HCJ 5131/03

MK Yaakov Litzman, Chairman of United Torah Judaism Faction

v.

1. Knesset Speaker

2. Minister of Finance

3. Attorney-General

The Supreme Court sitting as the High Court of Justice

[17 August 2004]

Before President A. Barak and Justices A. Grunis, S. Joubran

Petition to the Supreme Court sitting as the High Court of Justice

Facts: Various irregularities occurred during votes in the Knesset, in which certain Knesset members voted instead of other Knesset members. The petitioner asked the court to void the votes in which the irregularities occurred.

Held: Judicial scrutiny of legislative proceedings in the Knesset should be done with great caution, and only when the defect in the proceedings goes to the heart of the matter. In this case, the irregularities did not affect the outcome of the voting, and therefore judicial intervention was unwarranted.

Petition denied.

Legislation cited:

Basic Law: the Knesset, s. 19.

Israel Economic Recovery Programme (Legislation Amendments for Achieving Budgetary Goals and the Economic Policy for the Fiscal Years 2003 and 2004) Law, 5763-2003.

Knesset Procedure Rules, ss. 114, 120.

Israeli Supreme Court cases cited:

[1] HCJ 652/81 *Sarid v. Knesset Speaker* [1982 IsrSC 36(2) 197; **IsrSJ 8 52.**

[2] HCJ 971/99 *Movement for Quality Government in Israel v. Knesset Committee* [2002] IsrSC 56(3) 117.

[3] HCJ 8238/96 *Abu Arar v. Minister of Interior* [1998] IsrSC 52(4) 26.
[4] HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [1988] IsrSC 42(2) 309.
[5] HCJ 1843/93 *Pinhasi v. Knesset* [1995] IsrSC 49(1) 661.
[6] HCJ 73/85 *Kach Faction v. Knesset Speaker* [1985] IsrSC 39(3) 141.
[7] CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221.
[8] HCJ 975/89 *Nimrodi Land Development Ltd v. Knesset Speaker* [1991] IsrSC 45(3) 154.
[9] HCJ 6652/96 *Association for Civil Rights in Israel v. Minister of Interior* [1998] IsrSC 52(3) 117.
[10] LCrimA 2413/99 *Gispan v. Chief Military Prosecutor* [2001] IsrSC 55(4) 673.
[11] HCJ 3434/96 *Hoffnung v. Knesset Speaker* [1996] IsrSC 50(3) 57.
[12] HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [2001] IsrSC 55(4) 800.
[13] EA 5049/92 *Attorney-General v. his honour Supreme Court Justice (ret.) Mr A. Halima, Chairman of the Central Elections Committee for the Thirteenth Knesset* [1990] IsrSC 44(2) 37.
[14] HCJ 5160/99 *Movement for Quality Government in Israel v. Constitution, Law and Justice Committee* [1999] IsrSC 53(4) 92.

American cases cited:
[15] *United States v. Munoz-Flores*, 495 U.S. 385, 110 S. Ct. 1964 (1990).

For the petitioner — U. Stendal.
For the first respondent — A. Schneider.
For respondents 2-3 — O. Koren.

JUDGMENT

President A. Barak

During the second reading of a draft law, some Knesset members voted instead of other Knesset members. By voting in this way, they breached the rules governing the voting of Knesset members. Does this affect the validity of the law that was passed? This is the question that was brought before us in this petition. We dismissed the petition (on 31 July 2003), and said that our

reasons would be given separately. The following are our reasons.

The background

1. The Knesset enacted the Israel Economic Recovery Programme (Legislation Amendments for Achieving Budgetary Goals and the Economic Policy for the Fiscal Years 2003 and 2004) Law, 5763-2003 (hereafter — the Economic Recovery Law). The draft law included more than one hundred sections. After a debate that lasted approximately fifty hours, the Knesset began (on the afternoon of 28 May 2003) a vote on the objections and on the sections of the draft law in its second reading. The voting continued uninterrupted until the law was passed on its third reading (early in the morning of 29 May 2003).

2. Most of the voting took place on a show of hands with personal voting. In addition approximately eighty votes were held electronically. During an electronic vote, the Knesset member presses a panel of buttons next to his seat. The panel includes a button marked 'Present,' and alongside it buttons marked 'For,' 'Abstain' and 'Against.' For the vote of the Knesset member to be recorded, he must press the 'Present' button and one of the other buttons simultaneously. During the voting, MK Y. Litzman (the petitioner) said that 'with regard to the voting, I have the impression that there are Knesset members, and at the moment it does not matter who they are, who are not present in the House and for whom others have voted in electronic voting' (record of proceedings on 28 May 2003, appendix C of the petition). The Knesset Speaker, MK R. Rivlin responded immediately 'This is very serious. Please submit a complaint in writing, and do not make vague allegations' (*ibid*.).

