HCJ 652/81

M.K. YOSSI SARID
v.
CHAIRMAN OF THE KNESSET, MENACHEM SAVIDOR

The Supreme Court Sitting as the High Court of Justice
[March 1, 1982]
Before Ben-Porat, Barak and D. Levin JJ.

Editor's synopsis -

On December 1, 1981, the Alignment group in the Knesset submitted a motion of no confidence in the government. The Knesset Chairman (Speaker) set the following day, December 2, as the time for the debate and vote on the motion, and fixed the time for the opening of the session at 5 p.m. The Petitioner seeks an order *nisi* against the Chairman to show cause why he should not convene the Knesset session at its regular hour, 11 a.m. He contends that this is the hour at which Knesset sessions have always begun and that the Chairman fixed the time for this session at a later hour, in violation of the Knesset regulations, in order to enable supporters of the government to return from overseas in time to vote against the motion. The Chairman contends that he fixed the hour as he did for other proper reasons. The court denied the petition, holding:

1. The Chairman of the Knesset is one of the organs of State. In deciding to alter the time of the Knesset session, he fulfills a public function pursuant to Law- the Knesset regulations -which is subject to judicial review.

2. The heterogeneity of the various Knesset functions yields similar heterogeneity with respect to the scope of judicial review of its functions.

3. In determining the scope of judicial review of internal Knesset affairs that are concerned with the political relations between the Knesset and the government, two contradictory considerations clash. One is the preservation of the rule of Law, which applies to the Knesset as well as to other arms of the state. The other is the respect that must be shown for the separation of powers. Decisions of the Knesset concerning the political relations between it and the government are politically volatile and it is appropriate that the court stay its hand as much as possible in these matters so as to avoid politicization of the judiciary.

4. The desired balance between these considerations will be assured by adopting a test for judicial review which takes into account the extent of the violation claimed. When such violation is minor and does not affect the basic structure of our parliamentary system, the independence of the Knesset should prevail and the court will stay its hand. But when the violation is substantial and infringes upon basic values of our legal order, the need to ensure the rule of Law is dominant.

5. In this case, even if the Chairman deviated from the Knesset regulations, this was a minor deviation which should be resolved by internal parliamentary processes.

Israel cases referred to:

[1] H.C 222/68, *"Huggim Leumi'im" Society v. Minister of Police* 24P.D.(2)141.

[2] H.C. 306/81, *Flato Sharon v. Knesset Committee* 25P.D.(4)118.

[3] C.A. 228/63, *Azuz v. Azar* 17P.D.2541.

[4] H.C. 188/63, *Batzul v. Minister of Interior* 19P.D.(1)337.

[5] H.C. 108/70, *Manor v. Minister of Financ*e 24P.D.(2)442.

[6] H.C. 98/69, *Bergman v. Minister of Finance* 23P.D.(1)693; S.J. Vol. VIII, *supra* p. 13.

[7] H.C. 246/81, *"Agudat Derekh Eretz" v. Broadcast Authority* 35P.D.(4)1; S.J. Vol. VIII, *supra* p. 21.

[8] H.C. 563, 566/75, *Ressler v. Minister of Finance; Zivoni v. Chairman of Knesset Finance Committee* 30P. D. (2)337.

[9] H.C. 637/79, *Yitzhak v. Minister of Agricultur*e 34P.D.(2)442.

[10] H.C. 248/80, *Cohen v. Knesset Chairman* 34P.D.(4)813.

[11] H.C. 217/80, *Segal v. Minister of the Interior* 34 P.D.(4) 429.

[12] H.C. 65/51, *Jabotinsky v. President of the State of Israel* 5P.D.801; 4P.E.399.

American cases referred to:

[13] *Baker v. Carr* 369 U.S. 186 (1961).

[14] *Joint Anti-Fascist Committee v. McGrath* 341 U.S. 123 (1951).

[15] *Powell v. McCormack* 395 U.S. 486 (1969).

[16] *Poe v. Ullman* 367 U.S. 497 (1961).

A. Ginossar, M. Shachal, A. Lorch for the Petitioner.

D. Beinish, Director of the High Court Department in the State Attorney's Office, for the Respondent.

JUDGMENT

BARAK J.: On Tuesday, December 1, 1981, at 11:40 a.m., the Alignment faction submitted a motion of no-confidence in the Government. The Chairman of the Knesset decided that the no-confidence motion would be debated on Wednesday, December 1, 1981, and that the sitting would convene at 5:00 p.m. Knesset Member Yossi Sarid petitioned the court against the scheduling of the sitting in the afternoon hours. He argued that under rule 36(a) of the Knesset Rules, a motion of no-confidence is required to be debated "at the next regular sitting", and that sitting had long since been scheduled for Wednesday at 11.00 a.m. The Petitioner contended that the delay in opening the sitting was designed to allow several Knesset members, who support the Government, to return to the country in time for the vote, and that this consideration, which motivated the Chairman of the Knesset, is not legitimate, since the Chairman thus became "an instrument in the hands of the Government". The Petitioner did point out that the reason given by the Chairman for his decision was that a memorial for the late David Ben Gurion would be held on Wednesday, but the Petitioner claimed that this reason was not genuine.

