Israel:
Supreme Court Decision Invalidating the Law on Haredi Military Draft Postponement

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ISRAEL

SUPREME COURT DECISION INVALIDATING THE LAW ON HAREDI MILITARY DRAFT POSTPONEMENT

Executive Summary

This report discusses the background of the deferment of military service that has been enjoyed by an increasing number of individuals in the Haredi (ultra-Orthodox) population since the establishment of the State of Israel. It provides an analysis of the different arrangements and legislative attempts to regulate the issue, culminating with the recent February 2012 decision by Israel's Supreme Court that found the 2002 Tal Law unconstitutional. The report summarizes the Court's arguments and directions for a law that would comply with constitutional law requirements for proportionality.

I. Historical Background

The military draft deferment enjoyed by members of the ultra-Orthodox Haredi community in Israel has been a controversial issue throughout the history of the State of Israel. Adopted by David Ben-Gurion, Israel's first minister of defense, the draft deferment was the subject of numerous debates; a 1988 report by the State Comptroller; Israel Defense Forces (IDF), ministerial, and parliamentary committee hearings; and numerous decisions by Israel's Supreme Court.

The draft deferment has traditionally been extended to yeshiva[1] students who pledge that their sole occupation is the study of the Torah.[2] As such, the deferment constitutes an exception to the compulsory military draft that is generally imposed on all Israeli nationals and permanent residents who have not reached military retirement age.[3]

The number of eligible deferrals issued under this arrangement has dramatically increased over the years from under 400 a year until 1970,[4] to 800 in 1975,[5] 17,017 in 1987,[6]

[1] A yeshiva is a seminary for orthodox Jewish men where they study the primary source of Jewish law, the Talmud.

[2] The study of the Torah is generally assumed to include the study of Jewish law.

[3] Defense Service Law (Consolidated Version), 5746–1986, 40 LAWS OF THE STATE OF ISRAEL [LSI] 112 (1985–1986), *as amended*.

[4] HC 3267/97 Rubinstein v. Minister of Defense, 52(5) PISKE DIN [PD] [DECISIONS OF THE SUPREME COURT] 481, 491 [1998].

[5] *Id.*

[6] *Id*. at 500.

26,262 in 1995,[7] 28,772 in 1997,[8] and 61,000 by 2010.[9] The percentage of those enjoying deferments as compared with the total number of persons who were drafted has similarly increased at a steady pace, from 5.4% in 1987 to 6.4% in 1995, 7.4% in 1996, 8% in 1997,[10] and 14% in 2007.[11]

In his 1998 leading decision in *Rubinstein v. Minister of Defense* on deferment of military service for yeshiva students, Supreme Court President Aharon Barak explained the reason for the deferment and its historical context as follows:

> The original reason for the arrangement was the destruction of the yeshivas in Europe during the Holocaust and the wish to prevent the closing of yeshivas in Israel due to their students being drafted to the army. Today this objective no longer exists. The yeshivas are flourishing in Israel, and there is no serious worry that the draft of yeshiva students, according to any arrangement, would bring about the disappearance of this [yeshiva] institution.[12]

II. Basis of Controversy

The controversy over the deferment has increased as the number of those eligible for it has mushroomed. Whereas a minority of proponents of the deferment has continuously argued that a mandatory draft of yeshiva students would impact their freedom to pursue religious studies, many have argued that the deferment has impacted the right to equality by creating an uneven public sharing of the burden of military service.[13]

These conflicting arguments have been recognized by the Supreme Court as constituting a conflict between two competing constitutional rights that are guaranteed by the Basic Law: Human Dignity and Liberty[14]—the right to freedom of religion and the right to human dignity, including equality.[15]

In addition to the constitutional aspects of the controversy, many have argued that the deferment has also created "a social problem of the first degree."[16] Because the deferment

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[7] *Id.* at 495.

[8] *Id.* at 500.

[9] HC 6298/07 Resler v. Knesset (Feb. 21, 2012), ¶ 2, NEVO LEGAL DATABASE, http://www.nevo.co.il (by subscription; in Hebrew).

