

The Supreme Court sitting as High Court of Justice

HCJ 10042/16

HCJ 10046/16

HCJ 10054/16

HCJ 76/17

HCJ 802/17

Quintinsky v. Knesset

In the matter of the Multiple Apartments Tax Arrangement

Abstract

The petitions challenged the Multiple Apartments Tax Arrangement and its legislative procedures. An expanded five-justice panel of the Court (*per* Justice N. Sohlberg, Deputy President M. Naor and Justices E. Hayut and N. Hendel concurring, Justice M. Mazuz dissenting) granted the petitions and declared the Multiple Apartments Tax Arrangement relatively void, such that that the Knesset was not required to revisit the legislative proceedings prior to the Arrangement's deliberation in committee in preparation for the second and third readings, but could "return" to the legislative proceedings from the point in which the defect occurred – i.e., the stage of the deliberations in the Finance Committee.

1. The Tax Arrangement, anchored in Chapter XII of the Economic Efficiency (Legislative Amendments for the Implementation of the Economic Policy for Budget Years 2017 and 2018), 5777-2016, imposed a designated tax upon owners of multiple apartments whose aggregate rights in the apartments was 249% or more. Under the Tax Arrangement, a holder of apartments to the said extent would be subject to a tax of 1% of "the determining amount" for each apartment held, exclusive of two apartments as he may choose, where the "determining amount" would be calculated in accordance with a formula set out in the Appendix to the Law.

2. Five petitions were submitted, arguing that the Court should annul the law both for defects in the legislative process and for unconstitutionality. On Feb. 28, 2017, the Court issued an order nisi requiring the Respondents to show cause why the Tax Arrangements should not be revoked “*due to a substantive defect in its legislative proceedings that goes to the heart of the proceedings*”. Inasmuch as the order nisi addressed only the defects in the legislative proceedings, the Court’s judgment focused solely upon that subject.

3. At the outset of his opinion, Justice N. Sohlberg addressed the fundamental guiding principles of judicial review of the Knesset’s legislative procedures. On the one hand, he emphasized the principle of the separation of powers, from which the Knesset derives its elevated status as an independent authority entrusted with legislation, and which requires restraint and moderation in the judicial review of its actions. On the other hand, he presented the justifications for judicial intervention in the legislative process, bearing in mind, inter alia, the principle of the rule of law and the Knesset’s role in supervising and monitoring the activities of the government. Indeed, the principle of the separation of powers requires that judicial review of the legislative process be carried out with awe and reverence, moderation and respect. However, it also requires that the Court vigilantly stand guard lest the Knesset serve as the government’s doormat. This particularly so in Israel’s parliamentary regime in which the executive branch controls a majority of the members of the legislative branch, and all the more so when an “exceptional” legislative process like that of the Arrangements Law is concerned. The Court must, therefore, ensure that the Knesset fulfils its role faithfully and responsibly, inter alia through a proper, productive legislative process. Justice Sohlberg also noted that the Court *was not concerned with review of the content of the Law, but solely with an examination of the process of its enactment*.

4. After presenting the guiding principles, Justice Sohlberg addressed the criteria for judicial review of the legislative process as developed in [H CJ 4885/03 Israel Poultry Farmers Association Agricultural Cooperative Society v. Government of Israel](#), IsrSC 59(2) 14 (2004) (hereinafter: the *Poultry Growers* case) – deemed the leading case on the subject of judicial review of the legislative process – which established that judicial intervention in the legislative process is justified only in the presence of “a defect in the legislative process that ‘goes to the heart of the process,’” that involves a severe and substantial violation of the basic principles of

the legislative process. Such defects include, inter alia, the “principle of participation”, which is examined on the basis of two criteria: the first is whether the Knesset members were “denied any practical possibility of knowing about what they are voting”; the second is whether the Knesset members were denied any “practical possibility of formulating their position with regard to the draft law”.