2. The petition was brought before a judge of this court on Tuesday evening, who referred it to a panel of three judges for hearing on Wednesday morning, while also summoning a representative of the Attorney-General to appear. On Wednesday there appeared before us the Petitioner and his counsel, and also Ms. Beinish, on behalf of the Attorney-General. Due to the urgency of the matter Ms. Beinish did not have time to prepare an affidavit. In her opening remarks she submitted that the petition should be dismissed as non-justiciable. In regard to the facts, we were told, on behalf of the Chairman of the Knesset, that the change in the scheduling of the sitting on Wednesday from eleven a.m. to five p.m. was made by the Chairman by virtue of his authority under rule 27(c) of the Knesset Rules, according to which "the Chairman of the Knesset may change the scheduled time of a sitting". The primary reason for the change was the memorial for the late Mr. Ben Gurion. Nonetheless, there was also an additional reason, namely, that because of the Prime Minister's illness, and in view of the nature of the matter. the Government's reply to the no-confidence motion was to be given by the Minister of Defence, who was in the United States, and would be returning to Israel at the earliest for the afternoon sitting.

3. A factual dispute arose therefore, as regards the considerations of the Chairman of the Knesset. This dispute could not be resolved at that stage, since Ms. Beinish's statements with respect to the Chairman's considerations were delivered orally and were not supported by an affidavit. In these circumstances, counsel for the Petitioner declared that he would accept Ms. Beinish's factual declarations as if they had been made by affidavit. He contended that even on these facts the Chairman's decision was invalid, since according to Rule 36(a) of the Knesset Rules - and this specific provision prevails over the provision in Rule 27(c) - the Chairman should have scheduled the sitting for 11:00 a.m. According to this reasoning, the only way to change the opening time of a regular sitting is by resolution of the Knesset Committee under Rule 148, which provides that "the Knesset shall not deal with any matter in a manner contrary to the Rules, or to precedents, unless the Knesset Committee has considered the matter, and decided thereon". The difficulty is that the Knesset Committee before which the matter was brought, "refused to intervene in the Chairman's decision on the ground that the matter fell within the scope of his authority, and the Committee should not deal with it". As against these arguments, Ms. Beinish submitted that the Chairman's decision was made lawfully, within the scope of his authority under section 27(c) of the Rules, and on the basis of material considerations. Ms. Beinish concentrated in the main on the argument that the decision of the Chairman was not justiciable and that the court, therefore, should not hear the petition on its merits. She contended that the working procedures of the Knesset were non-justiciable, since they fell within the sovereign power of the Knesset, and were of a clearly political character. Mr. Shachal, counsel for the Petitioner, argued in reply that the Chairman's decision was based on the law and is of a purely administrative nature, so that it is subject to review by this court. Such review, he argued, is important to ensure that the Knesset Chairman observes the law.

4. The question now crisply arises whether it is proper for the High Court of Justice to entertain a petition concerning the authority of the Knesset Chairman in regard to Knesset working procedures. I said, "whether it is proper" to entertain the petition, because the question posed to us is not one of jurisdiction, but one of discretion (see H.C. 222/68 [1]). This court's authority to hear the petition stems from section 7(b)(2) of the Courts Law, 1957, under which the High Court of Justice is empowered to issue orders to state

authorities which "exercise any public functions by virtue of law". The Knesset Chairman is a state authority, and in deciding to change the time of the sitting he exercised a public function by virtue of "law"-that is, the Knesset Rules, which were adopted by the Knesset under section 19 of the Basic Law: The Knesset (see also the definition of "law" in section 1 of the Interpretation Ordinance [New Version]). Indeed, the provisions of the Rules relating to the working procedures of the Knesset form part of the constitutional law practised in the state (see A. Lechovski, "On the Working Procedures of the Knesset" in *Legal Studies in Memory of Rosenthal* (ed. Tedeschi, Magnes, 1964) 380). We, therefore, are empowered to hear the petition (see H.C. 306/81 [2]). The question still remains, however, whether we should hear the petition on its merits, in light of the special character of the Chairman's decision which concerns "internal parliamentary proceedings" (in the words of Shamgar J., *ibid*, at 142).

