HCJ 2144/20
HCJ 2145/20
HCJ 2169/20
HCJ 2171/20
HCJ 2175/20

Petitioner in HCJ 2144/20:	**Movement for Quality Government in Israel**
Petitioner in HCJ 2145/20:	**"Hozeh Hadash" R.A.**
Petitioner in HCJ 2169/20:	**Association for Progressive Democracy**
Petitioners in HCJ 2171/20:	**1. Blue and White Faction** **2. MK Avraham Nissenkorn** **3. Labor-Meretz Faction**
Petitioners in HCJ 2175/20:	**1. Yisrael Beiteinu** **2. MK Oded Forer**
	v.
Respondents in HCJ 2144/20:	**1. Speaker of the Knesset** **2. The Knesset** **3. Knesset Legal Advisor** **4. Likud Knesset Faction**
Respondents in HCJ 2145/20:	**1. Speaker of the Knesset** **2. Knesset Legal Advisor** **3. Attorney General** **4. The 34th Government of Israel** **5. Likud Faction**
Respondents in HCJ 2169/20:	**1. Speaker of the Knesset** **2. Likud Faction**
Respondents in HCJ 2171/20:	**1. Speaker of the Knesset** **2. The Knesset** **3. Likud Faction**
Respondents in HCJ 2175/20:	**1. Speaker of the Knesset** **2. The Knesset** **3. Knesset Legal Advisor** **4. Likud Faction**

Attorneys for the Petitioners in HCJ 2144/20:	Eliad Shraga, Adv., Tomer Naor, Adv., Hiday Negev, Adv.
Attorney for the Petitioners in HCJ 2145/20:	Yuval Yoaz, Adv.
Attorney for the Petitioner in HCJ 2169/20:	Yifat Solel, Adv.
Attorneys for Petitioners 1-2 in HCJ 2171/20:	Shimon Baron, Adv., Eran Marienberg, Adv., Oded Gazit, Adv.
Attorney for Petitioner 3 in HCJ 2171/20:	Omri Segev, Adv.
Attorney for the Petitioner in HCJ 2175/20:	Eitan Haberman, Adv.
Attorneys for Respondents 1-3 in HCJ 2144/20; Respondents 1-2 in HCJ 2145/20; Respondent 1 in HCJ 2169/20; Respondents 1-2 in HCJ 2171/20; Respondents 1-3 in HCJ 2175/20:	Eyal Yinon, Adv., Avital Sompolinsky, Adv.
Attorney for the Respondent In HCJ 2145/20:	Nahi Benor, Adv.
Attorneys for Respondent 4 in HCJ 2144/20; Respondent 5 in HCJ 2145/20; Respondent 2 in HCJ 2169/20; Respondent 3 in HCJ 2171/20; Respondent 4 in HCJ 2175/20:	Avi Halevi, Adv., Michael Rabello, Adv.

Israeli Supreme Court cases cited:

[1] HCJ 4044/95 *Porat v. Speaker of the Knesset*, IsrSC 49(4) 177 (1995)

[2] HCJ 652/81 *M.K. Yossi Sarid v. Chairman of the Knesset, Menachem Savidor*, IsrSC 36(2) 197 (1982) [https://versa.cardozo.yu.edu/opinions/mk-sarid-v-chairman-knesset]

[3] HCJ 8815/05 *Landstein v. Spiegler*, (Dec. 26, 2005)

[4] HCJ 7510/19 *Or-Cohen v. Prime Minister*, (Jan. 9, 2020)

[5] HCJ 4374/15 *Movement for Quality Government v. Prime Minister*, (March 27, 2016) [summary: https://versa.cardozo.yu.edu/opinions/movement-quality-government-v-prime-minister]

[6] HCJ 706/19 *Freij v. Speaker of the Knesset*, (March 28, 2019)

[7] HCJ 3747/19 *Aviram v. Knesset of Israel*, (June 18, 2019)

[8] HCJ 1843/93 *Raphael Pinchasi, Deputy Minister and Member of Knesset v. Knesset of Israel*, IsrSC 49(1) 661 (1995)

[9] HCJ 2704/07 *Movement for Governmental Fairness v. Knesset Committee*, (Jan. 28, 2008)

[10] HCJ 1179/90 *Ratz Faction – The Movement for Civil Rights and Peace v. MK Ovadia Ali, Deputy Speaker of the Knesset*, IsrSC 44(2) 31 (1990)

[11] HCJ 3132/15 *Yesh Atid Party led by Yair Lapid v. Prime Minister of Israel*, (April 13, 2016) [https://versa.cardozo.yu.edu/opinions/yesh-atid-party-v-prime-minister]

[12] HCJ 142/70 *Shapira v. Bar Association District Committee*, IsrSC 25(1) 325 (1971)

[13] HCJ 4805/07 *The Center for Jewish Pluralism – The Movement for Progressive Judaism in Israel v. Ministry of Education*, IsrSC 62(4) 571 (2008) [https://versa.cardozo.yu.edu/opinions/center-jewish-pluralism-v-ministry-education]

[14] HCJ 4742/97 *Meretz Faction in the Jerusalem Municipality v. Minister for Religious Affairs*, (Dec. 15, 1998)

Supreme Court of the United Kingdom cases cited:

[15] *R. v. The Prime Minister; Cherry v. Advocate General for Scotland*, UKSC 41 (2109)

The Supreme Court sitting as High Court of Justice

Before: President E. Hayut, Deputy President H. Melcer, Justice N. Hendel, Justice U. Vogelman, Justice I. Amit

Petitions for order nisi

Partial Judgment

(March 23, 2020)

President E. Hayut:

1. The five petitions before the Court are directed against Respondent 1, the acting Speaker of the Knesset (hereinafter: the Speaker), not to include the election of a permanent Speaker for the 23rd Knesset on the Knesset plenary agenda, although a request in this matter was presented to him by Knesset factions representing 61 Members of Knesset.