5. Thirteen years having passed since the Court’s decision in the *Poultry Growers* case – and in light of the experience accumulated in the interim, and in view of the Knesset legal adviser’s statement in the course of hearing this case that the case law does not currently provide adequate guidance to the legislature – Justice Sohlberg was of the opinion that some further polishing and direction was required. The *Poultry Growers* case had served its purpose, but at present, achieving a proper balance between the Knesset’s sovereignty and the need for legislative procedures appropriate to Israel’s constitutional parliamentary regime required that emphasis no longer be placed upon the question whether the Knesset members were “denied any practical possibility of knowing about what they are voting”. Rather, a somewhat different, more easily implemented and effective test was required along the lines of the second criterion raised in the *Poultry Growers* case. The legislative process must allow the members of the Knesset to adopt a substantive position, if only in a very limited manner, in regard to the bills placed before them. Under this approach, adopting a position is not a mere “passive” act, but requires a certain cognitive process, independent processing of the information presented to the Knesset member, and the formulation of an informed decision for or against the proposed law. Only when such an opportunity is provided, can it be said that the Knesset members were granted an opportunity to participate in a real, active sense in the legislative process.

6. Justice Sohlberg addressed the substance and importance of *parliamentary debate*, and held that a proper legislative process requires *debate* in the substantive sense of an exchange of ideas. In the absence of an opportunity to conduct a debate, the Knesset members’ participation in the legislative process is deprived of content, and is limited merely to a basic, “passive” understanding of the proposals before them. In such a situation, there is a not-insignificant fear that the Knesset will become a “rubber stamp” for the law’s sponsors – at times, the executive branch which, as noted, enjoys a parliamentary majority. Justice Sohlberg emphasized, however, that *the Knesset is not under a duty to conduct a hearing like the “due process” required of*

administrative agencies. The Court's intervention in the legislative process would be justified only when Knesset members are deprived of any practical possibility for conducting a minimal discussion of the proposed bill and form an opinion in its regard – even if only in the most basic sense (para. 79 of the opinion). However, if the legislative process was conducted in the said manner, but the Knesset members failed to exploit the opportunity afforded them, there would be no grounds for judicial intervention that would “coerce” the Knesset members to conduct themselves in some particular manner.

7. Justice Sohlberg further stressed that the question whether a parliamentary debate was conducted must not be examined in accordance with rigid, formal rules in the absence of which the principle of participation is not fulfilled. Care must be taken not to set an overly high, unattainable bar. Often, time limitations and workloads do not permit “sitting seven clean days” on every law, and conducting a comprehensive, exhaustive discussion of every jot and tittle. Clearly, it is often impossible to grant each and every Knesset member the opportunity to present all of his arguments at length and in detail. Judicial review of the legislative process thus requires addressing the matter *in light of all its circumstances*.

8. Justice Sohlberg also addressed the “exceptional” procedural framework through which the Tax Arrangement was enacted. In this regard, he noted that the need for the earlier noted parliamentary debate would seem to be inconsistent with the haste that characterized the enactment of the Arrangement Law, but he nevertheless held, in accordance with the holding in the *Poultry Growers* case, that despite the not inconsequential problems presented by this legislative mechanism, recourse to it does not, itself, invalidate a law. Judicial review of the legislative process must be substantive, and must focus upon the matters themselves, *viz.*, whether there was a clear, serious infringement of the fundamental principles of the legislative process. This conclusion is a consequence of the view that even if *ab initio* it were preferable to take the ‘high road’ of the normal legislative process, after the fact there is no justification for judicial intervention in the legislative process as long as the fundamental principles of the process were maintained. Moreover, we must take care not to adopt a “pure” approach that would impose demands upon the legislative process that the public's representatives would be unable to maintain. Therefore, the government must be permitted some leeway in this regard, and the Court should not preclude *a priori* a mechanism that facilitates a more rapid legislative process

that makes it possible to combine matters *that are directly and substantively connected to achieving the budgetary goals*, as long as this does not constitute a clearly serious violation of the fundamental principles of the legislative process.

