israel established Na'amat,

numbers and budget since the earliest days of the State, their early activities were largely confined to the provision of services to working mothers. This was a task that they handled with great efficiency, thus facilitating the integration of work and parenthood for women. These early activities did not include advocacy of legal solutions to feminist issues, and hence there was no systematic strategy for promotion of equal opportunity. Development of legal advocacy for women's rights was sporadic and often at the initiative of individual plaintiffs and their counsel. In the 1950s, several successful legal actions were brought before the courts to improve the status of married women on questions of matrimonial property, guardianship, and domicile.<sup>4</sup> In the 1960s, an unsuccessful action was brought against the tax authorities for discrimination against married women under the Income Tax Law.<sup>5</sup> In 1973, the first employment discrimination case, *Chazin v. El Al Israel Airlines*,<sup>6</sup> was fought in the labour courts, resulting in a judicial precedent that, in the absence of legislation, paved the way for a right to equal opportunity employment on the basis of public policy. The plaintiff, an air stewardess who alleged discrimination in promotion because the job of chief steward was closed to women, was supported in her legal action against El Al Israel Airlines (El Al Israel) by the Section for Working Women of the Histadrut.

In the mid-1980s, I established the Legal Center for Women's Rights in the Israel Women's Network. With a number of volunteer lawyers and a staff lawyer, we instituted an organizational concept of systematic advocacy on a wide range of feminist issues. Since then, women's organizations, with a growing body of staff lawyers, have formed coalitions on central feminist legal issues. The feminist legal strategy that we developed in the 1980s was to combine legislation and litigation. Lobbying for legislation was strategized, first, to take advantage

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a separate women's organization, and in addition, a section for representation of the working woman. Since membership in the Histadrut was more than 80% of employees, these women's organizations had an exceptionally strong base both organizationally and financially. Furthermore, WIZO, an international women's organization, mobilized resources to support women's needs in Israel. Alongside these organizations, the Israeli Feminist Organization was established in the 1970s, and the Israel Women's Network was established in 1985.

4. For a description of these cases, see Frances Raday, *Equality for Women in Israel?*, 27 JERUSALEM QUARTERLY (Spring 1983).

5. *Lubinsky v. The Tax Inspector*, 16 P.D. 403 (1962).

6. *El Al Israel Airlines v. Chazin*, 4 P.D.A. 365 (1973).

of general trends in legislative reform and to inculcate a feminist perspective whenever the opportunity arose, and second, to promote legislative solutions to issues that could not be resolved in the courts. Litigation was undertaken whenever there was a suitable issue and plaintiff. The litigation served to focus issues and to popularize them by presenting them in the context of individual cases that illustrated the injustice to women in current legal or social regulation. Even when litigation was unsuccessful, it could form a good basis for a legislative initiative. The case histories involving feminist legal strategies provide an insight into feminist legal activism and the response to it by judges and legislators.

The issue that galvanized this small core of feminist legal activists was the issue of early retirement for women. In 1982, Professors Tirza Cohen and Elaine Birman received letters from Hadassa Hospital, where they were department heads, congratulating them on their forthcoming retirement at the age of sixty. Their request to the Hadassa management not to be retired earlier than their male colleagues, whose retirement age was sixty-five, was summarily dismissed and they took me as counsel. After two years of hearings in the Regional Labour Court in Jerusalem, it became clear that the judge was not disposed to entertain the plaintiffs' claim. Judge Gutman intimated that in determining whether early retirement for women was contrary to public policy, he would take into consideration the attitudes of the employer and the unions who were parties to the very pension agreement that had ensconced the principle of early retirement for women. With the help of American feminists Betty Friedan and Elizabeth Holzman, women in the United States who raise the funding for the Hadassa Hospital were persuaded to intervene, and a new pension agreement was signed that fixed equal retirement ages for male and female doctors with academic tenure.

However, the issue of forced early retirement for women remained, and we returned to the labour courts with a discrimination claim by Dr. Nomi Nevo against the Jewish Agency. The claim was rejected by the Regional Labour Court and by the National Labour Court.<sup>7</sup> This decision by the

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7. Nevo v. The Jewish Agency, 18 P.D.A. 197 (1986); see also Frances Raday, *Women in the Workforce*, in *WOMEN'S STATUS IN SOCIETY AND LAW*, 64 (Frances Raday et al., eds., 1995) (in Hebrew). I worked on the case with Advocate Michael

National Labour Court in 1986 was probably the most significant single factor in goading the women's lobby into action. It provided concrete proof that the myth of equality, which had prevailed in Israel since the early days of the State because of women's presence in the Knesset, government, army, and professions, was truly a myth. It provided conclusive evidence that any inequalities which did exist were not merely residual oversights that would be promptly amended when attention was drawn to them. Women began to understand that presence is not a synonym for power. The women's organizations lobbied. Dr. Niza Shapira-Libai, a lawyer who was the Advisor to the Prime Minister on Women's Status, set up an advisory committee that drafted a proposal; M.K. Ora Namir, Chairperson of the Knesset Committee for Labour and Welfare, pushed through the Knesset the Equal Retirement Age for Women and Men Law in 1987 and the Equal Employment Opportunity Law in 1988.

In the wake of these developments, the women's lobby succeeded in promoting feminist legislation on a series of important subjects. In 1988, women's organizations engaged in successful legal advocacy on legislative reform of the law. Led by the Rape Crisis Center, the women's organizations successfully lobbied for reform of the laws on rape, introducing to Israel the concept of rape shield laws, cancelling the requirement for corroborative evidence, replacing the element of "unwillingness" previously required to prove the crime with "lack of free consent," and codifying the judicial ruling that marital rape is a criminal offense.<sup>8</sup> The Legal Center for Women's Rights drafted legislative proposals and successfully lobbied for their acceptance on a wide variety of issues, including extension of the definition of matrimonial property subject to division,<sup>9</sup> introduction of civil protection orders in cases of violence in the family,<sup>10</sup> affirmative

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Shaked, who is a fine trial lawyer, who agreed to work with me on the case, although she was not convinced at the time that this was a public interest issue of high priority.

8. Amendment No. 22 to the Criminal Code (1988); Amendment 30 to the Criminal Code (1990); Amendment to the Law for Amendment of Civil Procedure (Examination of Witnesses) (1988); see also Z. Hautman, *Rape—The Basis of Consent and the Laws of Evidence*, in *WOMEN'S STATUS IN SOCIETY AND LAW* 187 (Frances Raday et al., eds., 1995) (in Hebrew).