3. The manner of electronic voting during the session on the draft Economic Recovery Law aroused a public outcry. MK I. Gavrieli said that her vote was counted even though she did not take part in certain stages of the votes. Against this background, on 3 June 2003 the petitioner sent letters to the Knesset Speaker (appendix D(1) of the petition) and to the Knesset's legal adviser (appendix D(2) of the petition). He stated that in view of the information that MK I. Gavrieli proffered, her vote and other votes that may have suffered similar defects were invalid. From this he concluded that the law was not duly passed, and the vote should be held again. MK Vilan, who is not a party to the proceedings before us, also submitted a request on 3 June 2003 that the implementation of the law should be suspended until the investigation into the voting was completed.

4. On 3 June 2003, the Knesset Speaker appointed a team to investigate all the electronic voting that took place with regard to the draft Economic Recovery Law. In the first stage, it examined the allegation with regard to the vote of MK I. Gavrieli, despite her not being present in the House. The team found (in its report dated 4 June 2003) that it was reasonable to assume that a member of the Knesset had voted twice. The team recommended that no additional investigations should be made with regard to the other electronic votes that were held on the second and third readings of the draft Economic Recovery Law. Pursuant to a request by the Attorney-General on 8 June 2003, the Knesset Speaker asked the investigation team to complete the investigation with regard to all the other electronic votes that took place with regard to that draft law. Before the investigation was completed, on 9 June 2003 the petition before us was filed.

The petitions and the replies thereto

5. The petitioner points to defects that occurred in the voting. According to him, the clear cases of double voting could be the tip of the iceberg. It is impossible to know what was the scope of the phenomenon without a comprehensive investigation. The existing suspicions are sufficient to invalidate all the votes that took place on May 28 and 29. This step is essential in view of the serious damage inherent in the harm done to public confidence in the Knesset. At least the commencement of the law should be suspended until the investigation is completed. The petitioner also asked, in the alternative, that the vote should be held again, at least with regard to the sections in which the vote of MK I. Gavrieli was counted, even though she was not in the House. The petitioner also asked that we should order the Knesset Speaker (the first respondent) to examine thoroughly the method of voting in the Knesset, so that measures would be adopted to ensure that no cheating can occur in the legislative process. With regard to the Minister of Finance (the second respondent), the petitioner argued that he should refrain from carrying out acts based on the Economic Recovery Law. Finally, the petitioner asked that we order the Attorney-General (the third respondent) to start a thorough investigation into the whole affair.

6. In the reply on behalf of the Knesset Speaker, it was stated that several cases of *prima facie* irregularities had indeed been discovered in some of the votes. Some of these irregularities did not reach the stage of recording an electronic vote, and they are irrelevant to the petition. Of those irregularities that led to an invalid vote, the Knesset Speaker discovered four cases:

(a) From the supplementary report of the investigation team dated 17 June

2003, it transpires that MK M. Gurolevsky admitted that he voted twice instead of MK G. Arden. These votes were disqualified by the Knesset Speaker immediately after they were discovered, and revotes were held. Thus the defect was remedied. The Knesset Speaker filed a complaint against MK M. Gurolevsky to the Ethics Committee for Knesset Members, which decided, on 10 June 2003, to prohibit him from entering the House and its committees for four months, during which he could enter these sessions solely for the purpose of voting.

(b) The investigation team found that a vote had been recorded for MK I. Gavrieli, even though she was not present in the House. How this happened was not determined. The aforesaid vote relates to an objection that was submitted with regard to one of the sections of the draft Economic Recovery Law. The objection was defeated by a majority of fifty-five Knesset members who voted against it to forty-three members who voted for it. It follows that the outcome would not have changed even if the vote of MK I. Gavrieli had not been counted.

(c) The investigation team examined a record of a vote by Minister Katz, despite the fact that he did not press the voting buttons. This vote was disqualified by the Knesset Speaker and a revote was held. For this reason, the defect was already remedied during the Knesset session.

(d) It transpires from the supplementary report of the investigation team that *prima facie* Deputy Minister Y. Edri voted from his seat and from the seat of MK E. Yatom, who at that time was not seen to be sitting in his seat, but came to his seat immediately after the vote of the Deputy Minister. In this regard, the Knesset Speaker says that the vote referred to an objection that was submitted to one of the clauses of the Economic Recovery Law. The objection was not adopted by a majority of three votes. It follows that even if the vote of MK E. Yatom had not been counted, the outcome would not have changed.