9. Against this background, Justice Sohlberg examined the legislative process of the law under review, and held that the cumulative circumstances surrounding the legislative proceedings of the Tax Arrangement in the course of the preparation of the bill by the Finance Committee for a second and third reading leads to the conclusion that there was *a defect that went to the heart of the legislative process*. In this regard, Justice Sohlberg took note of the hurried schedule of the Finance Committee's debate, which did not allow the Knesset members time to examine the details of the updated bill prior to the debate; the atmosphere of haste, pressure and panic that characterized the Committee's debate (as reflected by the protocol of the session); and the complexity of the Multiple Apartment Tax Arrangement, which had serious economic and legal ramifications, and which could not be addressed in a hasty, routine manner. It was further emphasized that *no one characteristic of the process under review, alone, constitutes grounds for annulling the legislative procedure*. However, when members of Knesset are required to hear the reading of the provisions of a bill – “new” as well as “old” – understand and assimilate the explanations, express an opinion and listen to other opinions under such time restraints and haste, in the middle of the night, and following long, exhausting debates of other issues, while all the while being pressed to hurry, it becomes clear that no real debate can be held. Inasmuch as the members of the Finance Committee *who so desired* were not granted an opportunity to conduct a proper debate and form a considered opinion in regard to the Multiple Apartments Tax Arrangement, the *principle of participation* was clearly and substantially infringed. Under such circumstances, there is no recourse but to hold that there was a flaw going to the heart of the legislative process of the Multiple Apartments Tax.

10. Incidentally, Justice Sohlberg noted that the “abandoning” of the Finance Committee debate by members of the opposition may have had its political reasons, but such conduct does not provide grounds for judicial review of the process. Judicial review of the legislative process focuses upon the *possibility* afforded the Knesset members to conduct a debate and establish a position in regard to the bill. A Knesset member's choice to relinquish that possibility does not itself justify judicial intervention.

11. As for the remedy, Justice Sohlberg held that the finding of a flaw going to the heart of the legislative process does not necessarily require the nullification of the legislation under review. A distinction must be drawn between the question of the existence of a flaw going to the heart of the process and the question of the conclusion to be drawn from such a flaw. The decision as to the consequences of a flaw in the legislative process must be examined in light of the doctrine of *relative voidness*. In that framework, consideration must be given to the public interest that may be harmed from declaring a law or administrative act to be void, as well as to the extent of reliance upon the legislation, the scope of reasonable expectations that it created, and the consequences of declaring it void.

12. Justice Sohlberg addressed the proposal of the Knesset's attorney that a "warning of voidness" – a cautionary sign for the future – would suffice, but held that it would be inadequate under the circumstances. From a forward looking perspective, a mere warning would be insufficient in view of the seriousness of the defect in the legislative process, as well as in light of the opinion of the Knesset's legal adviser in regard to the need to give expression to the principle of participation and the need to set a minimum standard, and also owing to the fact that warnings – that were, in effect, "warnings of voidance" – were repeatedly given in the past, along with expressions of great concern in regard to flaws in hasty legislative procedures in regard to the Arrangements Law and other laws.

13. The arguments in regard to expectations created by the Tax Arrangement were examined, along with the reliance upon its provisions in the marketplace and the public arena, and particularly by individuals, but such expectations were not found sufficient to justify retaining the Tax Arrangement. While some individuals and some of the public would certainly lose due to the nullification of the Multiple Apartments Tax, that loss would be made up for by the gain of proper legislative practices. Moreover, an examination of the protocol of the Finance Committee's debate, and in light of the arguments made by the parties, the possibility cannot be ruled out that a proper debate in the Committee prior to the second and third readings may have resulted in changes in the content of the chapter concerning the Multiple Apartments Tax that would have influenced the ultimate legislative product.

14. In this regard, Justice Sohlberg emphasized that the judgment was entirely focused upon the legislative process, and not on the content or wisdom of the Tax Arrangement. The Knesset

may reenact the Multiple Apartments Tax Arrangement, and such a reenacting would not be what is polemically referred to as a “High Court bypass law”. A proper legislative process could give the Tax Arrangement legal force. Only then will the Arrangement’s expectations, reliance interests, and purposes be properly founded.