[10] Last three figures cited in HC 3267/97 Rubinstein v. Minister of Defense, 52(5) PD 481, 495 [1998].

[11] HC 6298/07 Resler v. Knesset, ¶ 2.

[12] HC 3267/97 Rubinstein v. Minister of Defense, 52(5) PD 481, 491 [1998] (translated by the author).

[13] *Id.* at 527–28.

[14] Basic Law: Human Dignity and Liberty, KNESSET.GOV.IL, http://www.knesset.gov.il/laws/special/eng/basic3_eng.htm (last visited Feb. 14, 2012).

[15] HC 3267/97 Rubinstein v. Minister of Defense, 52(5) PD 481, 527 [1998].

[16] *Id.* at 528 (translated by the author).

requires a pledge by the students that their sole occupation is yeshiva study, they are not allowed to work. Even those who drop out of the yeshivas do not reenter the labor force for fear of being drafted. In the 1998 decision cited above, Barak held that the resulting unemployment among the Haredis had created a community ravaged by poverty and fully dependent on governmental subsidies and private donations.[17]

Fourteen years later, in the 2012 decision in *Resler v. Knesset*, Justice Elyakim Rubinstein described the situation as follows:

> Nevertheless, we need to admit the truth, [that] unlike in the Jewish-Haredi society in other countries, which has understood that only a few brilliant individuals can live under the tent of Torah all their lives, in Israel a whole complicated sociological system has been built that even its leaders know, deep in their hearts, is not good and not appropriate, that because of military duty thousands of people sit in the yeshivas, where it is not their place. . . . These people, if they served in IDF, and if they worked like any other person while also making time for Torah [study] . . . , would be efficient both to the State, to their community, and to themselves.[18]

III. Legislative History

The deferment has traditionally been based on an arrangement the conditions and scope of which have evolved over time as a result of political considerations. As a result of the coalition agreement of 1977, for example, the previously existing cap on the number of yeshiva students eligible for deferment was removed and the conditions for eligibility have similarly been widely expanded.[19]

In August 2002 the Knesset (Israel's Parliament) for the first time passed a law to regulate draft deferment. The Deferment of Military Draft for Yeshiva Students Whose Occupation Is the Study of Torah Law 5762-2002 (Tal Law)[20] provided a statutory authorization to the Minister of Defense to approve yeshiva students' draft deferments. The Tal Law is named after Justice Tal, who chaired a governmental committee (the Tal Committee) upon the recommendations of which the law was adopted.

The Tal Committee was appointed following the 1998 decision of the Supreme Court in the matter of *Rubinstein v. Minister of Defense*, cited above, in which the Court determined that the practice of deferring the draft of yeshiva students that was in existence at that time lacked specific legal authorization.[21]

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[17] *Id.*

[18] HC 6298/07 Resler v. Knesset, ¶ 24 of the decision by Justice Rubinstein (translated by the author).

[19] *Id.*

[20] The Deferment of Military Draft for Yeshiva Students Whose Occupation Is the Study of Torah Law, 5762-2002, SH No. 5762 p. 521.

[21] HC 3267/97 Rubinstein v. Minister of Defense, 52(5) PD 481, 528 [1998].

IV. The Tal Law

The Tal Law,[22] as amended, authorizes the Minister of Defense (the Minister) to defer the military service of any Israeli national or permanent resident upon his request if

- he studies in a yeshiva on a regular basis at least forty-five hours a week (except for holidays as determined by the Minister);
- he does not engage in any other additional occupation or (if he is over twenty-three years of age and has enjoyed deferment for more than four years) during the time he spends in the yeshiva;
- he has declared that he has met the above conditions; and
- the head of the yeshiva in which he studies has affirmed that the applicant has met the first condition above and has pledged to inform IDF of any change in this situation within thirty days.[23]

The Tal Law also provides that persons who were granted deferment for at least four years and who were twenty-two or older and no longer fulfilled the above conditions for deferment could further be authorized by the Minister to defer their summons for an additional year (a year of determination).[24] The Tal Law authorizes a further deferment for yeshiva students who choose to perform "a civil service," which is defined as "service for purposes of health, welfare, immigration absorption, environment, and internal security and rescue."[25] According to the Tal Law, civil service of at least one year exempts the applicant from full military service (of three years); civil service of at least twenty-one days in a year exempts the applicant from reserve service for that year.