9. Amendment No. 2 to the Spousal Property Relations Law (1990); see also Y. Mendleson, *Spousal Property Relations*, in *WOMEN'S STATUS IN SOCIETY AND LAW* 437 (Frances Raday et al., eds., 1995) (in Hebrew).

10. The Law of the Prevention of Violence in the Family (1991); see also R.

action in appointments to the directorates of government companies,<sup>11</sup> and reform of discriminatory provisions with respect to married women in the Income Tax Ordinance.<sup>12</sup> These legislative initiatives drafted by feminist lawyers received widespread support on the floor of the Knesset, although some of their more radical details were lost in the legislative process.

Against this background of feminist legal activism, the number of cases on discrimination taken to the courts has increased appreciably. There have been many applications to the labour courts, most ending in compromise settlements, and a number of petitions to the Supreme Court sitting as the High Court of Justice. The most recent case, still pending, is the application of Ellis Miller to the High Court of Justice to be admitted to the pilots' course of the Israeli Air force, which is closed to women. She is represented by staff lawyers of the Israel Civil Rights Association and the Israel Women's Network.

However, the increase in litigation is probably less than it might have been had not the burden of promoting feminist litigation fallen entirely on voluntary women's and civil rights organizations, feminist litigators, and individual plaintiffs. Attempts to acquire funding for an Equal Employment Opportunities Commission have failed until now. In the process of legislating the Equal Employment Opportunities Law, it became clear that the Knesset's enthusiasm for promoting equal rights for women stopped short of providing budgets. The costs of litigation are formidable and, because they fall on private individuals and voluntary organizations, they create a chilling effect on feminist litigation.

An example of the kind of effort that may be required is the anti-discrimination war against El Al Israel. El Al Israel, which had been forced by the National Labour Court in 1973 to open up the job of chief steward to air stewardesses, had nevertheless continued to prevent ground stewardesses from entering the station managers' course. El Al Israel argued that women could not function as El Al Israel station managers abroad. From 1988 to 1995, working with Advocate Jonathan Misheiker's office, we

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Makias, *The Law for the Prevention of Violence in the Family, 1991*, in *WOMEN'S STATUS IN SOCIETY AND LAW 307* (Frances Raday et al., eds., 1995).

11. Amendment to the Government Companies Law (1993). The proposal was originally the brainchild of sociologist Dr. Josepha Steiner.

12. Amendment No. 89 to the Income Tax Ordinance (1992).



spent seven years in the Regional Labour Court in Tel Aviv pursuing a remedy. Finally, the course was opened to women, three job offers as station manager were made to our plaintiffs, and a 900,000 shekel payment in compensation for noneconomic loss, which is a sizeable sum in the Israeli legal world, was made to the plaintiffs. Although considered a resounding success in the context of the Israeli legal system, this settlement was far from ideal in terms of rectifying the impact of years of discrimination on the plaintiffs. Its achievement took long years of legal work and considerable wear and tear on the plaintiffs, who were challenging a large, powerful organization that was prepared, for the duration of those seven years, to bear the legal and publicity costs of continuing its discriminatory practices against women.

### III. ATTITUDES TOWARD FEMINISM AMONG WOMEN IN THE PROFESSION AT LARGE

In an afterward on feminist legal activism, I would venture that among the thousands of women judges, academics, and lawyers, only a small minority would consider themselves feminist. The reaction of women in the legal profession to the development of feminist legal activism has, with some notable exceptions, been less than enthusiastic. The legal system has lagged behind the feminist revolution in important areas. The move to guarantee equal opportunity in economic activities was delayed in comparison with such movements in North America, Scandinavia, and to some extent, Europe. Furthermore, the delegation of personal law to religious courts is an ongoing cause of the infringement of women's human rights. Yet, the women of the profession have not mobilized to press for reform. Women lawyers are not well represented in leadership roles in the Lawyers' Association. Women lawyers and judges have, with few exceptions, shown a distinct lack of enthusiasm for any form of workshop, mobilization, or representation based on feminist association or interest. The number of feminist litigators can be counted on one hand. Only a small minority of women law professors would regard themselves as feminists.

Anecdotally, negative attitudes or indifference to feminist causes can be illustrated by comments made by women in the profession. After a 1990 international conference on women in the judiciary at the Law Faculty of the Hebrew University and organized by the New York University Law Faculty, one woman judge said to me: "The complaints of women judges in the United

States regarding attitudes to women in the profession are not relevant to us here because there is such a positive attitude to women in the Israeli legal world.” When a conference was organized at the Law Society by the Lafer Center for Women’s Studies of the Hebrew University in 1993, entitled “Feminist Legislation—Progress or Stagnation?,” about two-hundred women from academia and the professions participated, but only a handful of them were lawyers. It was reported in the media in November 1995 that Advocate Judith Karp, who is Assistant State Attorney, complained to the President of the Supreme Court about the remarkably low attendance at a seminar for judges on violence against women. The seminar was organized by Judge Ziona Rot-Levy of the Tel Aviv District Court, in the framework of a regular series of seminars for judges on legal developments. The attendance of magistrate court judges was low and not a single Supreme Court or district court judge participated. There is opposition among many women members of the profession to any form of affirmative action for women. In a public debate on the need to ensure representation of minorities on the bench in the Supreme Court, our first woman Supreme Court justice, Justice Ben Porat, explained that, while it is necessary to reserve places for a religious justice and a justice of Sephardi origins, women could achieve advancement to the Supreme Court on their merits and without any protective intervention. Affirmative action for women, held constitutional by the Supreme Court in 1995, produces antagonistic responses from many women lawyers and academics.

How can we explain the reticence of the majority of women in law in Israel to associate themselves with the struggle for equality? Having worked in law for at least one year on each of four continents—in England, East Africa, the United States, and Israel—I have a comparative perspective, which I hesitantly share. In Israel, the integration of women into the legal profession works both at the formal and the informal levels. There is a feeling of belonging and collegiality with men and women in the profession. This feeling of belonging may blur sensitivity to actual inequalities. Furthermore, the prominent success of the not inconsiderable number of women who have reached the top in the judiciary, public service, universities, and legal practice has a cooling effect on awareness of discrimination. The women who have succeeded have no personal axe to grind. In contrast, other women may feel that they could have achieved

more and that they have been disadvantaged as a result of being women. For such women, the example of successful women role models undermines their attempt to explain their frustration in terms of discrimination within the profession, even though discrimination almost certainly exists.