(e) The investigation team located a *prima facie* double vote by MK W. Taha, who voted also instead of MK Zkhalka. The objection in this vote was not adopted by a majority of eleven votes. It follows that this defect also did not affect the outcome of the vote.

7. The position of the Knesset Speaker is that the petition should be dismissed. He referred to the position of the Supreme Court, which within the framework of consistent case law for many years has seen fit to act cautiously and with judicial restraint with regard to its intervention in the legislative

proceedings of the Knesset, both while they are in progress and after they have been completed. This restraint applies also with regard to the intervention of the court in the validity of a statute that has been enacted into law, when a defect occurred in the process of enacting it. In the opinion of the Knesset Speaker, only when the defect that occurred goes to the heart of the matter and was sufficient to affect the outcome of the vote is there a basis for abandoning the caution and judicial restraint that the court has taken upon itself. In our case, the defects do not go to the heart of the matter. They were insufficient to affect the outcome of the vote. The Knesset Speaker mentioned in his reply that without any connection to this incident of the voting, already in February 2003 a tender was issued for the supply, installation and assimilation of an electronic voting system in the Knesset. The new system, which will be installed in the coming months, will be more advanced that its predecessor.

8. The Minister of Finance (the second respondent) said in his reply that he is not entitled to refrain from implementing the law, as long as the court has not determined that the law is not valid. Admittedly, the voting of Knesset members instead of other members is an improper phenomenon that must be eradicated. Nonetheless, there are several ways of dealing with this that do not involve invalidating the law. In the case before us, there is no causal link between the defects that occurred in the legislation and the law that was passed. Therefore, the defect that was discovered does not go to the heart of the matter, nor does it justify judicial intervention. The Attorney-General (the third respondent) said that he decided on 18 June 2003 to begin a police investigation. It follows that the petition against him is superfluous.

The legal approach

9. The voting rules were breached in the legislative proceedings of the Economic Recovery Law. Knesset members voted during the second and third readings of the law in a way that was *prima facie* unlawful in three cases. This was expressed in their voting (electronically) in the place of other Knesset members. Two of these unlawful votes — even if we ignore them — are incapable of changing the results of the voting. The question that we face is whether these breaches invalidate the law. This question can be answered from two viewpoints. *One* viewpoint concerns the substance of the provision that was breached and its effect on the validity of the law. We can call this the viewpoint of the substance of the breach. According to this viewpoint, not every breach of the rules that apply to the legislation proceeding has the same outcome. There are severe breaches that go to the heart of the proceeding and that affect the validity of the law, and there are minor breaches that, even

though they occurred, do not affect the validity of the law. The substance of the breach will determine, in the final analysis, whether it is so serious that it affects the actual validity of the law. The *other* viewpoint concerns the scope of judicial review of legislative proceedings in the Knesset. We may call this the viewpoint of the scope of judicial review. It is well known that the scope of judicial review of internal proceedings in the Knesset is narrow. It reflects a delicate balance between the need to ensure the rule of law in the legislature and the need to respect the unique nature of the Knesset as the body elected by the people (see HCJ 652/81 *Sarid v. Knesset Speaker* [1], at p. 204 {58}). This delicate balance applies also to legislative proceedings, which are part of the internal proceedings of the Knesset. Justice E. Rivlin rightly said with regard to *Sarid v. Knesset Speaker* that the internal proceedings of the Knesset include 'legislative proceedings at the various stages through to their completion, sessions of the Knesset committees, the determination of the method of voting and the ways of holding sessions in the House' (HCJ 971/99 *Movement for Quality Government in Israel v. Knesset Committee* [2], at p. 167). The first viewpoint examines the laws that were breached, the seriousness of the breach, and the effect of the breach on the validity of the law. The judicial remedy is derived from the substance of the breach and its outcome. The other viewpoint examines the relationship between the judiciary and the legislature. The scope of judicial review determines the remedies for a breach of the rules. The choice between the two viewpoints reflects the historical development of the legal system (see S. Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' 19 *Mechkarei Mishpat* (2003), 720). It sometimes reflects jurisprudential approaches which also are influenced by the history of those legal systems, Thus, for example, civil law systems usually adopt the viewpoint of the substance of the breach. They determine which breaches of the legislative proceeding affect the validity of the law and which breaches do not have this result. The scope and the consequences of the breach determine the scope of the judicial review, since the existence of the right leads to the existence of the remedy (*ubi ius ibi remedium*). By contrast, common law systems usually adopt the viewpoint of the scope of judicial review. They determine in which situations judicial intervention in the legislative proceeding will be allowed, and in what situations the court will not intervene in such proceedings. The scope of the intervention determines the substance and outcome of the breach. The existence of the remedy leads to the recognition of the right (*ubi remedium ibi ius*).