15. Lastly, it was held that despite the severity of the defect in the legislative process, it was centered in the Committee’s deliberations in preparation for the second and third readings. That being the case, it would be proper that the remedy be focused upon what needed correction and not beyond that. There is no need or justification for voiding the entire legislative process and starting again from the beginning, which would cause greater harm than benefit. In light of that, Justice Sohlberg proposed ordering the Multiple Apartments Tax Arrangement relatively void, that is, it would not be necessary to repeat the legislative stages prior to the Committee’s deliberations in preparation for the second and third readings, and the legislature could “return” to the legislative process from the stage of deliberation in the Finance Committee – the stage at which the defect occurred – and continue as required.

16. President M. Naor concurred in the judgment of Justice Sohlberg, the main points of which were presented above, and added only a few comments of her own. Inter alia, President Naor addressed the role of the chair of a Knesset committee and that of the chair of the Finance Committee in particular. The President noted that while the role of the chair of the Finance Committee is complex and requires consideration of various interests, ultimately, as the chair of a Knesset committee he must ensure the principle of parliamentary independence and the conducting of a proper legislative process. On one hand, he must ensure efficient debate, while on the other hand, he must not surrender to a demand to bring a law to a vote at any price and at any time. Against this background, the President noted that in the instant case the Chair of the Finance Committee should have acted differently, for example, by convening a further hearing on the bill on the following day, as was requested by some of the committee’s members. The President further noted that the Court had expressed criticism in regard to the legislative process, but had refrained from intervening in a law that had been enacted by such a process due to the restraint and moderation demanded by the relationship among the branches of government. However, she emphasized that this does not mean that “everything is permitted” in legislative

proceedings. When the separation of powers is undermined, it is the role of the Court to ensure that each branch act within its own realm.

17. Justice E. Hayut concurred in the judgment of Justice N. Sohlberg, and noted that given the inherent problems of accelerated legislative proceedings, as in the case of the Arrangements Law, there is no avoiding the presumption that such proceedings are facially susceptible to defects. She therefore added that it is important to establish rules and criteria that would lessen the threat, and it is regrettable that such rules have not been incorporated into the Knesset rules even 13 years after the *Poultry Growers* case. Justice Hayut noted that the Knesset's legal adviser, Advocate Eyal Yinon, faithfully fulfilled one of his central statutory roles in clearly explaining to the Knesset House Committee, in advance, the importance of strict observance of the proper legislative procedures despite the pressing schedule. However, the new draft of the Multiple Apartments Tax Arrangement was only presented for the review of the members of the Finance Committee at the outset of the debate upon it, which raised objections from Knesset members from the entire political spectrum, as well as by the committee's legal adviser. Under such circumstances, "the writing was on the wall" and it was clear that the debate that was about to take place under such circumstances would be improper and tainted by a defect that went to the heart of the process. In regard to the Knesset legal adviser's letter warning that there was a defect going to the heart of the legislative process of the Multiple Apartments Tax Arrangement, and the Knesset Speaker's letter asking the chair of the Finance Committee to consider reconvening the committee in view of the defects in the legislative process, Justice Hayut noted that one might have expected that such an exceptional letter from the Knesset legal adviser, especially when accompanied by a request from the Speaker, would have fallen on attentive ears. Unfortunately, the chair of the Finance Committee did not heed that call, and we have thus arrived at this juncture. Inasmuch as more-than-sufficient "warnings of voidance" were given in this matter, Justice Hayut concurred in the opinion of Justice Sohlberg and the remedy he proposed.

18. Justice N. Hendel concurred in the opinion of Justice N. Sohlberg, and expanded upon the theoretical and practical importance of the right of Knesset members to participate in legislative proceedings from the perspectives of political theory and Jewish law. Often, modern legislation is not the product of philosophical enquiry seeking truth and justice, but rather of

political negotiations that involve political pressure and the relinquishing of principles. However, such a procedure does not violate the honor of legislation, as that derives from the nature of the common social project reflected by lawmaking. That joint creation that balances the values of all parts of society is a significant achievement that grants the law a special status worthy of public respect. But that is only true if the representatives of all the public were afforded an opportunity to participate in the legislative process. It is that participation that makes the law a foundational, unifying force, and transforms the exigencies of the process from coercion to a source of strength.