At the outset, I would note that some of the petitions requested additional remedies concerning the appointment of an Arrangements Committee, and in regard to the application of the provisions of the Public Health (New Coronavirus) (Home Isolation and Other Directives) (Temporary Provision) Order, 5790-2020 (hereinafter: the Public Health Regulations) to the activity of the Knesset, due to the outbreak of the coronavirus in Israel. However, as we noted in our decision from yesterday (March 22, 2020), it would appear that those remedies became superfluous when it became clear from the responses of the relevant respondents and the explanations of the Knesset Legal Advisor in the hearing that the appointment of the Arrangements Committee is on the agenda of today's plenary session, and the Public Health Regulations will not prevent convening the Knesset plenum and committees. Therefore, we ordered an updated notice in regard to these two issues, and the hearing before the Court focused upon the question of convening a plenary session for the purpose of electing a permanent Speaker.

This partial judgment will, therefore, address this question alone.

Factual and historical background

2. Elections for the 23rd Knesset were held on March 2, 2020, and it was set to be sworn in on March 16, 2020. In anticipation of the swearing in of the Knesset, several factions, comprising 61 Members of Knesset, requested that the Speaker of the Knesset include on the agenda of that session, inter alia, a motion for the election of a permanent Speaker for the 23rd Knesset. The Speaker refused to do so, giving as his reason that "the immediate need of the State of Israel is a broad unity government […]", and added that "hasty political moves, like electing a permanent Speaker of the Knesset and the enactment of controversial legislation, are intended to put an end to the possibility of the unity that the nation desires".

On March 15, 2020, the attorneys of the Blue and White faction requested that the Knesset Legal Advisor express his opinion as to the Speaker's refusal to accede to their request to include the matter of electing the Speaker on the Knesset's agenda. The following day, the attorneys of the Blue and White faction renewed their request to the Speaker of the Knesset and the Knesset Legal Advisor, and insisted that, in their opinion, the Speaker did not have the authority to prevent a debate on this matter. In a letter sent by the Knesset Legal Advisor to the Speaker of the Knesset on March 18, 2020, the Knesset Legal Advisor addressed the importance of convening the Arrangements Committee, but refrained from addressing the issue of appointing a permanent Speaker.

3. That led to the submission of the petitions before the Court, which were submitted by The Movement for Quality Government, the "Hozeh Hadash" Association, The Association for Progressive Democracy, the Blue and White faction and the Labor-Meretz faction, and the Yisrael Beiteinu faction (hereinafter, collectively: the Petitioners). All of the petitions are directed against the acting Knesset Speaker, MK Yoel (Yuli) Edelstein, and part against the Knesset and the Knesset Legal Advisor, Advocate Eyal Yinon. One petition (HCJ 2145/20) was also directed against the Attorney General and the Government. At its request, the Likud faction (hereinafter: the Likud) was joined as a respondent to the petitions.

Arguments of the parties

4. The Petitioners argue that the acting Speaker has a personal conflict of interests, is acting unreasonably, and that his decision not to include the election of a permanent Speaker of the

Knesset on the Knesset agenda is tainted by extraneous considerations. The Petitioners note that sec. 2(b) of the Knesset Rules of Procedure, which establishes that the Speaker of the Knesset be elected no later than the date on which the Knesset convenes for the purpose of establishing the Government, defines the final date for the election of the permanent Speaker, and emphasize that the current Speaker, who acts by virtue of the Knesset continuity rule, is frustrating the will of the majority of the Members of Knesset, and is thereby undermining public trust in the organs of government and the principle of separation of powers.

5. As opposed to this, Respondents 1-3 – the acting Speaker, the Knesset, and the Knesset Legal Advisor – argue that this Court should not intervene in the Speaker's decision, and that in accordance with sec. 2(b) of the Knesset Rules of Procedure, the Speaker can be elected at any stage between the convening of the Knesset and the establishing of the Government. However, the positions of the Speaker and of the Legal Advisor diverged on this point. According to the Speaker, he enjoys discretion in deciding upon the agenda of the plenum, and he therefore acted within the bounds of his authority, reasonably, and in accordance with custom when he took account of considerations related to the coalition negotiations, particularly in light of the outbreak of the coronavirus and the national state of emergency. As opposed to that, the Knesset Legal Advisor is of the opinion that while the Speaker is, indeed, granted discretion in regard to setting the agenda of the plenum, and that the Knesset Rules of Procedure require the election of a permanent Speaker prior to the establishment of the Government, but he adds that the current Speaker holds office by virtue of the continuity doctrine, and "as a temporary trust" until the election of a permanent Speaker. Therefore, inasmuch as a majority of the Members of Knesset requests that the Knesset elect a permanent Speaker immediately, the margins of the Speaker's discretion in regard to postponing the date contract with the passage of time.

The Likud is of the opinion that the Speaker acted in accordance with the law and the Knesset Rules of Procedure, and that the Court should not intervene in the exercise of his discretion.

6. In the hearing held on March 22, 2020, the Knesset Legal Advisor though it appropriate to point out that electing a permanent Speaker of the Knesset before clarifying the balance of political power and the future composition of the Government could lead to a "governance problem" that could severely impact the functioning of the Government if it ultimately transpires that the

permanent Speaker of the Knesset is a member of the opposition. However, the Knesset Legal Advisor explained in the course of his arguments that at present, and in order to prevent "serious mishaps", we should wait for "an additional, short period", and no more. In the hearing, the Attorney General, who did not address the issue of appointing a permanent Speaker in his written response, also pointed out that, in his view, once 61 Members of Knesset asked that the subject be placed on the agenda, the Speaker must accede to the request "as soon as possible".

Discussion and decision

7. The rule is that the authority to establish the Knesset's agenda and the date of its deliberations is granted to the Speaker (see sec. 25(b) of the Knesset Rules of Procedure). These are clearly "internal parliamentary" matters, and as a rule, this Court refrains from intervening in them (see: HCJ 4044/95 *Porat v. Speaker of the Knesset* [1] 179), except in special cases that threaten harm to "the fabric of democratic life" (*ibid*.) or to the fundamental structure of our parliamentary regime (HCJ 652/81 *Sarid v. Chairman of the Knesset* [2]).

Does the Speaker's refusal to put the election of the permanent Speaker of the 23rd Knesset on the plenum's agenda constitute one of those special cases in which there is a fear of harm to "the fabric of democratic life" or to the fundamental structure of our parliamentary regime?

That is the central question presented for decision in the petitions before the Court.

