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CAN EQUALITY SURVIVE EXCEPTIONS?

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I. THE SIGNIFICANCE OF EXCEPTIONS

The meaning of the exception vis-à-vis the general rule is primarily discussed in the context of emergency powers (following Carl Schmitt and Giorgio Agamben). But the complicated relationship between the norm and its exceptions is also relevant to other legal contexts. This Commentary is dedicated to the following question: What are the implications of considering equality a fundamental legal principle while recognizing exceptions to its application? More concretely, how does the existence of exceptions influence the understanding and viability of equality as the norm?

Evaluating this question with the focus on equality is especially valuable because the right to equality is especially sensitive to the impact of derogations from it. Several rights, like privacy, can be compromised in some areas and still retain their viability in other contexts. In contrast, one cannot treat an individual in a discriminatory manner in one area while retaining his egalitarian status as a full citizen. Furthermore, the right to equality is especially susceptible to different understandings, and these serve as justifications for some of the exceptions.

This Commentary uses Israeli protection of gender equality as an example to study the question presented. Later, it broadens the lessons drawn from this example for the purpose of exploring other contexts.

II. GENDER EQUALITY IN ISRAELI LAW: A NORM SUBJECT TO EXCEPTIONS

In Israel, equality has been recognized as a foundational constitutional principle since the early days of the state. Israel's Declaration of Independence from 1948 includes a promise that the state "will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex." This vision and its express application to gender equality, which were far from being self-evident in the world during that time, have left their mark on significant laws enacted in Israel's formative years. Examples of this include the Defense Service Law, 1949, which ap-

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plied mandatory military service to both men and women, and the Equal Rights to Women Law, 1951.

At the same time, the Israeli legal system has recognized and applied exceptions to this principle since its beginning. Proponents suggest that some of these exceptions reflect allegedly natural differences between men and women, and hence are not exceptions to equality. However, from a liberal perspective—denying stereotypical distinctions based on group affiliations—they are clearly exceptions to the equality principle.

These exceptions have arisen in several instances. First, for many years, following the British tradition of parliamentary sovereignty, Israel did not recognize the possibility of judicial review of legislation that did not conform to the basic principles of the system, including the principle of gender equality. In practice, Israeli legislation includes instances of different allocations of rights for men and women. In the context of mandatory military service for both sexes, the law has different provisions based on gender regarding length of service and exemptions from service. In addition, as a matter of a political compromise, Israel applies the religious law of the individuals involved in marriage and divorce. For practical purposes, this results in the application of religious regimes that do not conform with current understandings of equality (especially regarding control over the decision to divorce, which is disproportionately given to men in the traditions of the main religions of the country).

Second, this double-edged attitude toward equality survived the later development of Israeli constitutional law, which has adopted judicial review of legislation. When Israel accepted its new basic laws on human rights (Basic Law: Freedom of Occupation and Basic Law: Human Dignity and Liberty)—a form of legislation that prepares the chapters of the country's future constitution—there was a political concern regarding the impact of a full constitutional protection of equality (which had the potential to threaten delicate compromises, such as the law of marriage and divorce). Accordingly, Basic Law: Human Dignity and Liberty does not mention equality in an express manner (leaving open only the option to infer it from other constitutional provisions, such as the protection of human dignity, as the Supreme Court has done in later decisions). Additionally, this basic law applies only to new legislation, and hence awards former laws immunity from direct judicial review.

III. THE CONSEQUENCES OF THE EXCEPTIONS FOR GENDER EQUALITY IN ISRAELI LAW AND STRATEGIES FOR COPING WITH THEM

This Commentary addresses how the Israeli legal system has coped with the double message of accepting and denying gender equality at the same time. For this purpose, the Commentary examines the long-term influence of the exceptions to the norm, on one hand, and the strategies used to cope with these effects, on the other hand.

The Creeping Influence of the Exceptions—In practice, exceptions to the rule of gender equality are often treated as justifications for additional dis-

tinctions between men and women, especially in institutional contexts traditionally involved in gender discrimination (*e.g.*, military and religious institutions). For example, although the Defense Service Law does not include limitations on the participation of women in combat duties, the different regulation of the service of men and women was considered a traditional justification for this policy. Even when this policy was attacked in *Miller v. Minister of Defense*, it was not challenged in a sweeping manner. Rather, the challenge insisted on the right of women to volunteer for military positions. More examples come from the regulation of religion and state. The legislation in this area disqualifies women from certain religious positions of official nature (*e.g.*, Chief Rabbis and Municipal Rabbis), but not from other religion-related government positions (*e.g.*, members of religious councils). However, in practice, women were excluded from the latter as well. This discrimination was gradually abolished only after long legal struggles in such cases as *Poraz v. Tel Aviv Municipality* and *Shakdiel v. Minister for Religious Affairs*.

