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Rivka Weill

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## JUDICIAL INTERVENTION IN PARLIAMENTARY AFFAIRS TO PREVENT A COUP D'ÉTAT

RIVKA WEILL\*

### INTRODUCTION

The Yuli Edelstein decision of March 2020 was unprecedented for Israel as well as in comparative terms.<sup>1</sup> The Israeli Supreme Court not only scheduled the date of a parliamentary vote for the first time but did so for the vote on replacing the Israeli Parliament's (Knesset) most senior office holder—the Speaker, who controls the Knesset's agenda.<sup>2</sup> In the parliamentary arena, timing determines outcome because transitory coalitions constantly form to decide legislative agendas.<sup>3</sup> Timing is even more critical regarding the election of the Knesset Speaker because once a Speaker is elected, they cannot be removed before the next general election except for cause and with the support of seventy-five percent of Members of the Knesset (“MKs”).<sup>4</sup>

The pace and magnitude of the unfolding drama were breathtaking. The Court heard the political parties demanding the vote within the first business day after the submission of their petition.<sup>5</sup> Within the next twenty-four hours, the Court charged the Speaker, Edelstein, with calling a plenum vote to

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\* Reichman University (formerly IDC). Thanks to the panel's participants on Comparative Political Process Theory: Democracy and Distrust at ICON-S Mundo for their helpful comments. This Essay builds on my work: Rivka Weill, *The Yuli Edelstein Decision and the History of the Balance of Power Between the Knesset and the Government in Israel*, 44 TEL AVIV U.L. REV. 322 (2021) (Hebrew). I discuss some of the ideas in *Israel's Unfolding Democratic Crisis—Recent Constitutional Challenges and Rulings Explored*, YOUTUBE (April 28, 2020), <https://www.youtube.com/watch?v=cIPb7cDiTiY>. I thank the *Maryland Law Review* editorial team, and especially Carly Brody & Alyssa Radovanovich, for their outstanding work. Special thanks are due to my daughter, Elisheva Feintuch, for her helpful comments and Sagiv Wachman and Noa Baron for their excellent research assistance. An earlier version was first posted on SSRN on July 28, 2021.

1. HCJ 2144/20 Movement for Quality Gov't in Israel v. Knesset Speaker, Nevo Legal Database (Isr.) (Mar. 23, 2020) [hereinafter *Edelstein Decision*].

2. *Id.* at ¶ 15 (President Hayut).

3. *See infra* notes 86–96 and accompanying text.

4. Knesset Law, 5754–1994, § 8(a).

5. Issachar Zalmanovich, *Blue and White Petitioned the High Court Against Edelstein: “He Hijacked the Knesset, We Will Not Let This Happen,”* JDN (Mar. 19, 2020, 6:41 PM), <https://www.jdn.co.il/news/1299401/>.

choose a new Speaker within forty-eight hours.<sup>6</sup> Towards the expiration of the deadline, Edelstein resigned without compliance.<sup>7</sup> Never before had a Knesset Speaker resigned in protest while refusing to uphold a court order. While the Court's President stated that the rule of law has never been so gravely violated,<sup>8</sup> Edelstein claimed that he "prevented a civil war."<sup>9</sup> Every governmental branch viewed the other as damaging core democratic principles and attempting a coup. The revolutionary nature of this clash between the legislative and judicial branches bears great historical and comparative significance and should be thoroughly scrutinized.

Many Israeli scholars praise the *Edelstein* decision for the Court's willingness to strengthen the legislature's constitutional power in its relationship with the executive within a parliamentary system. They argue that the executive overtook control of the Knesset in recent years to such an extent that judicial intervention is warranted.<sup>10</sup>

In a parliamentary system, voters elect their representatives to the legislature. Parliamentary elections in turn indirectly determine the executive's composition because the ruling coalition is comprised of MKs enjoying parliament's support. The executive's mandate stems from parliament and is dependent on parliament's continued confidence. Parliament's expression of non-confidence in the government leads to its fall.<sup>11</sup> Since only the Knesset is directly elected, and opposition parties are represented only in the Knesset, it is of paramount constitutional importance to protect the legislature's constitutional power from executive encroachment.<sup>12</sup>

This Essay argues that, contrary to many scholars' analyses, the need to strengthen the Knesset at the expense of the government in a parliamentary system cannot justify the *Edelstein* ruling.<sup>13</sup> If at all, the *Edelstein* ruling can only be justified to guarantee an orderly transfer of power from one

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6. *Edelstein Decision*, *supra* note 1, at ¶ 1, 15 (President Hayut).

7. *See infra* note 105 and accompanying text.

8. H.C.J. 2144/20 Movement for Quality Gov't in Israel v. Knesset Speaker, ¶ 4 Nevo Legal Database (Mar. 25, 2020) [hereinafter *Contempt Decision*].

9. Shirit Avitan Cohen, *I Laid Under the Wheels, I Will Not Lead to a Civil War*, MAKOR RISHON (Mar. 26, 2020, 6:12 PM), <https://www.makorrishon.co.il/news/215437/>.