5. The Knesset is "the house of representatives of the State", and it is required to perform many varied functions. It enacts the Basic Laws and the ordinary Laws; it sometimes participates - in the plenum or in the various committees - in the process of subsidiary legislation; it supervises the actions of the Government, which holds office for as long as it enjoys the confidence of the Knesset, by means of a parliamentary question, motion of no-confidence and similar motions; it fulfills, in the plenum or in committees, several *quasi-judicial* functions, such as deciding on election appeals, withdrawing immunity and, in special cases, suspending a Knesset member, or removing him from office (see A. Rubinstein, *The Constitutional Law of the State of Israel* (3d ed., Schocken, 1981) 81, 291, 196; C. Klein, "On the Legal Definition of the Parliamentary Regime and Israeli Parliamentarism" 5 *Mishpatim* (1974) 308). This variety of Knesset functions correspondingly varies the scope of the court's judicial review of the manner in which the Knesset performs its duties, in the plenum and in committees, and through other functionaries. Indeed, the scope of judicial review of the Knesset's actions and decisions cannot be exhausted in a simple formula, but often varies according to the nature of the function under review. Take, for instance, the Knesset's legislative function. While a statute is not generally subject to review as to the legality of its content (C.A. 228/63 [3]; H.C. 188/63 [4]; H.C. 108/70 [5]), this court has reviewed the legality of a statute with regard to an entrenched provision in a Basic Law (H.C. 98/69 [6]; H.C. 260,246/ 81 [7]). It is true

that in so doing, the court left the question of its power to act in this way open for further consideration, but the very hearing and decision are in themselves

> ... at least some intimation of this court's approach to the question of the boundaries of its constitutional powers. Had the court believed that the separation of powers forbade it from deal in any way with a petition concerning the Knesset and its committees, it would have raised that question on its own initiative. In other words, the court's readiness to explore the issue on its merits has, in itself, implications as to the interpretation of the powers of the different state authorities.

(*per* Shamgar J. in H.C. 306/81 [2] at 141.).

Against this limited review of the legislative process there stands the court's ordinary review of quasi-judicial decisions of the Knesset and its committees, such as the removal from office of a Knesset member or his suspension (*ibid.*). Likewise, judicial review is exercised over decisions of the Knesset - in the plenum, or in committees, or by other organs of the Knesset - relating to subsidiary legislation, or which are of an administrative nature concerning, for example, party funding (see H.C. 563, 566/75 [8]; H.C. 637/79 [9]; H.C. 248/ 80 [10]). In summary, all that can be said, by way of generalization regarding judicial review of decisions of the Knesset, is that the scope of this review differs according to the nature of the decision reviewed. A "legislative" decision is different from a "quasi-judicial" decision, and both of these differ from a decision relating to the Knesset's supervision of Government actions.

6. The petition before us concerns a decision of the Knesset Chairman relating to the working agenda of the Knesset, in regard to the control exercised by the Knesset over the Government by means of the vote of no-confidence. What is the scope of the judicial review of such decisions of the Chairman? These decisions are not embodied in a *statute,* nor are they even *judicial* decisions, or decisions made in the frame of subsidiary legislation. We are dealing here with a decision of an administrative character, taken in the course of intra-parliamentary proceedings concerning the reciprocal political relationship between the Knesset and the Government. Is a decision of this kind subject to judicial review?

7. This question is by no means simple, since its solution involves a conflict between two opposing considerations. On the one hand there is the principle of the rule of law which means, in its formal sense, that all the organs of the state must obey the law. The principle of the rule of law is addressed to both individuals and governmental organs, and applies to the legislature itself, in the sense of "the rule of law in the legislature" (in the words of Silberg J. in his book *Principia Talmudica* (2nd ed., Hebrew University Law Faculty Publications, 1964) 70). If, therefore, the Knesset Rules contain provisions governing the conduct of the *internal* proceedings of the House, by the different Knesset authorities, these authorities must act in accord with the Rules. Just as this court exercises its jurisdiction in any case of failure to obey the law by the governmental authority, so too must it act in regard to a failure to implement the provisions of the Rules concerning the administration of the House, for were that not so, we might find the legislature itself in violation of the law. The provisions of the Rules express the law regarded by the Knesset as appropriate for the conduct of its parliamentary life, and for allowing its members to fulfill their political mission. Breach of the Rules frustrates these objectives, and judicial review is essential to prevent such a result, for where there is no judge there is no law, and where the court fails to intervene, the principle of the rule of law is violated (H.C. 217/80 [11] at p. 441). On the other hand, there is the principle that the working rules of the legislature are its own internal affair and, on the basis of the separation of powers, belong to the legislative authority itself, which also has the tools to examine itself and to scrutinize its own decisions. It is proper, therefore, that the judiciary respect the internal affairs of the legislature, and refrain from interfering in them. Moreover, decisions of the Knesset with respect to its reciprocal relations with the Government are usually heavily laden with political content from which the judiciary should properly distance itself so as to prevent, as far as possible, the "politicization of the judicial process" (in the words of Witkon J. in *Politics and Law* (The Hebrew University of Jerusalem, 1965) 58). It follows that -