8. These are the primary legal provisions relevant to the matter:

Section 20(a) of Basic Law: The Knesset provides that:

> The Knesset shall elect from among its members a Speaker and Deputy Speakers. Until the election of the Knesset Speaker, the Speaker of the outgoing Knesset shall continue to serve, should he have been reelected as a Member of the Knesset, and if he has not been reelected the most veteran Knesset Member, who is not the Prime Minister, a Minister or Deputy Minister, shall serve as acting Speaker. In this article, "most veteran" – whoever has served in the Knesset for the longest period, consecutively or

> intermittently, and from among those with equal seniority – the eldest among them.

The language of this provision was established in an amendment to the Basic Law in 2016. Prior to that amendment, the most veteran Knesset Member served as acting Speaker even if the Speaker of the outgoing Knesset was reelected as a Member of Knesset. The Explanatory Notes to the Bill noted that the amendment was intended to apply the continuity principle to the office of Speaker of the Knesset, in a manner similar to that set out in sec. 30 of Basic Law: The Government in regard to the continuity of the Government.

Section 2(b) of the Knesset Rules of Procedure, mentioned above, further establishes in regard to the election of the Speaker of the Knesset:

> The Speaker shall be elected no later than the date on which the Knesset convened for the purpose of establishing the Government, as stated in article 13 of Basic Law: The Government. Should the election of the Knesset Speaker be scheduled for the same date set for the sitting for the purpose of establishing the Government, the Speaker shall be elected first.

Section 2(b) sets a timeframe according to which the *latest* date for the election of the Speaker of the Knesset after its convening is the date of establishing the Government. This provision leaves it to the discretion of the acting Speaker to decide upon the date within this timeframe for putting the election of the permanent Speaker on the agenda of the plenum.

As opposed to the position of Respondent 1, we are of the opinion that, given the fact that we are concerned with an acting Speaker serving by virtue of the continuity rule, and given that the matter directly concerns him, the discretion afforded him in this regard is not broad, but rather very limited and defined. This is particularly true given that over the course of the last year, there were three elections, and Respondent 1 has, in practice, served as acting Speaker since the convening of the 22nd Knesset.

9. Indeed, since the dissolution of the Knesset on Dec. 26, 2018, we are locked in an exceptional governance situation that is the result of the failure of the public's representatives to constitute a permanent Government in Israel even after three rounds of elections that took place on April 9, 2019, on Sept. 17, 2019, and on March 2, 2020. On April 30, 2019, following the

elections for the 21st Knesset, at the time of swearing in of the Knesset, Respondent 1 was elected to serve as Speaker by a majority of 101 Members of Knesset and without opposition. He now serves as acting Speaker by virtue of the continuity principle under sec. 20(a) of Basic law: The Knesset, after the 21st Knesset and the 22nd Knesset ended their short terms and dissolved. As the Knesset Legal Advisor stated in his response to the petitions, the Speaker holds his office "as a temporary trust" until the election of a permanent Speaker. This exceptional situation necessarily affects the scope of the Speaker's authority and his discretion. Just as an interim Government acting by virtue of the continuity principle is required to act cautiously and with restraint (see: HCJ 8815/05 *Landstein v. Spiegler* [3], para. 9 of the opinion of Justice A. Procaccia; HCJ 7510/19 *Or-Cohen v. Prime Minister* [4], para. 8 of my opinion), so, too, the acting Speaker. The importance of caution and restraint on his part becomes particularly clear in view of the character of the role of the Speaker, which obligates him to impartiality and stateliness[1] (AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL: INSTITUTIONS, 716 (2005) (hereinafter: RUBINSTEIN & MEDINA) (Hebrew); AMNON RUBINSTEIN & RAANAN HAR-ZAHAV, COMMENTARY ON BASIC LAW: THE KNESSET, 80 (1993) (hereinafter: RUBINSTEIN & HAR-ZAHAV) (Hebrew)). In the present case, there is no avoiding the conclusion that the Speaker's decision not to bring the matter of electing a permanent Speaker for a plenary vote is incompatible with the scope of his authority as acting Speaker, and it deviates from the margin of discretion granted to him.

10. The defect in this conduct primarily inheres in the fear that it frustrates the will of the electorate. As we know, "the elections for the Knesset constitute the implementation of the basic principle of decision-making in a democratic system of government – decision by the majority" (RUBINSTEIN & MEDINA, p. 557). The essence of the democratic process is the possibility of translating the votes received by the members of the Knesset, as the elected representatives of the people, into political influence. In the present matter, the house factions, comprising 61 Members of Knesset, seek to exercise their political power in order to try to elect a permanent Speaker for the 23rd Knesset, a role whose importance and centrality to the administration of the affairs of the Knesset requires no elaboration (see sec. 6 of the Knesset Rules of Procedure). Therefore, intervention in this effort of the majority of the Members of Knesset constitutes a form of harm to

[1] The Hebrew term is *mamlakhtiyut*, which lacks a felicitous English equivalent.

the decision of the electorate. In this regard, as the legal advisors of the Knesset and the Government noted, the passage of time after the date of the convening of the Knesset is of significance given the timetables for the establishing of a Government as set out in Basic Law: The Government. Indeed, "foot dragging" in putting the matter on the agenda might lead to the actual frustration of the election of a permanent Speaker of the 23rd Knesset.

11. Moreover, the Speaker's position that the election of a permanent Speaker is contingent upon the efforts to form a Government puts the cart before the horse. The Knesset is the sovereign. The Knesset is not "the Government's cheerleading squad" in the vivid language of Deputy President E. Rubinstein in HCJ 4374/15 *Movement for Quality Government v. Prime Minister* [5], para. 142). Indeed, in the Israeli system of government, the Government enjoys a majority in the Knesset, and it has significant ability to influence the Knesset's functioning thereby and by virtue of the practice of coalition discipline. But that absolutely does not mean that it can, thereby, take steps that would constitute a substantive erosion of the independence of the Knesset. Respondent 1 explained his refusal by pointing out, inter alia, that Israel's citizens are hoping that, finally, a Government will be established after three rounds of elections. Certainly, those words correctly express the public sentiment that it would be proper that the leaders wake up and save the "ship of governance" from the dead end in which it is trapped, and this is, indeed, the immediate need, and all the more so in these corona times that have lately befallen us. But that hope – that we all share – cannot serve as a reason for the Speaker's refusal to bring the election of a permanent Speaker to a vote, inasmuch as by doing so, he places a political consideration regarding the forming of a Government at the heart of his refusal – however it may be constituted. Such a political consideration has no place in the margin of discretion granted to him on the question of whether or not to include motions for the agenda of the Knesset plenum, and all the more so when the matter is the election of the Speaker himself.