10. There should be harmony between these two viewpoints. This is usually

the case. This is certainly so with regard to the argument brought before us, that the legislation is not valid, since the rules that govern the methods of adopting legislation were breached. Indeed, the laws that determine the validity of the legislative proceeding must adapt themselves to the laws that determine the scope of the judicial intervention. In my opinion, these are the two sides of the same coin. If, according to the viewpoint of the substance of the breach, the breach of the rules governing the legislative proceeding is serious and goes to the heart of the proceeding and affects the validity of the law, the court should, according to the viewpoint of the scope of judicial review, exercise judicial review and grant the necessary remedy. If it does not do so, and a judicial remedy is not given where the rules that govern the legislative proceeding are seriously breached so that the legislation is invalidated, the result will be that a defective law will continue to be valid. There is no greater injury than this to the system. By contrast, if according to the substantive viewpoint the breach of the legislative proceeding is minor and does not affect the validity of the legislation, there are no grounds for judicial intervention. Despite the breach of the laws, there is a justification for judicial restraint whose purpose is to protect the unique nature of the Knesset as the body elected by the people.

11. Harmony between the two viewpoints will be guaranteed if it is determined that not every breach of the rules governing the legislative proceeding affects the validity of the legislation. We must distinguish between serious breaches that go to the heart of the legislative proceeding and minor breaches. Only serious breaches can affect the validity of the law. This was discussed by Justice T. Or, when he said:

> 'In my opinion, on this matter one should adopt a principled approach that gives the proper weight to the status of the Knesset as the State's legislature. In considering these arguments, the court should progress from case to case with due caution, and consider giving a declaration that primary legislation is not valid as aforesaid only in rare cases of a defect that goes to the heart of the matter' (HCJ 8238/96 *Abu Arar v. Minister of Interior* [3], at p. 35).

But what is a serious breach of the rules governing the legislation proceeding? When is it said that a breach of the rules creates a 'defect that goes to the heart of the matter'? The answer is that the breach is a serious one and it leads to a defect that goes to the heart of the matter when it harms the basic values of the democratic system that lie at the heart of the legislative

proceeding. These are breaches that harm the 'basic principles of the parliamentary system' (Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at p. 785). Indeed, the rules concerning the legislative proceeding — like any legislative norm in Israel — reflect the basic values of Israeli democracy. Harm to legislative proceedings is serious and the defect goes to the heart of the matter, if it harms those basic values of the system that underlie the legislative proceedings. In this way harmony is guaranteed between the viewpoint of the substance of the breach and its effect on the validity of the law and the viewpoint of the scope of judicial review. With regard to the scope of judicial scrutiny, it was held in *Sarid v. Knesset Speaker* [1] that:

> 'When the alleged harm to internal parliamentary proceedings is minor, and it cannot affect the foundations of our parliamentary system, then the consideration of the independence and special nature of the Knesset overrides the consideration of the rule of law, and the judiciary is justified in refraining from considering a matter that is in essence political. This is not the case when the alleged harm is significant and it involves harm to the substantive values of our constitutional system. In such a case, the consideration concerning the need to ensure the rule of law overrides any other consideration' (*ibid.*, at p. 204).

The criterion that was determined for the scope of judicial intervention in an internal parliamentary proceeding is one that takes into account —

> 'To what degree the fabric of parliamentary life is harmed and to what degree the harm affects the foundations of our constitutional system' (*ibid*.).

Indeed, when a breach of the legislative proceedings harms the basic values of the democratic system that underlie the legislative proceedings, this affects the validity of the law, and the court will exercise its discretion and carry out judicial review. Thereby it will prevent the harm to the fabric of parliamentary life and the harm to the foundations of our constitutional system that result from the breach. In this way, harmony is achieved between the viewpoint of the substance of the breach and the viewpoint of the scope of judicial review. Not every breach of the rules that govern legislative proceedings affects the validity of the law and justifies judicial review. Only a serious breach 'that goes to the heart of the matter,' which is characterized by harm to the basic values that underlie the rules, affects the validity of the law, and since it is harm 'to the substantive values of our constitutional system' (*ibid*.), it justifies

judicial review of the propriety of the legislative proceedings. This approach of ours is derived from purposive interpretation, and it constitutes a part thereof. According to purposive interpretation, the language of a legal text is interpreted in accordance with its purpose. The purpose of a legal text includes a general purpose and a specific purpose (see A. Barak, *Purposive Interpretation in Law*, 2003, at p. 196). The basic values of the democratic system that underlie the legislative proceeding are a part of the specific and general purpose of the rules that govern the legislative proceeding (cf. HCJ 953/87 *Poraz v. Mayor of Tel-Aviv-Jaffa* [4], at p. 329). They will therefore apply both to the issue before us (which concerns a claim that the law is not valid because of defects in the legislative proceedings) and other issues, in which it is claimed that the rules governing the legislative proceeding have been breached, even if the remedy sought is not the voidance of the statute.