The possibility to engage in the initiative of enacting basic laws on human rights without expressly mentioning equality reflects, once again, the fact that the long standing exceptions left their mark on the attitude toward equality as a foundational principle. At the same time, this drafting choice contributed and enhanced the compromising attitude toward the right to equality.

Strategies to Limit the Impact of the Exceptions—A close study of judicial precedents and legal activism outside the court reveals several strategies that diminish the impact of the exceptions.

- a. Equality as an Interpretive Principle—the Israeli Supreme Court regards equality as a governing interpretive principle. Accordingly, it conforms laws to the ideal of gender equality when the text is susceptible to such interpretation.
- b. Denying the Precedential Value of the Exceptions—Following the same rationale, when the Supreme Court interprets laws, it focuses on the principle, not on the exceptions. Accordingly, in the *Poraz* and *Shakdiel* cases, the Israeli Supreme Court endorsed equality even though the issues involved the regulation of law and religion—an area susceptible to exceptions. The Court applies this judicial method even when the legislative approach is explicitly non-egalitarian. For example, in *Milo v. Minister of Defense*, where the Court decided whether to recognize an argument for the right of women to be exempt from military service for secular conscientiousness reasons (although the law did not grant this right to men), it invoked the principle of gender equality in flatly rejecting the interpretation offered to support this result. The court did that without giving weight to the fact that the law on military service included many other exemptions from service that apply only to women (exemptions given mainly to married women, mothers, and religious women), and hence may serve as a basis to distinguish between men and women conscientiously objecting to service.

- c. Promoting Equality Jurisprudence in Areas Not Infected by Exceptions—The Israeli Supreme Court has drafted its most important equality precedents in areas that are relatively free from ideological controversies regarding equality. These precedents largely come from the area of equal opportunities at work (for example, *Nevo v. National Labor Court*). In these areas, women activists have even succeeded in pushing forward very impressive reforms regarding affirmative action and representation of women in government positions through amendments to various statutes, such as the Government Companies Law and the State Service law, and court decisions, such as *Israel Women's Network v. Government of Israel*.
- d. Promoting Equality Through Other Mediating Values—Since equality is considered a “suspect” value in some contexts, activists have realized that women’s rights can be more effectively promoted when initiatives are not exclusively justified on equality grounds. For example, they promoted harsher policies in the area of domestic violence without directly connecting the struggle to equality. Similarly, Israel’s advanced sexual harassment law (Prevention of Sexual Harassment Law, 1998) is drafted in a manner that emphasizes its connection to the constitutional value of human dignity—a value to which religious people can connect (Section 1 of the law states that “the purpose of this law is to prohibit sexual harassment in order to protect human dignity, liberty and privacy and to promote equality between the sexes.”). It is interesting to point out the difference between the developments in these areas in the United States and in Israel. In the United States, since there was no question about formal support for equality, the route for recognizing the ability to sue for sexual harassment was a broad interpretation of the right to equality as enacted in Title VII. In contrast, Israel’s sexual harassment prohibitions (including criminal sanctions) received express support in legislation and by politicians who would otherwise have been unlikely to unconditionally support equality in other contexts.

IV. THE NORM AND EXCEPTION DUALITY AND GENDER EQUALITY IN THE GLOBAL CONTEXT

The Israeli case study has the potential to shed light on the dilemma of promoting equality in other contexts, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). The Convention, which came into force in 1981, has been signed and ratified by the vast majority of the countries in the world. However, many of these countries ratified the convention subject to reservations that apply to major areas of importance to gender equality, including reservations that give express priority to customs and traditions. This reality calls to mind the same dilemma previously discussed in the context of Israeli law: Can equality survive these exceptions? More concretely, is equality promoted when the

international norm of gender equality has been adopted subject to exceptions? Will the long run be influenced by the norm or by the exceptions? What will be the enduring impact of the exceptions on the norm? Formally, states are not allowed to add reservations that run against the core provisions of the convention. However, the international practice regarding CEDAW tends not to meet this rule.

Additionally, the norm-exceptions dilemma has special relevance to the debate over feminism and multiculturalism. To quickly sketch the argument, since many cultures have discriminatory components, there are different views on how to choose between women's rights and respect for cultural rights of groups. On the two extremes of this debate, one finds those who reject any cultural trait that does not pass the equality test and those who oppose any equality reform that necessitates intervention in cultural traditions—and there are many shades of grey in between. The Israeli experience is very relevant to this debate, especially in countries with high immigration (like Canada), where proposals seek to recognize the operation of community tribunals in the area of family law. From the perspective of this analysis, it is important to engage in this debate with reference to the potential of the exception to reshape the norm.