The fact that we are currently in a governmental transition period in which a Government that enjoys the confidence of the Knesset has not yet been formed, also reinforces this conclusion. It may be presumed that the Members of Knesset who seek to place the matter of the election of a permanent Speaker before the plenum are aware of the significance and implications of taking this step. Nevertheless, they ask, and ask again to bring the matter before the plenum. The refusal to place the election of a permanent Speaker on the agenda of the Knesset plenum leads to the result

that the members of the Knesset are prevented from exercising their discretion on this matter, without regard for the results of the vote.

12. The customary, accepted tradition of the Knesset's work also carries weight in the present matter (HCJ 706/19 *Freij v. Speaker of the Knesset* [6], para. 9 of my opinion). The Knesset Legal Advisor noted that, in practice, most Knessets elected a Speaker on the day that the Knesset convened (para. 36 of the response of Respondents 1-3; and see: RUBINSTEIN & HAR-ZAHAV, p. 30). In this regard, it would not be superfluous to point out that one of the rationales grounding the bill for amending Basic Law: The Knesset, which applied the continuity rule to the Speaker, was that the permanent Speaker was customarily elected in close proximity to the convening of the new Knesset, and generally at the first plenary session. It was therefore decided that it did not make sense to appoint "the most veteran Knesset Member" as acting Speaker for such a short period, and it would be better to apply the continuity rule to this office, as well.

13. The Knesset Legal Advisor further raised the fear of a "governance problem" that might ensue if a Speaker were elected at present, and it would later transpire that he was a member of the opposition. At present, the possibility of the realization of that fear is unclear. In any case, it may be presumed that whoever may be elected to serve as the permanent Speaker of the Knesset will carry out his office in a stately manner, in accordance with the law, custom and procedures established by the Knesset. That will also be the case even if the members of the party he represented will sit in the opposition. That is how Respondent 1 acted over the years, and that, in general, is how his predecessors acted in the past. Indeed, it was not without reason that Basic Law: The President of the State establishes that if the position of President of the State is vacated, and as long as a new President has not assumed office, the Speaker of the Knesset shall serve as acting President of the State (sec. 23(a) of Basic Law: The President of the State), which teaches us that the stately character of the office of Speaker of the Knesset is second only to that of the President of the State.

14. Pursuant to the hearing held yesterday, March 22, 2020, and given the position of the Knesset Legal Advisor that we should only wait an additional, short period before bringing the matter of the election of a permanent speaker to a vote, and given the position of the Attorney General that it should be done as soon as possible, we asked for the Speaker's position in regard to his willingness to put the matter on the agenda of the Knesset as soon as possible, and no later

that Wednesday, March 25, 2020 (see our decision of March 23, 2020). The Speaker responded this evening that he is of the opinion that the intervention of this Court in the discretion of the Speaker of the Knesset to set the agenda of the plenum and bring the matter of his election to a vote is a precedent-setting intervention in the political agenda and in his discretion that is improper at this time. He noted that due to the special circumstances, he is hard pressed to state a precise date, but that he intends to place the matter on the Knesset's agenda when the political situation becomes clear.

15. In summary – the Speaker's continued refusal to allow the Knesset plenum to vote on the election of a permanent Speaker undermines the foundations of the democratic process. It clearly harms the status of the Knesset as an independent branch of government and the process of governmental transition, and this all the more so as the days pass since the swearing in of the 23rd Knesset. Therefore, in these circumstances, there is no recourse but to conclude that we are concerned with one of those exceptional cases in which the intervention of this Court is required in order to prevent harm to our parliamentary system of government.

I would therefore recommend to my colleagues that we issue an order absolute instructing the Speaker of the Knesset to convene the Knesset plenum as soon as possible for the purpose of electing a permanent Speaker for the 23rd Knesset, and no later than Wednesday, March 23, 2020.

Justice Neal Hendel:

I concur.

Justice I. Amit:

I concur in the decisive opinion of my colleague the President, Justice E. Hayut.

1. The timeframe is short, and I will, therefore, only add a few words on the issue before us, which will, no doubt, give academic scholars a broad basis for discussion.

> Truth be told, we are treading constitutional paths that our feet, and those of our predecessors, have not yet trodden since the establishment of the

> State to the present day. The new reality, perhaps anomalous, that is suddenly upon us gives rise, by its very nature, to constitutional issues that have not yet been elucidated (my opinion in HCJ 3747/19 *Aviram v. Knesset* [7].

The above was stated in regard to the 21st Knesset, for which elections were held on April 9, 2019. A year has passed at a stroke and seems but a few days, and we now stand at the outset the 23rd Knesset. In the year that passed, we witnessed two other rounds of elections, but the political instability remains as it was, and has even increased. The various rifts in society have broadened, and the legal and constitutional fog has thickened. And if that were not enough, we are in the midst of the rising storm of the coronavirus, whose consequences are still too early to foresee.

We say this as a reminder that in difficult times we must attend to the rims and spokes of the carriage so they not fall apart. Particularly in this sensitive, difficult period, we must not undermine the very existence of the system, nor deviate from the written and customary rules of the game.