Of the systems that I have observed from within, the Israeli system provides the most synthesized balance between career advancement and a traditional family life for those lawyers who wish to have both. This is probably because public services provide a wide range of opportunities for lawyers, from fairly low profile jobs to competitive career posts, and perhaps because there is in Israel an emphasis on family life and extra-occupational responsibilities that extends beyond the issue of parenthood (for example, recognition of rights to absence for sometimes months of military reserve service or for seven days of mourning). Since the great majority of women lawyers regard their own role as home keepers as central in traditional family life, this range of opportunities has acted as an escape valve through which they can juggle career and family life. Indeed, many women in law in Israel "succeed" in combining their career with a traditional family life: 82% of senior women employees in the public service have children (as compared with 100% of men) and almost all the women on the law faculties have children. According to research, even among women who have reached senior posts in the State Service, legal and nonlegal, the division of household and family obligations with their male spouses remains traditional.<sup>13</sup> Thus, many women regard failure to reach their full professional potential as the price they have willingly paid to combine their career with their family life.<sup>14</sup> In a profession in which the elite work twelve-hour days on a regular basis, the improvement of such women's opportunity to more fully fulfill their potential depends on a fundamental change of attitude either toward family life and relationships or toward the professional environment. In the absence of such

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13. See Yael Ishai, *Representative Bureaucracy: Women in the Senior State Service in Israel* (June 1994) (Research Report, Haifa University).

14. *Id.* Professor Yael Ishai found that senior- and middle-level women employees in the State Service in general had traditional attitudes toward family roles and they reported that they had made career sacrifices for their families. See also Dafna Izraeli, *Balanced Lives—Pursuing Professional Careers and Meeting Family Obligations (Mommy at Home and Mommy Track at Work): Israeli Perspectives*, in *WOMEN IN LAW* (Shimeon Shikreet, ed., Kluwer Academic Publishers) (forthcoming).

change, the feasibility of a personal compromise, which meets many if not all of the demands of family and career, probably explains the apathy of Israeli women in law, as a group, toward the feminist agenda.

#### IV. JUDGES AND GENDER

The record of the courts in handling feminist issues reflects both on the impact of feminist litigation and on the attitudes of the judiciary in a legal profession in which women are comparatively highly integrated. In the context of a symposium on women in law, the highlight inevitably falls on a search for distinguishing features of women judges in their decision making.

The quest to discover whether women judges have an identifiable difference in their substantive or procedural approach is an anathema to classical legal thinking. It goes against the legal grain to admit that the judge is not merely an objective and impartial agent of "The Law." This classical view has been criticized by judges and academics. Professor J.A.G. Griffith pointed out that in order for a judge to be completely impartial, he or she would have to be a political, economic, and social eunuch.<sup>15</sup> The admission that judges are not legal or constitutional robots, while certainly an irrefutable observation of fact, is not necessarily an assertion of an uncontestable good.<sup>16</sup> Indeed, feminist legal thinkers regard the fact that male judges function from a male world view as one of the sources of injustice for women in the legal system. Since, however, judges are incorrigibly human and since we live in a world of people, half of whom are female, we must examine whether a female world view is expressed through the mediation of female judges and, if it is, insist on its inclusion in the determination of the social norms that regulate both male and female lives.

Madame Justice Bertha Wilson of the Canadian Supreme Court expresses the issue eloquently:

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15. J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* (1977).

16. John Rawls graphically symbolized the requirement that the arbiters of social justice be objective in his determination that the partners to the social contract should determine policy in the original position, devoid of socio-economic identity. JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

[T]he universalist doctrine of human rights must include a realistic concept of masculine and feminine humanity regarded as a whole, that human kind is dual and must be represented in its dual form if the trap of asexual abstraction in which *human being* is always defined in the masculine is to be avoided. If women lawyers and women judges through their differing perspectives on life can bring a new humanity to bear on the decision making process, perhaps they *will* make a difference. Perhaps they will succeed in infusing the law with an understanding of what it means to be fully human.<sup>17</sup>

Let me preface my examination of the role of women judges in Israel by saying that the Israeli model cannot prove the conclusion that women judges have been the sole standard bearers of a feminist or feminine perspective, or that all women judges are pioneers of equality for women. Women's partnership with men in the legal profession has resulted in an integrated profession in which a female world view has recently gained a legitimate place, as expressed in the judgments of some male and some female judges, primarily in the Supreme Court. Nevertheless, although women judges have not consistently been the standard bearers, I would venture to say that proportionally more female judges than male judges have adopted an egalitarian world view on issues relating directly to differences of treatment for men and women, contextualized in a social framework that some feminist philosophy would identify as a feminist world view.

These observations apply, however, only to the realm of conscious decisionmaking and interaction. There are indications that, at the unconscious level, the court system continues to devalue women's right to equal respect. The extent of this phenomenon and the existence of differences between the attitudes of men and women judges and lawyers remains to be fully researched and analyzed. Furthermore, despite the clear directives of the Supreme Court, there are some courts with a poor record of empathy to women's causes—for example, labour courts—and indeed there are some courts—the religious courts—in which there is virtually no record of empathy. I tender these observations hesitantly and shall leave readers to form their own

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17. Justice Bertha Wilson, *Will Women Judges Really Make a Difference?*, 28 OSGOOD HALL L.J. 508, 521 (1990).

impressions from the data that follows. I have restricted my analysis to judicial pronouncements in the adjudication of issues that have a high and explicitly feminist profile. Related issues, such as sentencing in crimes of violence against women, have not yet been systematically researched in Israel and their analysis lies beyond the scope of this paper.

#### V. FEMINISM AND THE SUPREME COURT

The Supreme Court, which was until now a predominantly male court, did little to promote women's right to equality before the 1980s. In the handful of feminist issues brought before the Court (in its capacity as the High Court of Justice or as the highest appellate jurisdiction), there was minimal analysis of issues of equality and a conservative approach to remedies.<sup>18</sup> This, however, coincides with a period of widespread apathy and inactivism in the community at large regarding feminist issues. Since the 1980s, the Supreme Court has accepted eight out of the nine petitions that *directly* raised issues of women's equality.<sup>19</sup> Of the twenty-four opinions given by the Supreme Court justices in these eight cases, there were only two dissenting opinions. Three of the twenty-two concurring opinions in these cases were given by women justices.