The Tal Law has also established legislative authorization for the handling and approval of requests to serve in a special "combined service," which involves periods of active military service combined with periods of study in yeshivas designated for this type of service. The duration of "combined service" is longer than regular service and includes twelve months in addition to the full military duty.[26]

The Tal Law initially included a provision that it would expire within five years following its official publication on August 1, 2002. However, it provided the Knesset with the authority to extend its application to additional periods not exceeding five years each, subject to a requirement for a hearing not later than six months prior to expiration. In the absence of a

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[22] The Deferment of Military Draft for Yeshiva Students Whose Occupation Is the Study of Torah Law, 5762-2002.

[23] *Id.* § 2.

[24] *Id.* § 5.

[25] *Id.* § 6 (translated by the author).

[26] *Id.* § 9.

further extension, the Tal Law was scheduled to expire on August 1, 2012[27], but the Supreme Court recently intervened, as discussed more fully below.

A. The 2006 Supreme Court Review of the Constitutionality of the Tal Law

The constitutionality of the Tal Law was examined by the Supreme Court for the first time in May 2006 in the case of *Movement for Quality of Government v. Knesset*.[28] The Court recognized that Israeli society is bound by the principle of equally fulfilling obligations while equally enjoying civil rights. According to this principle, the Court held,

> [a] grant of a swift deferment—which over the years transforms into an exemption from military service—for thousands of persons eligible for military service based only on reasons of study in a yeshiva constitutes harm to the equality of every one in the majority group who is subject to military service. The distinction among persons designated for military service based on a religious worldview is discrimination without any relevant difference.[29]

The Court further held that the right to equality of every member of the majority population who is subject to the mandatory military draft is inherent in the right to human dignity.[30]

The right to human dignity is protected under Basic Law: Human Dignity and Liberty (the Basic Law).[31] Under Israeli law, however, a human right is not absolute and can be violated in accordance with section 8, "Violation of Rights," of the Basic Law: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."[32]

Having applied the criteria imposed by section 8, the Court first concluded that the Tal Law was enacted for a proper purpose based on the objectives of

- providing a legislative basis for the deferment;
- increasing equal sharing of the burden of military service;
- increasing the participation of the Haredi community in the workforce; and
- contributing to a careful and gradual resolution of the problem that is based on wide public consent without coercion.[33]

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[27] *Id.* § 16.

[28] HC 6427/02 Movement for Quality of Government v. Knesset (Dec. 12, 2005), NEVO LEGAL DATABASE

[29] *Id*. ¶ 28 (translated by the author).

[30] *Id.* ¶¶ 30–43.

[31] Basic Law: Human Dignity and Liberty § 8.

[32] *Id.*

[33] HC 6427/02 Movement for Quality of Government v. Knesset, ¶ 54.

According to Court President Aharon Barak, showing that the Tal Law complied with the Basic Law and that its measures did not exceed the purpose for which it was enacted is actual proof of its success.[34] Based on the data that was available to the Court at that time, there was no indication of an increase in the participation of yeshiva students in the army, the civil service, or in the combined service programs that were offered by the Tal Law.[35]

Having recognized that by limiting its application to a five-year period, the Law itself reflected its temporary experimental status, the Court decided to postpone a final determination on the constitutionality of the Tal Law to a later date. The Court held that such a determination could be made only with the passage of additional time, when its success in achieving the purpose for which it was enacted could be evaluated based on sufficient data. The Court warned, however, that if no actual change took place, the Tal Law could be declared unconstitutional at a later date.[36]

B. The 2012 Supreme Court Decision on the Unconstitutionality of the Tal Law

On February 21, 2012, almost six years after the issuance of the above decision in *Movement for Quality of Government v. Knesset*, the Supreme Court, by an extended bench of nine justices, reevaluated the constitutionality of the Tal Law. By a six-to-three majority the Court determined that the Tal Law violated the right to equality and that the Knesset, therefore, could not further extend its application beyond the August 1, 2012, expiration date.