2. Israel is a parliamentary democracy that employs a proportional, national system of elections that leads to a multi-party system. After the elections, the Knesset is sworn in, and normally it immediately activates its "operating system". The parliamentary activity is primarily regulated by the Knesset Rules of Procedure. However, in the normative fabric of the Knesset's activity, the Rules of Procedure constitute secondary legislation (see, e.g., HCJ 1843/93 *Pinchasi v. Knesset* [8], 712. For more on the status of the Knesset Rules of Procedure, see: Ariel Bendor, *The Constitutional Status of the Knesset Rules of Procedure*, 22 MISHPATIM 571, 574 (5754) (Hebrew)). Thus, the Rules of Procedure are of a lower normative status than the Knesset Law, 5754-1994 (hereinafter: the Knesset Law), which, in turn, is lower that Basic Law: The Knesset. The strength and overarching status of sec. 20(a) of Basic Law: The Knesset stand above sec. 2(b) of the Knesset Rules of Procedure, which also suffices in establishing the latest date for electing the Speaker of the Knesset ("no later than the date on which the Knesset convened for the purpose of establishing the Government"). The drafter of the Rules of Procedure allowed for postponing the election of the Speaker to this late date, but certainly did not intend to frustrate the election of the Speaker earlier than that date,

3. In its plain meaning, democracy is "majority rule". However, majority rule is not omnipotent. In the area of legislation, majority rule is subject to limitations deriving from the need to preserve the fundamental rights of people and citizens. In parliamentary activity, majority rule cannot trample the rights of the parliamentary minority (see, in detail, Yigal Marzel, *The Constitutional Status of the Parliamentary Opposition*, 38 MISHPATIM 217 (2008) (Hebrew)). This is the source of the Court willingness to review even "internal" decisions of the legislature in order to protect the right of the minority, despite the judicial restraint that it exercises in regard to intervention in Knesset decisions.

In various legal fields, the legislature protects the majority against tyranny of the minority (see, e.g., the Land Law, 5729-1969, sec. 30(b), which allows the majority owners of common property to make any decision in regard to the administration and normal use of the property, and sec. 159(a) that permits two-thirds of the apartment owners to decide upon the installation of an elevator on the common property). The present petitions entangle this Court in a situation that was not previously imagined. The political "market forces" did not do their job, and the Petitioners ask the Court to extend relief to the Parliamentary *majority* and protect the institutional, "core" right of the majority to realize its rights. The harm to the parliamentary majority that seeks to elect a Speaker of the Knesset who "in the fulfilment of his duties represents all the factions of the Knesset and stands at the head of the Knesset" (HCJ 2704/07 *Movement for Governmental Fairness v. Knesset Committee*, [9]) hereinafter: the *Movement for Fairness* case) constitutes harm to the fabric of democratic life and to the fundamental structure of our parliamentary regime (HCJ 652/81 *Sarid v. Speaker of the Knesset* [2], 204).

4. My colleague the President quoted the Speaker in his own words, in para. 11 of her opinion, the explanation the Speaker offered for his refusal to put the election of a Speaker of the 23rd Knesset on the agenda, and in greater detail, his position that the matter would frustrate the establishment of a unity Government. Sometimes, political coalition considerations in the election, appointment or removal of some Member of Knesset or another are legitimate, internal parliamentary considerations in which this Court will not intervene (the *Movement for Fairness* case, para. 7). That is not so in regard to the political consideration that moved the Speaker in this case – which is contingent upon the hope for the establishment of a unity Government. This consideration is not relevant (and speaking for myself, I had difficulty understanding the causal

connection between the election of a Speaker and frustrating the possibility of establishing a unity Government). The Government is one thing, and the Knesset is another. One touches upon the other, but they remain separate branches. We shall return to fundamental principles – the Government draws its vitality from the Knesset, and not the reverse. All the more so, a Government that has not yet formed cannot control the Knesset and order it to "cool its engines" until it is formed, if at all.

5. At this point, we arrive at the fear expressed by the Knesset Legal Advisor of electing a "contrarian" Speaker, if it should transpire that his faction will be part of the opposition. But we have already learned that between certain and perhaps, certain is preferred.[2] Opposite the fear that perhaps there may be a situation in the future of a "contrarian" Speaker, stands the certainty that the present situation, in which the majority is improperly prevented from exercising its parliamentary power.

6. The Speaker's argument, supported by the Likud faction, is that the authority to decide upon the Knesset's agenda and the dates of its sessions stands at the core of the Speaker's discretion, as a clearly internal parliamentary matter that this Court should not address (and compare HCJ 4064/95 *Porat v. Speaker of the Knesset* [1], 179).

I am not of that opinion. The present petitions do not concern some "regular" decision that a party wishes to bring to put on the Knesset's agenda (on the Court's refraining from ordering the Knesset to put certain legislative bills on its agenda, or refrain from doing so, see, for example: HCJ 1179/90 *Ratz Faction v. MK Ovadia Ali* [10]; and see the many examples in RUBINSTEIN & MEDINA, 238 fn. 275 (6th ed. 2005)).

The present decision is of an entirely different type. We are concerned with a "royal" decision that concerns the election of the mover and shaker of the Knesset's activity, who conducts the parliamentary orchestra with stateliness. This Court's intervention is required in order to allow the parliamentary majority to realize its right to elect the Speaker. From here on, the Knesset institutions will act according to their wisdom, in accordance with the rules established in the normative fabric mentioned above (Basic Law: The Knesset, The Knesset Law, and the Knesset Rules of Procedure). Our judgment is not a form of intervention, and is not, Heaven forfend, a

[2] Ed: See, e.g., TB Ketubot 12b.

"takeover" of the Knesset's agenda, but merely a buttressing of the status of the Knesset as an independent branch of government, separate from the Government, and *a fortiori* from an interim government over the course of three rounds of elections.

Justice U. Vogelman:

Section 20(a) of Basic Law: The Knesset establishes that the Knesset shall elect a Speaker from among its members. A majority of the Members of Knesset request that the Knesset be convened to elect a Speaker. Section 2(b) of the Knesset Rules of Procedure establishes the latest date for the election of a Speaker – no later than the day on which the Knesset convenes for the purpose of establishing the Government. Is the Speaker of the Knesset permitted to exercise his authority to set the agenda of the of the Knesset, by virtue of sec. 25 of the Rules of Procedure, in a manner that would prevent proceedings for the election of the Speaker, due to his view that putting the matter on the agenda before the conclusion of attempts to form a unity Government would harm the efforts to achieve that goal? Do these circumstances constitute a cause for the intervention of this Court in the exercise of the Speaker's authority to set the agenda of the Knesset plenum? These are the questions presented for our decision.

I concur in the detailed opinion of my colleague President E. Hayut and her conclusions.

The criterion for judicial review of decisions of the Speaker of the Knesset are well known. As has been held: "The authority to set the agenda of the Knesset and the dates of its sessions is given to the Speaker of the Knesset. This is clearly an 'internal parliamentary' matter. This Court does not exercise its authority in a matter such as this except in special cases in which there is a fear of harm to the fabric of democratic life" (HCJ 4044/95 *Porat v. Speaker of the Knesset* [1], 179).