Justice Hendel further addressed the question of the duty of Knesset members to participate in the legislative process. Jewish law stresses the recognition of this view in light of the conception of the public's elected representatives as partners, agents and trustees of the public. Common to these approaches is a raising of the bar required of the holders of elected office. Justice Hendel's opinion referred to a number of halakhic decisors who were active at the time of the establishment of the State of Israel and thereafter who were supportive of democracy in general, and of the State of Israel in particular. As opposed to Jewish law, Israeli law leaves the duty of Knesset members to participate in the legislative process to the public sphere. But that public duty of participation also carries legal weight when the scope of the right to participation is examined.

The importance of the right of participation and the existence of a "public duty" of Knesset members to participate in the legislative process lead to the conclusion that, in the instant case, members of Knesset were actively deprived of that right of participation to an extent of a flaw going to the heart of the process that leads to the nullification of the law.

Dissent of Justice M. Mazuz:

1. Justice M. Mazuz, dissenting, was of the opinion that the petitions should be denied. He disagreed with the Court majority both in regard to the principles applied in reviewing the process in this case, as well as in regard to the application of those principles to the instant case.

2. In the opinion of Justice Mazuz, the majority's approach constituted an unjustified, substantive deviation from over three decades of the Court's consistent precedent in regard to

judicial intervention in the Knesset's legislative process. The approach to intervention in the Knesset's work procedures had, until now, been limited to protecting the democratic "rules of the game". It was accordingly held that the Court would intervene in the internal decisions of the Knesset only when confronted by a serious violation of "*substantive values of our constitutional regime*" (the *Sarid* rule [HCJ 652/81 *Sarid v. Speaker of the Knesset*, IsrSC 36(2) 197]). That position was justified, inter alia, by considerations of the separation of powers and mutual respect among the branches of government.

3. As far as the constitutional review of a law on a claim of flaws in its *legislation*, the leading case in this matter (the *Poultry Growers* case) established a more exacting rule under which the Court's intervention is limited only to cases in which it is proven that the legislative process was tainted by "a defect in the legislative process that 'goes to the heart of the process.'" A defect that 'goes to the heart of the process' is a defect that involves a severe and substantial violation of the basic principles of the legislative process in Israel's parliamentary and constitutional system". That rule, which the Court reiterated on numerous occasions, focuses upon preserving the democratic "rules of the game" in regard to the legislative process ("the basic principles of the legislative process"), and expressly held that the Court would not review the legislative process on the basis of arguments as to the *quality of debate* ("proper legislative process"). In accordance with that rule, *all* of the many petitions submitted in this matter to date were unanimously denied.

4. Justice Mazuz was of the opinion that although the majority viewed their position as *implementing* the extant rule in this matter, its approach actually represents a *substantive change* of the rule in law and in practice. In practice, the majority approach abandons the rule established in the Court's consistent precedent that focuses upon protection of a Knesset member's *right of participation* in the legislative process, and concentrates its constitutional review for claims of defects in that process upon criteria that concern the *quality* of the of the legislative debate in the Knesset (the length of the deliberations on the bill; the influence of the deliberations upon the bill; and the time that elapsed from the presentation of the bill for examination by the Knesset members and the date of the deliberations), inter alia in reliance upon criteria proposed by Victor Goldfeld in the framework of the doctrine of "legislative due process", a doctrine expressly rejected by the Israeli Supreme Court.

5. In the opinion of Justice Mazuz, we are concerned with a far-reaching change in the delicate, sensitive relationship between the Court and the Knesset in its primary role as the legislature – from the role of protecting the democratic “rules of the game” to that of conducting detailed review of the *quality* of the Knesset’s legislative debates. In Justice Mazuz’s view, this is a very problematic conception that raises a series of difficult theoretical and practical issues, both in terms of the *normative* aspect of the principles of constitutional review and in terms of the principle of *the separation of powers and inter-institutional comity*, as well as in terms of its *practical* consequences. This approach was expressly rejected over and over again by the Supreme Court in a large number of judgments spanning over three decades, and it has no counterpart in the law of other states.