12. A uniform criterion is therefore recognized. It applies both with regard to the validity of legislation adopted by means of a breach of the rules regulating the legislative proceedings and also with regard to the scope of judicial review. This criterion depends upon the harm to the basic values that underlie the legislative proceeding. This criterion raises four questions that we ought to consider.

13. The *first* question is what are the basic values of the democratic system that underlie the legislative proceeding (see Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at p. 784, and A. Vermuele, 'The Constitutional Law of Congressional Procedure,' 71 *U. Chi. L. Rev.* (2004) 361). As a rule, the values of the State of Israel are its values as a Jewish and democratic State. For our purposes, these are the values of both formal and substantive democracy. With regard to formal democracy, we should emphasize the principle of representation and the principle of realizing the will of the majority. The people have chosen their representatives. The representatives act in the legislature. The Knesset member is the 'constitutional unit' (see HCJ 1843/93 *Pinhasi v. Knesset* [5], at p. 682). He tables motions; he has access to the proceedings of the House; he participates in deliberations. He has the practical opportunity of formulating his intentions. On the basis of the information imparted to him he expresses his position and tries to persuade his colleagues. At the end of this process, a vote takes place, in which the Knesset member participates and realizes his constitutional status. The resolution adopted is the decision of the majority. Against this background, we have held that denying a faction with a single member the power to table a motion of no confidence harms a 'substantive and

central value of the parliamentary system' (HCJ 73/85 *Kach Faction v. Knesset Speaker* [6], at p. 164). Alongside the values of formal democracy lie the values of substantive democracy. These express in our case, *inter alia*, equality between members of the Knesset. Everyone receives the same information; everyone has one vote; every Knesset member is assured on an equal basis his constitutional rights as a person and as a Knesset member. Thus the legislative proceeding gives expression to the Knesset member's freedom of speech and additional human rights that are connected with and facilitate the legislative process (such as freedom of movement). Alongside all of these, there is the Knesset member's duty of faith. Indeed, every Knesset member acts as trustee of the whole public. He must ensure public confidence in the Knesset. He must realize his trust to the whole public. Indeed, these values all aim to ensure — in so far as legislative proceedings are concerned — that the law that is adopted will reflect the collective will of the legislature (see the judgment of the Spanish Constitutional Court STC 99/1987, cited in Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*, at p. 784), which emphasizes the 'realization of the will of the House').

14. The *second* question is what is the source of the rules whose breach may affect the validity of the law? Certainly the most important source is the Basic Laws themselves. In this regard, it is sometimes accepted — mainly because of the viewpoint of the scope of judicial review — that only a breach of rules concerning the legislative proceeding that are enshrined in the constitution affects the validity of the statute. This is the law in the United States with regard to federal legislation (cf. *United States v. Munoz-Flores* (1990) [15]). In my opinion, the effect on the validity of the legislation is not conditional upon the rule that was breached being necessarily enshrined in a Basic Law. This of course is the most important source. Nonetheless, it is not the only source. There are additional sources that exist alongside it, such as an 'ordinary' law, the Knesset Procedure Rules and the decisions of the Knesset Committee (see A. Rubinstein & B. Medina, *The Constitutional Law of the State of Israel*, fifth edition, 1997, at p. 640). The status of these derives from the Basic Law: the Knesset (s. 19), which provides:

'Work procedures and rules

19. The Knesset shall determine its work procedures; to the extent that the work procedures are not determined in statute, the Knesset shall determine them in rules; as long as the work procedures as

> aforesaid have not been determined, the Knesset shall act in accordance with the custom and practices that are acceptable to it.'

The provisions in the Knesset Procedure Rules concerning legislative procedures bind the Knesset. Admittedly, the Knesset may, with certain restrictions, change the provisions of the Rules. But as long as it does not do so, it is obliged to respect them. Justice M. Cheshin rightfully said:

> 'Once the Knesset has determined the legislative proceedings…, it is then liable to follow the path that it has determined for itself, until it expressly repeals that system of proceedings and determines a new system of proceedings… The Knesset is "bound" by the procedure that it determined. With regard to legislative proceedings that have been previously determined, the Knesset can and may change that procedure, provided that the change is made in a manner that has been determined in advance' (CA 6821/93 *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7]).