> Paramount considerations relating to the separation of powers, the independence of parliament and the mutual respect which should prevail between state authorities, require that the Knesset enjoy freedom of action in managing its proceedings as it deems fit, without having its acts scrutinized by outside authorities. Were the court to sit in judgment over the propriety of Knesset proceedings, this body would be unable to

> function properly, and the court too will be flooded with litigation that turns it into a perpetual arena of political and procedural conflicts.

(Y.S. Zemach, "The Problem of Non Justiciability in Parliamentary Proceedings" 3 *Iyunei Mishpat* (1973) 752, 753.)

Indeed, the need to respect the status of the legislature, on the one hand and, on the other hand, to protect the judiciary, justify judicial restraint and refrainder from reviewing the administration of the legislature, as regards its reciprocal relations with the Government.

8. These opposing considerations are of great weight, and we should properly take them into account. It appears to me, therefore, that there is no room to lay down a comprehensive rule as to the scope of the court's intervention in the working procedures of the Knesset. Indeed, the accepted approach in England, that parliamentary proceedings are excluded from the range of judicial review, has not been adopted in Israel, and this court has held that

> there is no reason why this court should not exercise its power as against a Knesset decision taken in violation of the law or the principles of natural justice (save in cases where the matter dealt with by the Knesset is non-justiciable).

(Per Kahan D.P. in H.C. 306/81 [2], at 132).

However, that ruling concerned a *quasi-judicial* decision, whereas we are concerned with a decision that is not *quasi-judicial,* but an administrative one, concerning intra-parliamentary affairs. True, the decision of the Knesset Chairman to delay the time of the sitting until the afternoon is *justiciable* in the sense that its legality can be judged by legal standards, but that, alone, does not exhaust the principle of non-justiciability, which also addresses the reciprocal relations and mutual respect owed by the legislature and the judiciary to one another (see *Baker v. Carr* [13]).

9. It seems to me that these opposing considerations of the rule of law, on the one hand, and respect for the Knesset's special standing on the other hand, require a judicial balance, which is based on restraint, yet does not yield to complete impotence. This self-

restraint must be based on a standard which will define those areas in which the court will not interfere out of respect for the uniqueness of the Knesset as the people's elected body, and those in which the court will intervene to preserve the rule of law in the legislature. The determination of this standard is a difficult task that requires use of that "expert feel of lawyers" referred to by Justice Frankfurter in *Joint Anti-Fascist Committee v. McGrath* [14], and in which Smoira P. found "an excellent definition of the limits of judicial power" (H.C. 65/51 [12]). In my opinion, the proper balance between the need to secure "the rule of law in the legislature" and the need to respect the special standing of the Knesset in its decisions concerning its internal affairs, will be assured if we adopt a standard that takes into account the degree of the apprehended harm to the fabric of parliamentary life, and the extent of its influence on the fundamental structure of our constitutional regime. When the alleged violation of the intra-parliamentary process is minor, and would not affect the foundations of our parliamentary regime, the consideration of the independence and uniqueness of the Knesset outweighs that of the rule of law, and the judiciary would be justified in refraining from hearing a matter that is essentially political. The matter would be different when the violation complained of is manifest, and impairs substantive values of our constitutional regime. In such circumstances, the need to secure the rule of law prevails over all other considerations, much as that need prevails where we are concerned with a violation of the right of a Knesset member as an individual in a quasi-judicial proceeding (see H.C. 306/81 [2], and also *Powell v. McCormack* [15](1969)). In determining the proper standard, taking into account the degree of harm and the interest affected, we commend a flexible criterion which, by its very nature defies exact definition, and the content and scope of which will be determined by the court according to the needs of the time, and the matter involved (cf. *Poe v. Ullman* [16] at 509).

10. In view of these standards, it appears to us in the instant matter that even if the Knesset Chairman departed from the provisions of the Rules - and in this respect we are not expressing any opinion on the merits - it was of minor significance and must be resolved through the intraparliamentary process itself. We do not have before us any substantial violation, such as might have occurred if the possibility of the no-confidence vote in the Government had been entirely precluded or seriously jeopardized which would have justified our intervention. Grievances of the kind raised in this petition ought properly be

resolved in the house of representatives itself, through the frame of its own institutions, as part of its internal administration. This petition does not warrant our intervention.

For these reasons we dismissed the petition on December 2, 1981.

Judgment given on March 1, 1982.