6. In the opinion of Justice Mazuz, an examination of the procedures adopted in enacting the Multiple Apartments Tax Law clearly shows that there was no violation of the right of the members of Knesset in general or of members of the Finance Committee in particular to participate in the legislative process. The rule of intervention established by the case law in this regard refers to a situation in which Knesset members are “*denied any practical possibility*” of knowing about what they are voting and of formulating their position with regard to the draft law. An examination of the matter refutes the argument that such was the case in matter before the Court.

The proposal regarding the “Multiple Apartments Tax” was published for public review on Aug. 2, 2016. Shortly thereafter, the proposal was approved by the Government, and a memorandum of the law was published for public comment. After comments were obtained from various bodies, the bill was approved by the Ministerial Legislation Committee. The bill was submitted to the Knesset on Oct. 31, 2016, and was debated in two lengthy sessions of the Finance Committee held three weeks apart. The first session, held on Nov. 21, 2016, lasted some two-and-a-half hours. In the course of that session, the details of the bill were presented and comments and objections were voiced by members of the committee. The second session was held on Dec. 15, 2016. That marathon session lasted some eight hours, and at its conclusion, the bill was approved for submission to the plenum for a second and third reading. During this not inconsiderable period from the publication of the first proposal, the proposal was the subject of active, sometimes turbulent debate in the media and in various public forums. In addition, during

the period of some three weeks between the two sessions of the Finance Committee, meetings and consultations were conducted between representatives of the Ministry of Finance and coalition and opposition members of the committee, as well as with the legal advisers of the committee and representatives of the Bar Association and the Institute of Certified Public Accountants. While by the very nature of the process, various changes were made in the bill in the course of the process, primarily in response to requests by Knesset members, these were included in the draft presented to the committee prior to the debate, and they were also presented and explained in the lengthy concluding session by senior representatives of the Treasury who were present at the session.

7. Under these circumstances – in which the legislative process proceeded for nearly five months, including publication to the public, a plenum debate and vote in the first reading, two lengthy sessions of the Finance Committee, and a plenum debate and vote on the second and third readings – one can hardly say, in the opinion of Justice Mazuz, that the members of Knesset were denied *any practical possibility* of formulating their position and of knowing about what they were voting, which is the test for a constitutional violation of the right of participation. Justice Mazuz was also of the opinion that this was not a legislative process of which to be proud. There is no doubt that the haste and urgency of the concluding session of the Finance Committee impeded the possibility for a detailed examination of the bill. However, that is not the test for intervention, particularly when the Knesset members were acquainted with the main points of the bill for some considerable time.

8. In Justice Mazuz's opinion, even a comparison between the circumstances and defects argued against the process in the present case and those addressed in prior judgments shows that the defects in the present case were not of a kind that differed or were of greater severity than those addressed in previous petitions that were *all denied*. On the contrary, in at least some of the previous petitions, including that of the *Poultry Growers* case itself, the defects were clearly more *severe* in various aspects. In the opinion of Justice Mazuz, this demonstrates that the criteria applied in this case were different from those applied in the Court's previous decisions.

9. Justice Mazuz was of the opinion that broadening the scope of constitutional review of legislative proceedings also raises a significant theoretical normative problem in regard to the source of authority for constitutional review of the quality of legislative proceedings themselves.

Justice Mazuz surveyed the legal situation in other countries (the United States, England, Canada and Germany), and pointed out that constitutional review of legislative proceedings *per se* is not accepted in those countries, and that the approach adopted by the Court's majority deviates from the accepted practice of other states.

10. In concluding, Justice Mazuz expressed a dissenting view in regard to the appropriate remedy in this case, as well. In his view, even if there were defects in the legislative procedures that would justify the Court's intervention – as was the view of the majority, and with which he disagreed – the operative result decided upon by the Court's majority is not the remedy that accords with the circumstances and the principles of constitutional relief. In his view, it would have been sufficient in this case to point out the defect, which did not influence the results of the vote, or to issue a “warning of voidance”, or at most, to declare “delayed voidance”, that is, to establish a time frame during which the law would remain in force and during which the Knesset could reenact the law from the point in which the alleged defect occurred.