This status of the Knesset's Rules of Procedure leads to the conclusion that a law that is adopted in breach of the basic values that underlie the provisions in the Knesset's Rules is a law whose validity is defective. I discussed this in one case, where I said:

> 'The legislative proceeding, like any other Government proceeding, is a "normative" proceeding. In other words, it is a proceeding whose stages are regulated by law. Under the Basic Law: the Knesset (s. 19) the legislative proceedings are determined in the Knesset's Rules of Procedure. In order to pass a "law," the provisions of the Rules of Procedure with regard to legislative proceedings must be observed. Underlying these proceedings — in so far as a draft law tabled by the Government is concerned — are three readings (in the House), and deliberations in a committee (after the first reading and in preparation for the second reading). If one of these stages is absent, such as if one of the readings was not held or if there was no majority in a vote or if there were no deliberations in committee or if there was a defect in one of these proceedings that goes to the heart of the matter, the motion does not crystallize into legislation, and the court is competent — whether

> upon a direct attack or an indirect attack (see HCJ 761/86 *Miari v. Knesset Speaker*, at page 872) — to declare the law 'void.' The mere publication of the law in *Reshumot* cannot remedy the defect that occurred, although it does constitute — by analogy with the provision of section 10(b) of the Government and Justice Arrangements Ordinance, 5708-1948 — evidence that the law was passed lawfully. This evidence can be rebutted' (HCJ 975/89 *Nimrodi Land Development Ltd v. Knesset Speaker* [8]).

The constitutional courts in Germany and Spain have adopted a similar approach (see Nevot, 'Twenty Years of the "Sarid" Test: a Fresh Look at Judicial Scrutiny of Parliamentary Proceedings,' *supra*).

15. The *third* question is this: when the rules concerning the legislative proceeding are breached, and this breach harms the basic values of the system, is the outcome always the voidance of the law such that it is merely 'scrap paper'? The answer is no. Admittedly, the breach of the aforesaid rules influences the validity of the law. However, this influence does not need to lead necessarily to the absolute voidance of the law. Except in unusual cases — such as a law that was published in *Sefer HaHukkim* (Book of Laws) but did not pass the legislative proceedings at all — the voidance of the law requires a constitutive judicial determination. The court has broad discretion in this regard (see A. Barak, *Interpretation in Law*, vol. 3, 1994, at p. 720). Thus, for example, the declaration that a law is void can be retroactive (from the date on which the law was published), active or prospective. It can be retroactive for one matter (such as the criminality of conduct) and active or prospective for another matter (such as civil consequences). We are dealing with the broad concept of relative voidance (see HCJ 6652/96 *Association for Civil Rights in Israel v. Minister of Interior* [9], at p. 125). Indeed, a breach of the rules is one thing and the consequences of the breach quite another (see LCrimA 2413/99 *Gispan v. Chief Military Prosecutor* [10]). This distinction, which was made mainly with regard to the validity of an administrative act, is even more pertinent to the issue of the validity of legislation. It has been rightly held that 'before the court disqualifies a law, it must consider the matter with great care' (Justice I. Zamir, in HCJ 3434/96 *Hoffnung v. Knesset Speaker* [11], at p. 67). Within this framework, the court ought to apply the doctrine of relative voidance, which allows it to fashion the remedy in accordance with the nature of the breach.

16. The *fourth* question is how the court will decide — when it wishes to know whether there are grounds for judicial review of the legislative

proceeding — whether the conditions that justify the review exist? How will the court know whether the proceeding is justiciable or not (see HCJ 9070/00 *Livnat v. Chairman of Constitution, Law and Justice Committee* [12])? The answer is that it should study the petition and assume that the facts on which the petitioner relies are well-founded. Against this *prima facie* factual background, the court should ask itself whether the basic values that underlie the legislative procedure have been harmed. If the court finds in this first stage that the basic values of the legislative process have not been harmed, it will deny the petition, without examining whether in practice the rules have been breached. Only if the court finds that *prima facie* the basic values underlying the legislative process have been breached will it continue the proceeding and examine whether its initial impression was well-founded.