A closer analysis of the Supreme Court's decisionmaking in these cases shows that the Court took a pro-feminist stand on issues that were disputed in the society at large. In all eight cases, the Court gave opinions that, to a greater or lesser extent, asserted the importance of the principle of gender equality.

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18. See Frances Raday, *On Equality, in WOMEN'S STATUS IN SOCIETY AND LAW* 19, 33-35 (Frances Raday et al., eds., 1995) (in Hebrew).

19. The eight cases in which the argument for women's rights were accepted are: *Plonit v. Ploni*, 35(3) P.D. 57 (1981) (Goldberg, J., dissenting); *Cohen v. State of Israel*, 35(3) P.D. 281 (1980); *Bagatz 153/87, Shakdiel v. Minister for Religious Affairs*, 42(2) P.D. 221 (1988); *Poraz v. Tel Aviv Municipal Council*, 42(2) P.D. 309 (1988); *Bagatz 87/104, Nevo v. National Labour Court*, 44(4) P.D. 752 (1990); *Cr. App. 561/92, State of Israel v. Barry*, 48(1) P.D. 302 (1993) (commonly referred to as the *Shomrat* decision); *Bagatz 1000/92, Bavli v. High Rabbinical Court*, 42(2) P.D. 221 (1992); *Bagatz 453,454/94, Israel Women's Network v. State of Israel* (not yet published) (1994) (Kadmi, J., dissenting). The case in which the argument for women's rights was rejected is *Bagatz, Hoffman v. Rav HaKotel*, 48(2) P.D. 265 (1994) (commonly referred to as the case of the *Women of the Wall*). In this case, two of the justices upheld the petitioners' claim in principle, but refused to intervene in the discretion of the executive, preferring to recommend that the government take measures to enforce the women's rights.

In four of the cases—*Plonit*, *Cohen*, *Shakdiel*, and *Poraz*—although egalitarian justice was meted out to the applicants, the outcomes were not based on a fully articulated egalitarian philosophy.<sup>20</sup> These cases were the earlier petitions, which may explain their less determinative language. In two of these four cases, women justices gave concurring opinions and went a step further in analyzing women's situations than did their co-justices.

In the case of *Plonit*,<sup>21</sup> the Court, by a two-to-three majority, rejected the claim of the father of a fetus that he had a right to be heard before a statutory abortion committee prior to that committee's decision whether to permit the abortion requested by his wife. The President of the Court, Justice Shamgar, based his opinion on interpretation of the statute, guarding the abortion committee's ability to function properly in accordance with the Penal Law. In her concurring opinion, Justice Ben-Ito took a similar position, but she added a wider policy analysis that dealt with the socio-economic implications of the Law's abortion provisions. She said:

Thus [under the Law], no right is given to the father, on the strength of his fatherhood, to demand the birth of the child. And should it be said that the husband has such a right on the strength of marriage—my answer is double: I agree with Justice Carmi that the marriage contract does not subjugate the woman's body to her husband whether in order to bear his children or for any other purpose. Even if the bearing of children is regarded as one of the aims of marriage, it is not a purpose which can be achieved by force . . . . [T]he purpose of the Law which allows abortions in some circumstances was one sole purpose: to allow women to come out of hiding and

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20. The decisions in *Bagatz* 153/87, *Shakdiel v. Minister for Religious Affairs*, 42(2) P.D. 324 (1987) and *Poraz v. Tel Aviv Municipal Council*, 42(2) P.D. 309 (1988), were, in the opinion of this author, among those decisions that were *less* assertive of the importance of the principle of gender equality. In *Shakdiel*, the Court upheld the right of women to serve as members of religious regional councils and, in *Poraz*, their right to sit on electoral boards for municipal rabbis. In those cases, the Court granted the remedy that the petitioners had applied for, but the principle of equality for women, although recognized as a fundamental right, was relegated to a somewhat weak position. Justice Barak regarded the right to equality as a right that was to be horizontally weighed against other legal rights and interests, such as the interest in efficient implementation of legislative objectives, and not as a right that was to be given priority.

21. *Plonit v. Ploni*, 35(3) P.D. 57 (1981).

carry out the abortion in proper sanitary conditions, in a recognized medical facility, in a supervised environment and with the possibility of receiving medical and psychological counseling where needed. Its purpose was to prevent blatant discrimination between rich women and poor women and to make sure that the latter would not be forced to endanger their health.<sup>22</sup>

In the case of *Cohen*,<sup>23</sup> in 1980, the Court unanimously held that imposition of sexual intercourse by a man on his wife without her consent was rape within the meaning of the Criminal Code, even if this interpretation was not consistent with the English common law from which the Code had been derived. The justices based their decision on the Jewish law, under which rape within marriage is prohibited, and expressly indicated that a similar ruling would not be applicable to Moslems if Moslem law was different on this issue. However, Justice Ben Porat, the only woman justice sitting on the case, reserved her opinion on this point, saying that the interpretation of the Criminal Code in Israel might be different from the "outdated" interpretation of "unlawful" intercourse in England, in which case the decision of the Court would apply equally to members of different religions.

In the other four of those eight cases—*Nevo*, *Bavli*, *Shomrat*, and *The Israel Women's Network*—principles meeting feminist criteria were expressly incorporated. In each of those cases, the leading opinions were written by male justices and only one of the total sixteen opinions was written by a woman justice.

In *Nevo*,<sup>24</sup> the Court, overturning the National Labour Court, held that women have the right to continue working until the retirement age of men if that age was different from the retirement age fixed for women in pension agreements. *Nevo* was the first Supreme Court decision to expressly recognize discrimination against women as a negative social phenomenon that must be dealt with by the courts. Justice Bach wrote the leading opinion. He introduced to Israeli judicial language the concepts of "attitudes based on over-inclusive stereotypes" and "prejudices" against women. He wrote that discrimination is "a

22. *Id.* at 84-85.

23. *Cohen v. State of Israel*, 35(3) P.D. 281 (1980).