In her majority opinion, outgoing Court President Dorit Beinish reached the following conclusion: "Time has shown that the Law has not realized the goals on which it was based, and that in reality, the Law has anchored, almost fully, the draft deferment arrangement that existed prior to its enactment."[37]

While eight of the nine justices agreed with Beinish that the Tal Law violated the right to equality, five joined her in concluding that the experience gained since the Law's enactment was sufficient for determining that it violated the Basic Law. Two justices were of the view that due to the complexity of absorbing the Haredi into Israel's military and civilian life the executive branch should be given more time to continue gradually implementing the Law. They held, therefore, that the petitions should remain pending to allow the Court to continue to receive updates on its future implementation.

One justice, upcoming Court President Asher Grunis,[38] was in the minority, expressing his opinion that the Court should have completely refrained from reviewing the constitutionality

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[34] *Id.* ¶ 64.

[35] *Id.* ¶¶ 63–70.

[36] *Id.* ¶ 70.

[37] HC 6298/07 Resler v. Knesset ¶ 63 (translated by the author).

[38] Aviad Glickman, *Judge Asher Grunis Named Chief Justice*, YNET.COM (Feb. 10, 2012), http://www.ynetnews.com/articles/0,7340,L-4187918,00.html.

of the Tal Law because it was passed in the Knesset by a majority vote. Grunis further held that the limited impact of "the Court's contribution to a change in the social conduct of a whole sector in the Israeli society [i.e., by influencing yeshiva students' draft decisions and entry into the labor force] was extremely limited and did not justify the Court's intervention in this matter."[39]

The following is a summary of the main holdings in Beinish's majority opinion in this case:

1. No Evidence That Tal Law's Objectives Have Been Achieved

Having examined comprehensive data on the implementation of different options offered by the Tal Law (draft postponement, civil service, and combined service), Beinish recognized that, although there was a slight increase in the number of Haredi who serve in the military or in civil service, their number was insignificant relative to the number of Haredi who enjoyed the deferment.[40]

2. The Tal Law Has Two Inherent Flaws

a. Minimum Age for Selecting Alternatives to Military Service

Beinish determined that the Tal Law's grant of an automatic deferment of four years between the ages of eighteen to twenty-two and the determination of the latter as the earliest age for selecting either "a year of determination" or civil service[41] diminish the ability of the army to absorb yeshiva students. This is because by the age of twenty-two the overwhelming majority of the Haredi population is already married and most likely a parent to one or more children.[42] Beinish noted that to avoid complications, including the need for the army to pay increased family and dependent compensation, yeshiva students at this age who choose not to remain in the yeshivas are usually directed to perform a much shorter period of civil service.

b. Lack of Incentives for Compliance

While the Tal Law grants yeshiva students wide discretion to choose among several options of service or deferment without any conditions related to family or medical status, or to choose the number of yearly deferments enjoyed, it does not contain any incentive for compliance or any ground that would lead to any obligation to perform service during one's lifetime.[43]

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[39] HC 6298/07 Resler v. Knesset ¶¶ 2–3 of Justice Grunis's opinion (translated by the author).

[40] *Id*. ¶ 56.

[41] *See* summary of the Tal Law, section IV of this report.

[42] In the Haredi community it is common to marry at the age of eighteen. Contraceptives are usually not used.

[43] HC 6298/07 Resler v. Knesset ¶ 59 of Beinish decision.