The authority to set the Knesset's agenda allows for arranging "internal parliamentary" life, while addressing the quantity and substance of the subjects before the Knesset. This authority to arrange is not authority to ignore a request by a majority of the Members of Knesset to carry out a statutory procedure required by a Basic Law due to a conceptual or political view held by the acting Speaker. In a situation in which a majority of Knesset Members request to hold an election for the office of Speaker in the framework of sec. 20(a) of Basic Law: The Knesset, the election

process should be permitted to proceed without delay, and it should not be frustrated by reason of the acting Speaker's view that electing a Speaker will harm the attempt to form a unity Government. This all the more so in circumstances of an acting Speaker who holds office by virtue of a continuity provision (and who was also not elected by the 22nd Knesset). The authority entrusted to the acting Speaker does not permit him to refrain from placing the matter of the election on the Knesset agenda, and the manner of exercising it in the said circumstances inflicts real harm to the fabric of democratic life by not permitting the majority of Knesset Members to carry out a procedure anchored in Basic Law: The Knesset, and that is required by the election of a new Knesset.

In my opinion, as well, the intensity of this harm grounds a cause for an order absolute, as recommended by my colleague the President.

Deputy President H. Melcer:

1. I concur in the opinion of my colleague the President, which – due to time constraints – constitutes "a little than can hold a lot" [MIDRASH RABBA 5]. Nevertheless, I would like to add a few comments, inasmuch as the petitions before us raise important, unique issues that have not been addressed previously in Israeli constitutional law.

I will, therefore, focus, with the necessary brevity, upon the relevant principles of constitutional law and in comparative law, and by reference to a prior case that has implications for the matter before us.

The Knesset, which is one of the three, classic branches (the legislature, the executive, and the judiciary), has properly had its status anchored in Basic Law: The Knesset, which was the first among the Basic Laws constituted by the Knesset (see: AMNON RUBINSTEIN & RAANAN HAR-ZAHAV, COMMENTARY ON BASIC LAW: THE KNESSET (in the series COMMENTARY ON THE BASIC LAWS, (Itzhak Zamir, ed., 1993), pp. 25-28 (hereinafter: RUBINSTEIN & HAR-ZAHAV) (Hebrew)).

This is not the place for a survey of all of the functions of the Knesset and its powers, but it can be said, in general, that three primary roles were reserved to the Knesset:

A. Primary legislation.

B. Oversight of the functioning of the Government.

C. Its role as constituent assembly.

(see: RUBINSTEIN & HAR-ZAHAV, pp. 29-30).

3. Since the dissolution of the 20th Knesset and up to now, following the elections for the 23rd Knesset – the Knesset has barely exercised its legislative authority (not to mention its role as constituent assembly), and in practice, what it was supposed to do was to oversee the functioning of the Government, which, since the dissolution of the 20th Knesset, has become what is termed an "interim government".

4. The events that led to the petitions before us (and the petitions that preceded them and remain pending in HCJ 2109/20, 2135/20, and 2141/20) demonstrate the possibility of the Knesset being paralyzed, in practice, and unable to properly exercise even the said oversight authority.

Such a state of affairs is unacceptable, inasmuch as when an "interim government" is serving, which suffers form a "democratic deficit" (inter alia, because a no-confidence motion cannot be brought against it), the oversight functions of the Knesset should intensify, if only by virtue of the general duty of confidence that the Government owes the Knesset by virtue of sec. 3 of Basic Law: The Government (see: Rivka Weill, *Twilight Time: On the Authority of Caretaker Governments*, 13 MISHPAT UMEMSHAL 167 (2010) (Hebrew) (hereinafter: Rivka Weill); Yigal Marzel, *The Government's Duty of Confidence to the Knesset*, in FIDUCIARY DUTIES IN ISRAELI LAW (Ruth Plato Shinar & Joshua Segev, eds.) 135, 200-205 (2016) (Hebrew) (hereinafter: Yigal Marzel)).

5. If every "interim government" suffers from "democratic deficit", an "interim government" after elections suffers from the most severe deficit, inasmuch as the voters have had their say (see: Rivka Weill, p. 176). In such a case, the Knesset, which under sec.1 of Basic Law: The Knesset is *the house of representatives of the state*, should oversee the "interim government" more closely, and act in accordance with the will of the *majority of its members*, while respecting the rights of the minority.

6. Therefore, the question before us is whether the acting Speaker, who holds his office only by virtue of the continuity principle under sec. 20 of Basic Law: The Knesset, is permitted – after the elections – not to put on the agenda a motion by 61 Members of Knesset to elect a new Speaker.

7. The Speaker is of the opinion that the matter falls within the scope of his discretion to set the agenda for Knesset sessions, and he is allowed to refuse such requests of him by virtue of sec. 2(b) of the Knesset Rules of Procedure until such time as the Knesset convenes to establish a Government, as stated in sec. 13 of Basic Law: The Government (in the 22nd Knesset, this period continued though the entire term). In this regard, he argues, as a reason for the delay, that the need to form a unity government might be harmed, in his view, if a Speaker were elected now.

8. As opposed to this, the Petitioners are of the opinion that such conduct is undemocratic, hampers the Knesset's activity that the Speaker is supposed to direct, particularly at this special time when urgent legislative and oversight actions are required in regard to the corona problem that has befallen us, and conjecture that the current Speaker is acting on the basis of personal considerations (the fear that he might not be reelected).

9. It would seem to me that the attempt to frustrate the will of the *majority* of Knesset Members to bring about the election of the Speaker immediately does not meet the legal tests.

This is correct in principle, as explained by my colleague the President in her opinion, and my other colleagues, and is particularly correct at present, when the Knesset is required to act energetically in its legislative and oversight roles, and the Speaker is the one who must navigate its activity. It also violates the tradition of a proper transfer of governance, when necessary.

A comparative law examination also leads to this result, as I will immediately address.

10. In Great Britain, on the eve of Brexit, the Prime Minister sought to prorogue Parliament (from Sept. 9, 2019 to Oct. 14, 2019) so that it would not prevent him from completing the separation process from the European Union that he wished to advance (which was meant to end on Oct. 31, 2019). He therefore turned to the Queen (who holds the authority to order such a suspension), and she agreed, on the basis of the representations of the Prime Minister.