From the general to the specific

17. In the petition before us, an electronic vote was recorded unlawfully. *Prima facie*, in three cases one Knesset member voted instead of another Knesset member. Thereby the rules governing the voting procedures were breached. It is obvious — and the Knesset Committee so determined on 3 January 1996 — that a Knesset member cannot vote instead of another Knesset member. This is the case even when there is an agreement between them. It is certainly the case when there is no agreement between them. This forbidden voting harms the basic values of the democratic system that underlie the voting rules. This was discussed by the Ethics Committee of the Knesset when it examined the case of MK Gurolevsky, who voted twice instead of MK G. Arden:

> 'The issue of resolutions adopted by the Knesset, and voting and participation therein, which is enshrined in the Basic Law is the lifeblood of democracy and constitutes the most fundamental part of parliamentary work. Any harm to a vote or any perversion of the voting procedures by a Knesset member, even if they occurred as a result of a misunderstanding, temporary weakness, error of judgment, fatigue, confusion or any other reason, constitute very serious harm to democracy and a real danger to its existence' (paragraph 3.4 of the decision of the Ethics Committee on 10 March 2003).

We agree with these remarks. Formal democracy is based on voting and the power of the majority. A double vote seriously harms the principle of representation on which formal democracy is based. It harms substantive democracy, since the principle of equality is harmed and the Knesset member's

duty of trust is breached. The 'realization of the will of the House' is perverted.

18. It follows that if an invalid vote affected the majority required on the second reading of the draft Economic Recovery Law, the defect in the voting procedure would result in the disqualification of the second reading. Since this reading is an integral part of the legislative proceeding, it would be sufficient to prejudice the validity of the Economic Recovery Law. Justice M. Cheshin rightly pointed out:

> 'According to the Knesset Procedure Rules, a law does not come into effect unless the Knesset passed it in three (or four) readings. A draft law that only had two readings will not cease to be a draft nor will it become law even if there is a provision in the draft itself that the draft will become "law" after it has two readings only. An express previous amendment (to the Rules or to statute, as necessary) that will allow a law to be adopted after only two readings is the only kind of amendment that is capable of changing a draft law into a "law" after two readings only' (*United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 534).

This is not the case if the defect was remedied because a revote was held and there was no repetition of the defect. This is also not the case if the defect is not remedied, and it harmed the basic values that underlie the legislative proceeding, but it was insufficient to influence the outcome of the vote. That is the case before us, in which the 'realization of the will of the House' was not perverted. Admittedly, the principles concerning representation and equality were harmed. Notwithstanding, the principle of the majority decision was not harmed, and in an overall balance the proportionate remedy in such circumstances is not voidance of the law but initiating proceedings against the Knesset member who voted unlawfully. An analogy can be derived from the validity of elections. Even if votes were obtained unlawfully, this is insufficient to disqualify the elections, if the defect would not influence the outcome of the elections (see EA 5049/92 *Attorney-General v. his honour Supreme Court Justice (ret.) Mr A. Halima, Chairman of the Central Elections Committee for the Thirteenth Knesset* [13]).

Concluding note

19. The development of laws concerning defects in the constitutional proceeding and the outcome thereof must be carried out 'with due caution'

(Justice T. Or in *Abu Arar v. Minister of Interior* [3], at p. 35). Our judgment is a cautious step in this direction. The court must navigate between the clear extreme cases. On the one hand, there are those minor breaches of the rules concerning legislation. Examples of these are defects that have been remedied, or defects that had no effect. On the other hand there are serious breaches, which give rise to defects that go to the heart of the matter, since they harm the basic values that underlie our system. This is the case if a law is passed without the required number of readings or if the required number of readings took place without the necessary majority being obtained. Admittedly, there is no inherent sanctity in the three readings for a draft law tabled by the Government (section 114 of the Knesset Procedure Rules). It is possible to determine another arrangement that will allow the legislature to express its will. But once rules in this respect have been determined, and these provide for three readings, they must take place. It is through these that our democracy finds expression. Rhetorically it can be said that the document that was passed is not a 'law' (see Justice M. Cheshin in *United Mizrahi Bank Ltd v. Migdal Cooperative Village* [7], at p. 530, and my remarks in *Nimrodi Land Development Ltd v. Knesset Speaker* [8], at p. 157). Objectively it can be said that the basic values that underlie the legislative proceeding were harmed, and therefore the breach is serious and it creates a defect that goes to the heart of the matter. Between the extremes lie the difficult cases. Thus, for example, what is the law if after the first reading a new matter is added that falls outside the scope of the original draft law? The rule provided in the Knesset Procedure Rules is that a decision must be made by the Knesset Committee (see section 120 of the Knesset Procedure Rules). In one case it was said, as an *obiter dictum*, that if a new matter is added without being brought before the Knesset Committee, 'this is not a deviation that amounts to a defect justifying the intervention of the court in the legislative proceedings of the Knesset' (Justice D. Dorner in HCJ 5160/99 *Movement for Quality Government in Israel v. Constitution, Law and Justice Committee* [14]). I doubt whether this approach should be accepted, and I would like to leave it undecided. My approach would be different if the question arose as to whether an issue is new, and the response of the Knesset Committee is that the issue is not new. In such a case it seems to me that there are no grounds for considering an argument that the Knesset Committee erred in its approach. This matter also can be left undecided.

