FOREIGN AND SECURITY POLICY 28.06.2024 | Anat Thon-Ashkenazy

More than just a ruling

In a landmark ruling, the Israeli Supreme Court declared the non-enforcement of mandatory enlistment for yeshiva students discriminatory

The issue of mandatory enlistment for all Israeli citizens is nearly as old as the state itself. It was first addressed in 1949, when Israel's first Prime Minister David Ben-Gurion decided to exempt 400 yeshiva students from military service, provided they engage in Torah study. Ben-Gurion's main aim, defined in collaboration with the ultra-Orthodox leadership, was to ensure that Torah study continued in Jewish communities, which was almost wiped out during the Holocaust.

Since then, however, the number of yeshiva students exempt from military service has grown to approximately 63 000 by June 2023, disproportionate to the share of the ultra-Orthodox in Israeli society. It thus comes as no surprise that this exemption has sparked a profound public and legal debate within Israeli society about the equal shouldering of the burden between those who are obligated to serve in the Israel Defense Forces (IDF) and those who are exempt. This issue has become doubly crucial in recent months in view of the war that followed Hamas' massacre in Gaza border communities on 7 October 2023.

A rule of law issue

The ruling issued this week by the Israeli Supreme Court, sitting as the High Court of Justice (HCJ), that the government lacks the authority to avoid applying the Defense Service Law to yeshiva students while continuing to provide financial support to yeshivas even though their students are not officially exempt, is both historic and important. In fact, however, its primary significance does not lie in its application to drafting, as no such arrangement has yet been put forward. Its main historical value is rooted in its decision on an even more fundamental question that has preoccupied the Israeli public in recent years — that of Israel's rule of law.

In response to this question, a judicial panel of nine has unanimously

decided in favour of bolstering the protection of Israeli rule of law by deciding on two fundamental issues:

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The first is the HCJ's firm statement that since the government's decision not to enforce compulsory military service *for all* is discriminatory, government decisions may not set forth arrangements that violate the right to equality. This can only be achieved through legislation. There is nothing new or surprising about this ruling; in fact, it reiterates the well-established notion provided by the HCJ in the 1998 *Rubinstein* ruling. In it, the HCJ stated that the matter required a decision to be formulated as a Knesset law, in view of the growing number of yeshiva students exempt from the draft, as well as the fact that it was a 'poignant national issue'. This led the HCJ to rule that the government did not have the authority to issue this discriminatory decision, thus rendering it void. It further added that 'the difficulty in this state of affairs is accentuated in view of the ongoing war in which Israel is engaged, projecting onto the IDF's need for the human resources necessary to complete its crucial missions'.

The second issue that this HCJ ruling reaffirms is that the Attorney General alone may represent the government and that, in the absence of a relevant ruling, she is the authorised interpreter of the law. Again, this judgment is not new. But it is particularly critical at this time, as the current government has in fact requested separate representation by private attorneys a record number of times because its ministers' actions are contrary to the directives and interpretation of the law by the Attorney General.

In doing so, the government is effectively trying to shake off the Attorney General's legally mandated binding authority and exclusive role in representing the government. In this case, this shedding has taken several forms. First, despite the Attorney General's view on the flaws in the decision not to draft the ultra-Orthodox, the government continued to pursue this resolution and even sought separate representation. Moreover, in clear violation of the unusual permission granted to it to be represented by private counsel, the government has even expanded

private representation, at its own discretion, to the IDF, the Ministry of Defence and the Ministry of Education.

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It is noteworthy that, as part of the legislation package promoted by the government last year, known as the 'judicial reform', a discussion was held about the Attorney General's binding authority, which strove to limit her power to that of a consultant. Although this bill was not pursued in the end, the government's conduct in the case at hand has shown that it does not need a law to shake off the Attorney General's authority. It was no coincidence, therefore, that in response to the government's decision to have a private attorney represent all government ministries in this petition, the Attorney General's representative stated that this represented a continuation of the 'judicial reform'. The Attorney General herself described this and other similar steps as a 'quiet reform'.

In its unanimous HCJ ruling, the Supreme Court – despite the wide range of identities, positions and worldviews represented by this judicial body – has conveyed a key message: it has once again shown that it does not succumb to the public image often attached to Supreme Court justices as being divided into a 'conservative' and a 'liberal' camp. Instead, it has shown no disagreement or diversity. The Supreme Court has remained steadfast in its position that in the absence of primary legislation, a discriminatory arrangement cannot be set forth and that the Attorney General is a central pillar in the protection of the rule of law and, therefore, any attempt to undermine or gnaw away at her binding status must be curbed.

What's next?

For the most part, the political system did not surprise anyone with its responses to this HCJ ruling. The leaders of the opposition expressed their satisfaction with it, while most coalition members, especially the ultra-Orthodox parties, were enraged by it. Nevertheless, some coalition members' reactions were slightly different, such as that of the chairman of the Foreign Affairs and Defense Committee, Knesset and *Likud* member Yuli Edelstein, who claimed that the law his committee will promote will not only require the coalition's support, but broader support — a

demand that could undermine the coalition's intentions.

And so, at this stage, the dramatic question is not only: What will be the nature of the legislation that the Knesset will pass? But also: Will the government continue to take steps that will lead to a change in the nature of the relations between the state authorities in order to pass a discriminatory arrangement? If it does indeed pursue an arrangement that will grant a blanket exemption to numerous yeshiva students, thereby violating the right to equality, as some coalition parties are demanding, it could also go back to promoting the bills that were part of the 'judicial reform' and that sought to strip the Supreme Court of its power to review Knesset laws alongside government decisions. Since the Supreme Court is the only check on the government and the Knesset in the Israeli system of governance, such bills could erode Israeli democracy and leave the Israeli public less protected against governmental initiatives that violate its rights.

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