24. *Nevo v. National Labour Court*, 44(4) P.D. 752 (1990); see also Raday, *supra* note 7, at 107-08.



plague which creates feelings of disadvantage and frustration and which undermines its victims' feeling of belonging to a society and their motivation to contribute to it." He showed how forced early retirement prejudiced women in their career promotion and damaged their professional and economic well-being. Finally, he enjoined the courts to examine all cases of differential treatment of women with a high level of scrutiny because there is often insufficient awareness of the discrimination.

Justice Netanyahu's concurring opinion in *Nevo* is highly illuminating. She wrote the briefest of brief opinions, the whole of which I quote below:

It is saddening in my view, that in the Israel of our times, it was not clear and obvious that imposition of retirement on a woman at an earlier age than a man is discrimination.

Since the generation of the founders and the pioneers, women have taken, and take until now, an equal share with men in production in all areas of life and are not less capable in doing so than men, in spite of the extra burdens which they bear as wives and mothers.

The discrimination is expressed, in my view, not only in the financial loss caused by the earlier retirement but also, and in my opinion mainly, in the fact that a woman is prevented, just at the age when she is freer for it, from reaching and completing achievements and from flourishing in the fulfilment of her potential and her various capabilities.<sup>25</sup>

Justice Netanyahu's conviction of the need to guarantee equality for women is crystal clear. So is her dismay at her discovery that the commonly accepted assumption—that women are treated as equal in Israel—is ill founded. She reiterates in a nutshell the essence of Justice Bach's holding on the discriminatory nature of early retirement. However, her choice to write only a brief supporting opinion in the first Supreme Court judgment to give women a right to a remedy against economic discrimination in private relations symbolizes the reticence of most women in our integrated legal profession to be the standard bearers of female justice.

In *Shomrat*,<sup>26</sup> the Court accepted a prosecution appeal of an

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25. *Nevo*, 44(4) P.D. at 770.

26. Cr. App. 561/92, *State of Israel v. Barry*, 48(1) P.D. 302 (1993); see also

acquittal in a case of adolescent group rape. Justice Shamgar and Justice Cheshin analyzed the element of nonconsent in rape from a perspective of the right to human dignity and women's fundamental right to equality. The Court acknowledged and accepted feminist research findings regarding rape trauma syndrome and the propensity of women not to report rape immediately after the attack. The Court was greatly skeptical of the probability of any fourteen-year-old girl consenting to the sexual acts carried out by a group of boys. Justice Cheshin added, "[a] man who initiates intimate contact with a woman bears the burden of requesting her consent and the burden of acquiring her consent is placed on him."

In *Bavli*,<sup>27</sup> the Court held that women are entitled to receive a half share of the matrimonial property upon divorce, even if the divorce proceedings and the division of property questions are under the jurisdiction of a religious court, where the applicable religious law does not include a presumption that matrimonial property is shared. Applying the principle of women's right to equality, Justice Barak examined the different doctrines of matrimonial property—the presumption of common rights in matrimonial property practiced in the civil courts and the doctrine of separation of property practiced by the rabbinical courts under Jewish Law. He reached the conclusion that the doctrine of separation of property was discriminatory against women. He held that, even though it is applied in a neutral way to property of the husband and the wife, the doctrine of separation of property has an adverse impact on women in view of the socio-economic realities of the relations between married men and women.

In 1994, the Israel Women's Network applied to the High Court of Justice to enforce the affirmative action provisions of the Government Companies' Law, passed in 1993, and to obtain an order cancelling appointments of three men to government company directorates on the grounds that the Ministries concerned had not sought women for the positions. Granting the application, the Court confirmed the constitutionality of affirmative action for women.<sup>28</sup> Justice Maza held that

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Raday, *supra* note 7, at 58-59; Hautman, *supra* note 8, at 233-34.

27. *Bavli*, 48(2) P.D. 221; *see also* Mendleson, *supra* note 9, at 456.

28. Bagatz 453,454/94, Israel Women's Network v. State of Israel (1994) (not yet published); *see also* Frances Raday, *Affirmative Action*, 3(1) MISPAT UMIMSHAL 145

affirmative action is “a criterion for equality which is one of the essential derivatives of and one of the chief guarantees for the fulfilment of the principle of equality itself.” He explained:

[P]rovision of equal opportunity has a chance of achieving an egalitarian result only where the populations competing do so from a starting position which is more or less equal . . . . A significant gap in the equality of ability, whether its source is in discriminatory laws which were in force in the past and have now been discontinued, or in whether it has been created by invalid attitudes which have become rooted in society, increases the chances of the strong groups and detracts from the chances of the weak groups . . . . The correction of past injustices and the achievement of real equality is possible only by giving a preference to the weak group.

The social impact of the case has been considerable: only 2% of company directors had been women before the law was passed. The Ben Dror Committee of the Finance Ministry now reports that, since the passage of the law, it has confirmed appointments for 498 men and 148 women and rejected 67 men and 21 women.

Justice Dorner was appointed to the Supreme Court in 1993. Although she has not yet heard any of the cases in which the issue of discrimination against women has been raised directly, she has written a number of opinions that clearly reveal what many feminist legal thinkers would regard as a feminist perspective.

In the *Danilovitz* case, which concerned the right of homosexual couples to employment benefits enjoyed by married and common law couples, she argued, in a concurring majority opinion, for a strong judicial principle of equality to be applied in private and public relations in addition to equality rights guaranteed by statute. She was also the only member of the Court to analyze in depth the changing norms regarding the right of homosexuals to equal treatment in the general social context.

In *Vaxelbaum*,<sup>29</sup> the Court accepted the petition of a fallen soldier's family to order the Ministry of Defense to allow them to make variations from the standard epitaph in the army burial

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(1995).

29. Bagatz 5688/93, Dangatz 3299/93, *Vaxelbaum v. Minister of Defense* (not yet published) (1995).

ground by adding the names of the soldier's brothers to the tombstone. Justice Dorner wrote a contextual and emotional concurring opinion, taking the unusual measure of prefacing her opinion with a quotation from a radio interview. She quoted Judith Hendel, an Israeli woman author, as follows:

People bring things from home, they bring jars, they bring dishes, I even saw them bringing all kinds of household utensils there or they bring some musical instrument . . . to give something intimate with an absolutely personal aura to the tomb . . . . They come there as if coming home. She comes to her son, she goes there to her son and she sings him a lullaby. Because time froze. Time stood still. She sings him a lullaby and for her he is alive . . . . A father called me . . . and he told me that he will not go to the memorial ceremony on memorial day. I ask him why and so he told me: "Because I cannot bear it when they say 'our sons.' It is not our sons. It is my son."