Various opponents of that suspension, among them Members of Parliament, filed petitions against the suspension to the Supreme Court of the United Kingdom. An expanded bench of the Supreme Court held, *per* President Lady Hale and Deputy President Lord Reed, that there was *no* authority to prorogue Parliament (beyond the recess periods, which do not halt all Parliamentary business) (see: *R. v. The Prime Minister; Cherry v. Advocate General for Scotland* [15] (hereinafter: *R. v. Prime Minister*). This affair is similar to our own (although not identical,

inasmuch an Arrangements Committee was appointed, and other temporary committees are meant to be established), and the reasons given there are appropriate here, as well.

11. In the United States, impeachment proceedings are held before the Senate, and by virtue of the American Constitution, the Chief Justice presides, rather than the Vice President who usually presides over the Senate. The main reason for this is the inherent conflict of interests of the Vice President in this regard, as he has a personal interest in the outcome of the proceedings (see: AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY, 5-13 (2012); and further see my opinion in HCJ 3132/15 *Yesh Atid v. Prime Minister* [11]).

12. The Knesset Legal Advisor was of the opinion that the immediate election of a Speaker might lead to a "governance problem". Past experience would seem to demonstrate otherwise, and the example that will be presented below actually encourages the *independence* of the Knesset and the *required checks and balances*.

Once upon a time (and as we know, in constitutional law, past events – even if they were not presented for a decision by the Court—constitute persuasive precedents):

After the death of Speaker of the Knesset Yosef Sprinzak, in January 1959 (who served as Speaker since the establishment of the Knesset), the then ruling party (Mapai) sought to elect a member of that faction, Knesset Member Beryl Locker, to replace him. The leader of the opposition at the time, Member of Knesset Menachem Begin, together with his colleague Dr. Yohanan Bader, recommended that Member of Knesset Dr. Nahum Nir-Rafalkes of the Ahdut Ha'avoda party, who was an experienced and respected parliamentary jurist (and a member of the Mapai coalition) submit his candidacy for the office for the duration of the third Knesset, and he agreed. There was a contest, and in the end, the "Nir Coalition" won with the 53 votes of Herut, The General Zionists, Ahdut Ha'avoda, Mapam, The National Religious Party, and The Israeli Communist Party, while the Mapai candidate, MK Beryl Locker, received only 41 votes (The Progressive Party, which held seven seats, abstained).

Since then, the term "Nir Coalition" has become an idiom that describes a positive phenomenon in Israeli constitutional law, because that coalition proved that it was possible to nominate a candidate who was not acceptable to the ruling party, bring about his election, and *advance the independence of the Knesset* (see: DANNY KOREN & BOAZ SHAPIRA, COALITIONS:

ISRAELI POLITICS: 50 YEARS – 100 EVENTS, pp. 37. 257-258 (1997) (Hebrew); URI YIZHAR, BETWEEN VISION AND POWER: THE HISTORY OF THE AHDUT HA'AVODA-POALEI ZION PARTY, pp. 270-271 (2005) (Hebrew)).

13. Moreover, on a different note, the reason expressed by the Speaker to justify his position is given (if at all) to the person assigned to form the Government (whose faction is among the Petitioners), and not to the Speaker in his role as Speaker.

14. In view of all the above, intervention is required here, as it was in Great Britain in *R. v. Prime Minister*, for without it "the fabric of democratic life" and "the fundamental structure of our parliamentary regime" will be undermined, in the sense of the exceptions set forth in HCJ 652/81 *Sarid v. Speaker* [2].

15. I can but conclude with the hope that the lessons will be learned, and that we will not have to address petitions of this sort in the future.

It is therefore decided as stated in the opinion of the President to make an order absolute instructing that the Speaker of the Knesset must convene the Knesset plenum as soon as possible, for the purpose of electing a permanent Speaker of the 23rd Knesset, and no later than Wednesday, March 25, 2020.

Given this day, 27 Adar 5780 (March 23, 2020).

Supplementary Judgment

(March 24, 2020)

President E. Hayut:

Pursuant to our decision of March 22, 2020, we were today presented with an updated notice by Respondents 1-2.

As explained there, on March 23, 2020, the Knesset plenum decided upon the establishment of an Arrangements Committee. That committee convened and decided upon the establishment of a temporary Foreign Relations and Security Committee, as well as the establishment of a temporary Finance Committee, and a recommendation for establishing four additional, special committees was put before the Knesset plenum.

It was further explained that the Arrangements Committee held its first full session, using a communications and television system, and maintaining appropriate seating distance, and an opinion by the Knesset Legal Advisor on the subject of conducting debates and voting in the Knesset committees and the Knesset plenum during the period when the coronavirus restrictions are in place was appended.

In view of the details in the updated notice, the hearing on the said subjects is no longer required, and the petitions in that regard are dismissed without an order for costs.

Given this day, 28 Adar 5780 (March 24, 2020).

Judgment and Decision

(March 25, 2020)

President E. Hayut:

1. In the partial judgment we issued on March 23, 2020, in five of the petitions in the heading, we decided to grant an order absolute instructing Respondent 1, the acting Speaker of the Knesset, to "convene the Knesset plenum as soon as possible, for the purpose of electing a permanent Speaker of the 23rd Knesset, and no later than Wednesday, March 25, 2020".

2. Today – March 25, 2020 – at 11:00, at the beginning of the Knesset's plenary session, Respondent 1 gave notice that he is resigning his position and adjourned the session. Pursuant to that move, the Knesset Legal Advisor notified us that he had informed Respondent 1 that under sec. 5(a)(2) of the Knesset Rules of Procedure, his tenure will end 48 hours after his letter of resignation was placed before the Knesset or submitted to the Knesset Secretary. The Knesset

Legal Advisor further pointed out in his notice to the Speaker of the Knesset that "his resignation at this time does not affect his obligation to carry out the Court's order …", and that "the Speaker of the Knesset informed the Knesset Legal Advisor that he does not intend to put the matter of electing a permanent Speaker of the Knesset on the agenda of the Knesset plenum today".

By this conduct, the Speaker of the Knesset violated the order absolute as stated in the judgment.