Miscellaneous

20. In the petition before us, the petitioner finds fault with the Knesset Speaker (the first respondent) for not suspending the commencement of the Economic Recovery Law. In view of our conclusion with regard to the validity of the Economic Recovery Law, this aspect of the petition should be denied. Even if there were a defect in the legislation that affected the validity of the law, no complaint may be directed at the Knesset Speaker for not suspending the commencement of the law. The reason for this is that the Knesset Speaker has no power to suspend the commencement of a law that suffered defects during the legislative proceedings that led to its enactment. The suspension of the commencement of the law can be done only by a new legislative act of the Knesset, or by a judicial decision.

21. The petitioner asked, within the framework of one of the remedies sought in the petition, that we order the Knesset Speaker to hold a revote for the vote in which it was discovered that there was an unlawful vote from the seat of MK I. Gavrieli. He also asked that we order the Knesset Speaker to re-examine the method of voting in the Knesset, in order to prevent cheating. As we have seen, in some of the cases the Knesset Speaker ordered a revote (in the case of MK Gurolevsky's voting, and in the case where Minister Katz's vote was recorded, even though it was not he who pressed the voting buttons). In other cases, a revote was not held (the voting on behalf of MK I. Gavrieli, who was not in the House, and the voting on behalf of MK E. Yatom). This matter falls within the discretion of the Knesset Speaker during the voting process. This court will not exercise judicial review of this decision, which is entirely an issue of the internal management of the Knesset's business. Of course, the absence of a revote may lead — when the invalid votes affect the outcome — to a decision that the validity of the law is prejudiced. In such a case, the judicial review addresses the validity of the law, and not the discretion of the Knesset Speaker. As to the re-examination of the voting system, this matter too falls within the framework of the internal management of Knesset affairs, with regard to which judicial review is not exercised. I will go further and say that from the material submitted to us on the matter subject to our review, we see that the Knesset Speaker acted decisively, quickly and efficiently with regard to the serious phenomenon that arose. A complaint was filed with the Ethics Committee of the Knesset, and this imposed sanctions on MK Gurolevsky. Instructions were given to carry out a comprehensive investigation of the voting and the scope of the irregularities that occurred. Basic principles concerning the voting were revised and reviewed. There was full cooperation with the police investigators who were asked to investigate the incident on the instructions of the Attorney-General. Before the petition was

filed, a tender was published for the supply, installation and assimilation of a new advanced electronic voting system. It follows that there is no basis for the allegations against the Knesset Speaker with regard to his conduct in this matter.

22. The petitioner also named the Minister of Finance as a respondent in the petition (the second respondent). It was argued that he should refrain from carrying out acts based on the Economic Recovery Law. In view of our conclusion that there is no defect in the validity of the law, this part of the petition should be dismissed. We should add that even if we were of the opinion that there is a defect in the validity of the law, the remedy for that would not be that the Minister of Finance should refrain from putting the law into operation. As long as the Economic Recovery Law has not been cancelled — whether by an act of legislation of the Knesset or by a constitutive declaration of the court (within the framework of the rules of relative voidance) — the law remains valid, and the Minister of Finance must put it into operation on the basis of that assumption. Of course, a law frequently gives the responsible minister some scope of discretion with regard to its operation. Within the framework of this discretion, it is sometimes possible to wait for a judicial determination with regard to the validity of the law, if a serious complaint is made in this regard. As aforesaid, in the case before us the question of the validity of the law was determined shortly after the legislative acts, and therefore the exercising of discretion by the Minister of Finance in this regard has been resolved in view of our conclusion that the law is valid in every respect.

23. Finally, the petitioner asked us to order the Attorney-General (the third respondent) to start a thorough investigation into the whole affair. From the statement of the Attorney-General we see that an instruction to this effect was given (already on 18 June 2003). Therefore this part of the petition has been satisfied.

For these reasons, we decided (on 31 July 2003) to dismiss the petition.

Justice A. Grunis

I agree.

Justice S. Joubran

I agree.

Petition denied.

30 Av 5764.
17 August 2004.