In the case of *Buchbut*,<sup>30</sup> Justice Dorner wrote a concurring majority opinion, reducing from seven to three years the prison sentence imposed by a lower court upon a battered woman who had killed her husband. In her opinion, she concurred with Justice Bach, and both opinions are based on an expression of understanding of the severity of the violence to which the accused had been exposed. Justice Bach said that in assessing the punishment, the Court "cannot ignore the special severity and the massive amount of deeds of brutality carried out by the deceased against his wife, the appellant. There was here, it seems, an intensive continuum of blows, including injury to the appellant with different instruments, and of terror, intimidation, and acts of humiliation, worse than which it is hard to imagine." Justice Dorner, however, expanded the Court's comprehension of the social context of the killing. She opened her opinion with a description of that social context and the way it affected the life of the accused woman before the Court:

Carmela Buchbut was a battered woman. For twenty-four years her husband treated her brutally. In the village where she lived, this was an open secret. Her husband's parents, his brother, his sisters, and the community all knew of it and all kept silent. She wandered around as a shadow, carrying on

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30. Cr. App. 6353/94, *Buchbut v. State of Israel* (Aug. 14, 1995) (not yet published).

her face and body signs of her injuries and she does not smile. Her sons grew up in the atmosphere of the beating of their mother, and even when they were grown up did not intervene. In November 1993, she was hospitalized after her husband had beaten her on the head with a clog. Serious injuries were detected and, accordingly, it was clear that she had been beaten. She explained to the hospital staff that she had beaten herself and, amazingly, her explanation was accepted.<sup>31</sup>

Justice Dorner referred to some of the research findings on the situation of battered women, which reinforce the theme of her judgment: "[T]he battered wife, frustrated and unprotected by an ineffective legal network, often sees no choice but to kill or be killed." The powerful message of the Dorner opinion leaves no illusions as to the reality of the suffering of the accused as victim and the totality of the social isolation and helplessness that her status as battered wife imposed upon her. The message is so powerful that the natural conclusion should be that in cases like Carmela Buchbut's, as in cases of self-defense, the accused should not be regarded as criminally responsible. However, this is a conclusion that has not yet been reached by the Israeli courts.

Earlier this year, on the occasion of the publication of *Women's Status in Society and Law*,<sup>32</sup> the first book on this topic in Israel, Justice Dorner gave a public lecture in which she advocated adopting affirmative action as an integral part of the principle of equality. She spoke movingly of the disadvantage of women in society and the need to assist women in their path to advancement. I am not sure that this "different voice" is substantively different from that of some of the male justices I referred to above, expressing themselves on issues of equality for women. However, it is the first woman's voice that has allowed itself to express freely in the Supreme Court, with regard to women's situation, that sensitivity to the fate of the weak which is often said to be feminine.

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31. Bagatz 5688/93, Dangatz 3299/93, Vaxelbaum v. Minister of Defense (1995) (not yet published) at 8.

32. *WOMEN'S STATUS IN SOCIETY AND LAW* (Frances Raday et al. eds., 1995) (in Hebrew).

## VI. A CHECKERED PATTERN IN THE LABOUR COURTS

The record of the labour courts has had its moments of glory on the path to creating equal opportunity for women. The Regional Labour Court in Tel Aviv gave the first judgment in Israel to examine, in a way that was not perfunctory, the issue of discrimination against women.<sup>33</sup> It was a woman judge, Judge Harduf, who wrote this opinion. She used, in a way that was innovative in Israel, the doctrine of public policy as a vehicle for creating employment discrimination law in the absence of a statutory prohibition of employment discrimination. She accepted the plaintiff air stewardesses' suit to invalidate a collective agreement that barred their promotion to the top job of chief steward. She unequivocally rejected arguments brought by El Al Israel, the defendant employer, that women air stewardesses were entitled to equal but separate career tracks since they received free cosmetics in exchange for not being eligible for promotion to chief steward, and that the job was not suitable for women because the aura of authority of a male chief steward reassured passengers. Her judgment was upheld by the National Labour Court, and Judge Bar-Niv, with a bench of seven judges, added a strong admonition that discrimination against women was contrary to the I.L.O. Employment Discrimination Convention and prejudiced the worker's right to human dignity.<sup>34</sup>

However, the radical pursuit of equality for women was not to be a constant feature of labour court judgments. Out of eight reported judgments between 1985 and 1995, only in two did the labour courts award the discrimination plaintiffs the remedy they sought.<sup>35</sup> In another two cases, the courts accepted the claim, but did not award the major remedy requested,<sup>36</sup> and in four cases, the courts rejected the claim.<sup>37</sup> Although empowered by statute to give an enforcement remedy, in only one case<sup>38</sup> did

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33. *Chazin v. El Al Israel Airlines et al.*, Regional Labour Court, Tel Aviv (1972) (unpublished).

34. *Workers Committee of El Al Israel Airlines v. Chazin*, 4 P.D.A. 365 (1973).

35. *State of Israel v. Gestetner*, 24 P.D.A. 65 (1992); *Blitz v. Hebrew Univ.*, 26 P.D.A. 528 (1994).

36. *Chen v. Ta'as*, 26 P.D.A. 4 (1993); *Dover v. Zahal* (1993) (not yet published).

37. *Nevo v. The Jewish Agency*, 18 P.D.A. 197 (1986); *Plonsker v. Shatiach Adom*, 21 P.D.A. 46 (1989); *Aboutbul v. Habonim*, 23 P.D.A. 61 (1991); *Licht v. Warman*, 22 P.D.A. 201 (1990).

38. *Blitz*, 26 P.D.A. 528.

the courts do so. Requests for interim injunctions have been consistently rejected. Of course, the rejection of claims cannot, on a numerical basis alone, be regarded as proof of the labour courts' lack of enthusiasm for fighting employment discrimination against women. However, a closer look at the decisions supports a view that the labour court judges, male and female, are not sufficiently using the power bestowed on them by statute, by judicial precedent, and by constitutional principle to help women combat the discrimination against them. Women judges have participated both in the decisions that reject women's discrimination claims and in those that accept them.