3. The Petitioner in HCJ 2145/20 filed a request under the Contempt of Court Ordinance, petitioning the enforcement of the partial judgment, and to grant every remedy as the Court shall see fit (hereinafter: the contempt request). The Petitioners in HCJ 2171/20 and HCJ 2169/20 joined that request, while the Petitioner in HCJ 2144/20 filed a new petition (HCJ 2252/20 – hereinafter: the new petition) for declaratory relief establishing that in view of the conduct of the Speaker of the Knesset and his violation of the order, his tenure ended immediately, and that under the circumstances created, sec. 5(a)(2) of the Knesset Rules of Procedure doed not apply. The Court was further asked to declare that the veteran Member of Knesset be appointed as Speaker of the Knesset until the election of a permanent Speaker, and that the Knesset plenum convene today for the purpose of deliberating the election of a permanent Speaker. In the decisions given after the submission of the contempt request and the new petition, the parties to all the petitions were asked to submit their responses to these proceedings, and after collecting all the responses received (with the exception of the Likud faction, Respondent 4 in HCJ 2144/20, which chose no to respond), we called an urgent hearing of the contempt request and the new petition, which was held this evening at 8:00. All the Respondents presented themselves, with the exception of Respondent 1, who informed the Court by means of the Knesset Legal Advisor that he wishes to suffice with the written response he submitted, and with the exception of the Likud faction, whose attorney, Advocate Halevy, informed the Court that he received notice of the hearing in a telephone call at about 6:30, and in view of the timetable set, and in view of his location when he received the notice, he would be unable to attend the hearing. The Respondents in the new petition agreed to conduct the hearing as if an order nisi had been granted.

4. Respect for the rule of law is the cornerstone of every democratic regime, and it is proven, inter alia, by obeying judicial decisions and orders. This duty to comply is imposed upon the entire population, and the organs of government are not exempt. On the contrary, those authorities have

a far greater duty to obey judicial decisions and orders, and Israeli law, in the entirety or its arrangements in this regard, adopted the accepted approach of the Common Law that grants a presumption of regularity to the organs of government. The assumption grounding that presumption is that a judgment issued against the state will be carried out appropriately (Uri Aharonson, *Non-Compliance with Decisions of the High Court of Justice as an Institutional Failure: A Proposal for Judicial Enforcement*, 19 MISHPAT UMEMSHAL 1271, 1285 (2016) (Hebrew)). This Court addressed the dangers inherent to the non-compliance of governmental agencies with judicial orders, stating:

> A state in which the state authority takes the law into its own hands – complying with a judicial order against it if it wishes to, and ignoring it if it does not – is one in which the seeds of anarchy and mayhem are being sown, and which is developing a dangerous culture of the rule of force and arbitrariness. A state authority is a fiduciary of the public, and "has nothing of its own" (HCJ 142/70 *Shapira v. Bar Association District Committee* [12], at p. 331). As such, it should serve as a beacon for respect of the law and the rule of law. The eyes of the public are raised to the state authorities and public office holders. Respect for the values of law, and development of a tradition of protection of the value of the rule of law are influenced by their conduct. Disobedience of the law and non-compliance with judgments by a state authority involve a deep moral violation not only of the formal infrastructure of the foundations of the law and the regime, but also of the core of the tradition and the culture of proper government, that serve as an example of appropriate conduct of the individual in society (HCJ 4805/07 *Center for Jewish Pluralism v. Ministry of Education* [13], 602-603 [para.35]).

While we have, indeed, known instances in which governmental authorities "dragged their feet" in carrying out court orders, as well as instances in which they did not comply with such orders due to claims of difficulty in their implementation or enforcement, or due to the need to make preparations. But until today, never in the history of the State has any governmental office openly and defiantly refused to carry out a judicial order while declaring that his conscience does

not allow him to comply with the judgment. That is what Respondent 1, who is one of the symbols of government (even though he currently holds his office by virtue of the continuity rule, without being elected) chose to do, and the harm of his conduct to the public interest in preserving the rule of law and compliance with judgments and judicial orders is immeasurably severe. If that is how a person of authority behaves, why should a common citizen act differently? (see and compare: HCJ 4742/97 *Meretz v. Minister of Religious Affairs* [14], para. 6). This question resounds in its fullest force particularly in these difficult times in which we are contending with the coronavirus outbreak, when citizens are required to comply with the unprecedented orders and restrictions imposed upon them, inter alia, by virtue of emergency regulations.

5. We cannot be reconciled to such a situation, and an unprecedented violation of the rule of law requires unprecedented remedies. In the course of today's hearing, the Knesset Legal Advisor noted that the legislature and the drafters of the Knesset Rules of Procedure did not foresee a situation like the one created by the resignation of Respondent 1, especially in the absence of a deputy to act in his stead. He presented a possible path according to which the lacuna in this regard in sec. 20A(c) of Basic Law: The Knesset and in the Knesset Rules of Procedure could be filled by this Court's exercising its authority under sec. 15 of Basic Law: The Judiciary, and ordering that in order to ensure compliance with the judgment of March 23, 2020, the most veteran Member of Knesset be granted limited, defined authority as follows:

> (1) To apply to the Arrangements Committee, by virtue of sec. 19 of the Knesset Rules of Procedure, for the purpose of convening the Knesset plenum tomorrow, Thursday, March 26, 2020, even though it is not a day that the plenum convenes under the Rules of Procedure;
>
> (2) To set the agenda for that session, by virtue of sec. 25 of the Knesset Rules of Procedure, and include the motion for the election of a permanent Speaker of the Knesset;
>
> (3) To preside over that session.

All the parties to the hearing expressed their consent to the recommended path.

6. The Knesset Legal Advisor further noted that in preparation for the hearing, he had spoken to Member of Knesset Amir Peretz, who is the most veteran Member of Knesset, who agreed to

act in accordance with the said path as may be decided, and this was also confirmed by Advocate Segev, who represents the Labor-Meretz faction in HCJ 2171/20.

7. Therefore, we hereby grant an order as stated in para. 5, above. To avoid any doubt, we would emphasize that this order shall remain in force even if Respondent 1 decides to withdraw his resignation.

Given this day, 29 Adar 5780 (March 25, 2020).