The Tal Law, Beinish held, not only provides individuals wide discretion as to whether to enroll in any form of public service, but also provides the government unlimited discretion as to implementation by not providing any measurements of success or goals that need to be met. As a result, according to Beinish, "lack of action thereby transforms the Law into a dead letter."[44]

3. Suggestions for a Possible Future Resolution

Having concluded that "the means determined by the Law did not achieve and cannot at a level of actual probability achieve its goals,"[45] Beinish suggested that the Knesset should reach a new arrangement that could rely on the framework of the Tal Law. Such an arrangement, however, would require addressing the current Law's shortcomings, including its lack of any element of a duty of service based on age and physical ability, or a duty to substitute military service with civil service or absorption by the labor force.[46] According to Beinish, the objective of equal sharing in public responsibilities that such a future Law should address could be met by requiring a review of the number of individuals providing service, as well as an evaluation of the type, duration, and supervision of public service.[47]

4. The Proper Scope of Judicial Review

According to the minority opinion by incoming Court President Asher Grunis, the Court should have refrained from entertaining the petitions in this case because the privilege granted to the minority Haredi population by the Tal Law was based on a law passed in the Knesset by majority vote. Beinish rejected this approach based on the following determinations:

First, judicial review should not be limited to the narrow concept of democracy as merely the rule of the majority. Rather, it should extend to the concept of democracy as a regime that protects basic human rights. According to Beinish, "[t]his is the main lesson learned after World War II. . . . [I]t is not enough to guarantee the democratic process; it is also necessary to preserve the democratic substance that is reflected by protecting human rights. This protection is not limited to situations of harm to the minority."[48]

Second, Beinish reasoned, the reality of Israel's coalition government, where small political parties often tip the scale in legislation, presents difficulty in determining the division between the rights of the majority and those of the minority. This is especially true regarding draft deferment, where "it is no secret that throughout the dealings with the arrangement of draft

[44] *Id.* ¶ 57.

[45] *Id.* ¶ 56.

[46] *Id.* ¶ 64.

[47] *Id.* ¶ 68.

[48] *Id.* ¶ 70.

deferment, [the issue] involved coalition coercion in which the majority accepted the law of the minority, among other [reasons], because of political coalition interests."[49]

The third and, according to Beinish, main argument against the Court's decision to refrain from entertaining the petitions is that judicial review regarding harm to constitutional rights relates to a person as an individual. The fact that many are harmed by the same governmental action, as this case shows, in Beinish's opinion does not exempt the Court from the duty to examine the constitutionality of the harmful action.[50]

V. Concluding Remarks

The February 21, 2012, decision of Israel's Supreme Court prohibiting any further extension of the application of the Tal Law beyond August 1, 2012, reflects the Court's determination to apply constitutional requirements to the very complex legislative effort to bring about a resolution of an increasingly difficult socioeconomic problem in Israel.

The draft deferment for Haredi youth has been recognized as a violation of the right of the majority of Israelis to equal treatment under the law. It has also been continuously linked to the poverty rate in the Haredi community and its impact on the state budget.

Many, including the justices who rendered the latest decision, agree that the repeal of the Tal Law will not resolve the matter. According to Justice Edna Arbel, for example, the absorption of the Haredi, while considering their way of life and specific religious requirements, will undoubtedly pose challenges to IDF's policies of absorption regarding other demographic sectors, such as women.[51]

The repeal of the Tal Law requires the Israeli government to introduce alternative legislation that will attempt to stop the process of differential treatment and alienation of a whole segment of Israeli society. A reevaluation of the issue will undoubtedly require a further study of Haredi community conditions and possible modifications and adjustments to government and military programs. Some have even suggested that the debate regarding full participation in carrying public duties should be expanded to discuss the involvement of the Arab-Israeli community, to whom compulsory military service does not currently apply.[52]

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[49] *Id.* (translated by the author).

[50] *Id.*

[51] *Id.* ¶ 18 of Justice Arbel's decision.

[52] *See, e.g.*, Anshel Pfeffer, *After Tal Law Ruling, Israel Is Back to Square One*, HAARETZ.COM (Feb. 21, 2012), http://www.haaretz.com/news/national/after-tal-law-ruling-israel-is-back-to-square-one-1.414019.