First, let us take a look at the four cases in which the labour courts rejected discrimination claims. The most discouraging case by the labour courts was *Nevo* in 1984,<sup>39</sup> the case in which the labour courts' judgments were subsequently reversed by legislation and overturned by the High Court of Justice in the decision discussed above. Representing Dr. Nevo on the issue of discrimination in retirement, I initially brought the action before Judge Gavrieli, a woman judge in the Regional Labour Court. She held that early retirement of women had originated as a privilege for women and that, although it had become disadvantageous for some women to be forcibly retired early, "the labour courts were not the place for social revolutions," and it was up to the collective labour relations parties to bring about change. On appeal to the National Labour Court, there were seven judges—three professional judges and four lay judges, one of whom was a woman—and the Court rejected our appeal by a majority of five to two. In a divided opinion of the National Labour Court, the names of the majority and the dissenting judges is not given, but it is commonly believed that the lay woman judge was one of the dissenting judges. In their majority opinion, written by Judge Goldberg, the five judges held that early retirement was a privilege, in spite of proof of economic and professional loss referred to in the minority opinion, and that when the legislature had wished to make discrimination against women illegal, it had done so expressly, as for instance in the Equal Pay Law. Conversely, when the legislature was silent, it indicated that "the time is not yet ripe." It was this decision that

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39. *Nevo*, 18 P.D.A. 197.

paved the way to the corrective legislation and the reversal in the High Court of Justice.

In the other decisions in which the claims of women discrimination plaintiffs were rejected, no women judges were involved. In *Plonsker*,<sup>40</sup> the Tel Aviv Regional Labour Court held that it was not prima facie discrimination for an employer not to accept a woman for the job of assistant manager on the grounds that, in his subjective opinion, she was not sufficiently attractive for the job. In *Licht*,<sup>41</sup> the contested application of twenty-eight male ground crew members to join their employer, El Al Israel, as defendants in order to contest the ground stewardesses' action to open the station managers' course to women was accepted by the National Labour Court. In *Aboutbul*,<sup>42</sup> a woman's action to obtain equal pay was rejected on the grounds that her lower level of pay was justified on the facts.

In one of the two cases in which the labour courts gave the remedy sought, a woman judge rejected the application for a remedy at the Regional Court level and was overturned by the National Labour Court.<sup>43</sup> The *Gestetner* case concerned the advertising of a job for a sales representative for men only. The Regional Labour Court judge, Judge Porat, had accepted the employer's argument that the requirement that the sales representative must lift heavy loads justified restricting advertisement to male employees. The National Labour Court, with Judge Goldberg writing the opinion, held that the courts must not apply stereotyped views regarding men's and women's capabilities, that the lifting of heavy weights had not been proved to be a central part of the job, and that there was no bona fide occupational qualification justification for restricting advertising of the vacancy to men. In the other of the two successful cases, the *Blitz* case, Judge Barak of the Regional Labour Court (not to be confused with Justice Barak of the Supreme Court) held that the Hebrew University had discriminated against the plaintiff by employing her on a temporary basis at the age of fifty, while the policy with regard to men was to employ them on a temporary basis only after the age of fifty-five. Judge Barak, a woman judge, granted the only enforcement remedy given by the labour

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40. *Plonsker*, 21 P.D.A. 46.

41. *Licht*, 22 P.D.A. 201.

42. *Aboutbul v. Habonim*, 23 P.D.A. 61 (1991).

43. *State of Israel v. Gestetner*, 24 P.D.A. 65 (1992).



courts in discrimination cases. Her judgment was upheld by Judge Eliasoph in the National Labour Court.<sup>44</sup>

#### VII. INTERACTIONS BETWEEN MEN AND WOMEN IN THE COURTROOM

In research underway at the time of this writing,<sup>45</sup> interim findings indicate that there is no blatantly sexist interaction between men and women judges and lawyers. The researchers have not witnessed the use of stereotypical patronizing or disparaging language toward women. There are, however, some more subtle forms of interaction that create an atmosphere of deference to men and not to women. Terms of address are particularly problematic. The researchers have observed that while male judges are frequently addressed as "His Honour" (Cavodo), a term that is exclusively used to address judges, the female form of this term of address is almost never used for women judges. Women judges are usually addressed as "Madam" (Geverti). While this has a parallel for male judges—"Sir" (Adoni)—its use is less deferential because it is not a term used exclusively to address the judge, but is also used by the judge in addressing counsel. Use of "The Honoured Judge" in its feminine and masculine form (Cavod HaShofet/et) does not differentiate in deference to men and women judges, but as a residual term of address, it cannot correct the imbalance that results from the use of other forms of address.

The researchers have also observed that terms of address for women counsel in the courtroom are problematic because judges often fail to address women by name as they would male counsel. Thus, while the men will be addressed as "Advocate Levy" or "Mr. Levy," the women will be addressed as simply "Madam." My own personal experience in the courtroom has been somewhat different. I have found that, while male counsel are addressed as "Advocate Levy," they would address me as "Ms. Raday" (Geveret Raday). In one discrimination suit, I used this to illustrate the process of stereotyping to the three male judges and suggested that, because I showed courtesy in addressing defense counsel as "Advocate," the Court might instruct defense counsel to choose whether to address me as "Professor," "Barrister-at-Law," or

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44. *Blitz v. Hebrew Univ.*, 26 P.D.A. 528 (1994).

45. R. Bogush and R. Don-Yehiya are researching into the position of women in the administration of justice in the Israeli court system. They have completed analysis of 140 out of the 450 court proceedings in their research sample.

“Advocate,” but to desist from addressing me as “Ms.” My request evoked defensive remarks from counsel that “Ms.” is not a less respectful form of address than “Advocate,” but the judges called counsel to order and acceded to my request.

In informal discussion with some of the few judges and lawyers who have a feminist background, they said that they have witnessed blatantly gender-biased remarks in the courtroom to women judges and lawyers. If the final results of the research show otherwise, the facts will be a subject of controversy.

Even if, at the conscious level, there may be an atmosphere of mutual respect between men and women judges and lawyers, this does not mean that the problem of sexual bias has been solved in the Israeli court system. There is evidence that, on a less conscious level, judges and lawyers treat litigants in accordance with sex stereotypes. In one study, Tamar Plesner showed how a complainant in a rape trial was treated in terminology and attitudes, which typed her as the accused rather than the victim.<sup>46</sup> Furthermore, there are constant allegations by women’s organizations that sentencing is too light for sexual offenses against women. The interim findings of the research on women in the administration of justice seem to support this accusation.

#### VIII. ATTITUDES TOWARD STATE AND RELIGION AND THE IMPACT ON WOMEN IN THE PROFESSION

The central areas of disregard of women’s right to equality are the areas of state and religion. The political compromise reached on this issue, stemming from the time of the British Mandate, is the delegation of matters of personal status to the jurisdiction of the of the courts of the various religious communities (Jewish, Moslem, and Christian). These courts are blatantly patriarchal institutions, and the relegation to them of questions of personal status causes an ongoing violation of women’s right to equality in personal status law. The result of this political compromise for women in the legal profession has been the exclusion of women from the bench for divorce jurisdiction for all communities, because the religious courts are exclusively male and the

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46. T. Plesner, *Rhetoric in the Service of Justice: The Sociolinguistic Construction of Stereotypes in an Israeli Rape Trial* 4 TEXT 173 (1984).

marginalization of women at the family law bar because of the increased difficulties for women advocates in those courts.

The responsibility for the subjugation of women's equality to the deference to religious autonomy belongs to the political parties and their coalition agreements. For many years, the Supreme Court has maintained a low profile on this issue and has not intervened decisively to vindicate women's right to equality when petitions on issues of state and religion have been brought before it.<sup>47</sup> The dilemma and ambivalence of the Supreme Court is clear. On one hand, in the *Bavli* decision, discussed above, the Supreme Court took a strong stand on women's right to equality in the division of matrimonial property in the rabbinical courts. On the other hand, on public issues of state and religion, the Court has refrained from imposing its views on the state authorities.

The case of the *Women of the Wall* illustrates literally the silencing of women in all areas of life and law touched by the *modus vivendi* on state and religion. A group of orthodox Jewish women wished to pray by the Kotel—the site at the Wall of the Second Temple, which is considered by Jews to be the historical and spiritual center for Jewish culture and religion—in prayer groups, wearing a tallit and praying out loud from the Tora (the scroll of the Bible). They were refused permission by the Rav HaKotel, who has authority under state law to regulate the use of the site, on the ground that their mode of worship was not acceptable for women in accordance with Jewish custom. Their petition to the High Court of Justice was accepted in principle, but rejected in the result. Two of the three justices upheld the petitioners right of access and their freedom of worship. Neither justice referred to the principle of equality. The third, Justice Elon, himself of a religious persuasion, rejected the petition and said that, although the question of equality between men and women was at issue regarding modes of worship, it could not be examined in the context of a dispute at a site as important as the Kotel. The majority recommended that the government find a solution that would guarantee the women freedom of access while minimizing the injury to the sensitivities of other worshipers at the Kotel.<sup>48</sup> Over a year has passed without any solution being

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47. See Frances Raday, *Religion, Multiculturalism, and Equality*, ISRAEL YEARBOOK ON HUMAN RIGHTS 1 (1995).

48. *Hoffman v. The Commissioner of the Kotel*, 48(2) P.D. 265 (1994).

proffered by the government, and the women, whom I represent as counsel, have returned to petition Bagatz (the Supreme Court).

The women of the legal profession have not taken any organized stand on their exclusion from the vital areas of legal life regulated by the religious courts. The current Secretary of Na'amat, who is herself a lawyer, has taken a public stand on the need for civil marriage in Israel. The responsibility for the subjugation of women's rights to religious values in the sphere of the personal law falls squarely on the Knesset. The socio-political forces that hold this *modus vivendi* in place seem to be invincible. However, even apparent intractable facts can be changed by persistent argument and organization, and in this, women in the profession have a role that, until now, has remained grossly underplayed.

#### IX. REFLECTIONS

There is a powerful message of gender integration in terms of formal and informal success and attitude in the legal profession in Israel. Women are not only present—they also have power. Their prominence in the profession results in no small part from their numbers, their top level appointments, and their high level of proficiency in the State Service and judiciary. They are far less well represented in the high levels of private practice.

Women in the judiciary have not been the flag bearers of equality for women. Support for judicial activism to advance the equality of women has not been consistently found among women judges, and feminist thinking has found expression in the Supreme Court among both men and women justices. Nevertheless, on closer examination of the judicial decisions, it seems that a higher proportion of women judges than of male judges take an ideological stand on these issues and that, though they may not be the standard bearers of feminism, they exhibit on average a higher level of sensitivity and concern on issues of equality for women.

Most women in the legal profession are not inclined to feminist activism. Some may regard the success of women in the profession as a barrier to any claim of inequality. Others may regard a failure to reach their full potential in the profession as the result of a choice to integrate a traditional family life with their careers. Feminist lawyers are those whose agenda extends

beyond the fulfilment of their own personal and professional expectations to the wider context in which women lawyers, like other women, find themselves exposed to the continuing disadvantage and discrimination that is accompanying us into the twenty-first century.

#### POSTSCRIPT

Since this Essay was written and sent to press, two new developments have occurred. I add them as a brief postscript. Both of these new developments serve to support and strongly underline the themes previously identified in this Essay.

The first was the decision of the High Court of Justice in the *Ellis Miller* case in November 1995. The Court held by a majority decision that the Israeli Air Force must allow women volunteers to be tested for the pilots' course. Three of the five justices—the two women justices, Justice Dorner and Justice Strasbourg Cohen, and Justice Maza—held that the refusal to admit Ellis Miller was discriminatory and the fact that the inclusion of women as pilots in the flight squadrons would be very costly for the Air Force was not a sufficient reason for blocking women's opportunity to become pilots. They held that society must underwrite such costs in order to further the cause of equality between the sexes. The high cost to which the three justices referred was the cost that would result from the fact that women would be less active in reserve service, on which the operational capacity of the Air Force is heavily dependent. The Air Force would be unable to rely on the reserve service of women pilots to the same extent as that of men because, under the Defense Service Law, women who become pregnant are automatically exempted from reserve service and, although they could volunteer, they would be entitled to unilaterally terminate a commitment to volunteer for reserve service at any time.

The second development was the appointment of a third woman justice to the Supreme Court, Justice Dorit Beinisch. Now, of the thirteen justices on Israel's Supreme Court, three are women.