10. *See, e.g.*, Ittai Bar-Siman-Tov, *Covid-19 Meets Politics: The Novel Coronavirus as a Novel Challenge for Legislatures*, 8 THEORY & PRAC. LEGIS. 1, 38 (2020); AMICHAH COHEN, THE HIGH COURT WARS; THE CONSTITUTIONAL REVOLUTION AND THE COUNTER-REVOLUTION (2020), <https://www.idi.org.il/media/14968/supreme-court-wars.pdf>. *See also* Panel on Judicial Intervention in Parliamentary Proceedings—the Edelstein Decision's Anniversary, YouTube (April 11, 2021), <https://www.youtube.com/watch?v=mn4cG1Vz53w>.

11. *See* Rivka Weill, *Constitutional Transitions: The Role of Lame Ducks and Caretakers*, 2011 UTAH L. REV. 1087, 1097 (2011).

12. *See generally* Rivka Weill, *The Living-Dead*, 38 FORDHAM INT'L L.J. 387 (2015).

13. *See infra* Parts III–IV.

administration to the next.<sup>14</sup> Further, this Essay shows that the law, the Knesset's practice, judicial precedents, and the Israeli system's parliamentary nature all supported Edelstein's position in a manner that should have prevented judicial intervention.<sup>15</sup> Moreover, unbeknownst to the Court, the petitioners enjoyed a majority to replace the Speaker but not to form a government that enjoys the Knesset's confidence. They sought to use the Court to enable a political transfer of power that was otherwise impossible.<sup>16</sup>

I suggest that the *Edelstein* affair illustrates the potentially dangerous implications of judicial intervention in parliamentary affairs: politicization of Court rulings on the one hand and judicialization of politics on the other.<sup>17</sup> In fact, this Essay is the first in the comparative field to argue that when courts intervene in intra-parliamentary affairs, they should only use declaratory relief. This could have prevented some of the bitter fallout from the *Edelstein* affair. Courts should not grant injunctions while meddling with intra-parliamentary procedures because disobeying these injunctions will expose members of parliament ("MPs") to contempt of court proceedings. Such proceedings, in turn, deeply undermine MPs' parliamentary privilege.<sup>18</sup>

#### I. THE POLITICAL CIRCUMSTANCES

The coronavirus ("COVID-19") hit Israel at the height of a political crisis. After two undecided election campaigns in 2019, in which no MK was able to form a government that would win the Knesset's confidence, the third election for the Twenty-Third Knesset took place on March 2, 2020. The third election had designated polling stations arranged to accommodate citizens in quarantine.<sup>19</sup> Israel had neither previously held three general elections in twelve months nor had a caretaker government in power for so long.<sup>20</sup>

Caretaker governments are roughly the equivalent of lame duck administrations in presidential systems. I define them as starting with the Knesset's dissolution or government's resignation and until the swearing-in of a new government after elections.<sup>21</sup> On December 26, 2018, the Knesset

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14. See *infra* Part IV.

15. See *infra* Parts III–IV.

16. See *infra* Parts V–VI.

17. See *infra* Part VI.

18. See *infra* Part VI.

19. OFER KENIG, COVID-19 AND THE 2021 ELECTIONS IN ISRAEL: CHALLENGES AND OPPORTUNITIES 6 (Aug. 18, 2021), <https://www.idea.int/sites/default/files/covid-19-and-the-2021-elections-in-israel-en.pdf>.

20. Rivka Weill, *The Yuli Edelstein Decision and the History of the Balance of Power Between the Knesset and the Government in Israel*, 44 TEL AVIV U. L. REV. 322, 337 (2021) (Isr.).

21. See Rivka Weill, *Judicial Review of Constitutional Transitions: War and Peace and Other Sundry Matters*, 45 VAND. J. TRANSNAT'L L. 1381, 1395 (2012).

decided to dissolve and by the time of the *Edelstein* decision, the caretaker government served for 454 days.<sup>22</sup> Israeli caretaker governments suffer from democratic deficit since they typically lost the Knesset's confidence and serve on a temporary basis to avoid a vacuum in governance. They further exhibit agency problems and may embark on risky adventures to either affect election results or leave a legacy.<sup>23</sup> Since 2003, the average duration of Israeli caretaker governments has been approximately 160 days.<sup>24</sup>

I attribute the frequency and lengthy duration of caretaker governments to Israel's parliamentary system with a proportional representation (PR) election method. Under the PR election system, each political party is represented in the legislature roughly according to its share of electorate support. To form a government, political parties must form a coalition that enjoys the Knesset's support. These combined features lead to weak and unstable governments that depend on many coalition parties.<sup>25</sup> Yet, even against this background, the duration of the caretaker government governing in 2020 was outstanding; it almost tripled the average. Many worried that a brewing political crisis, coupled with the spread of COVID-19, could serve as an excuse for violating democratic principles.<sup>26</sup>

In 2016, the Knesset amended Basic Law: The Knesset to provide that the outgoing Speaker (assuming he would be re-elected as MK) continues to fulfill his role on an interim basis until the election of a new Speaker.<sup>27</sup> Edelstein thus served as the Knesset Speaker on a carry-over basis. The Twenty-Third Knesset was sworn in on March 16, 2020, and President Reuven Rivlin assigned the Blue and White party's leader—Beni Ganz—the task of forming a government, per the recommendation of sixty-one out of one hundred and twenty MKs (“61 Bloc” or “Blue and White party's Bloc”).<sup>28</sup>

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22. Law to dissolve the 20th Knesset, 5778–2018.

23. Weill, *supra* note 21, at 1393–97.

24. Weill, *supra* note 20, at 330 (supporting data in chart).

25. Weill, *supra* note 21, at 1385.

26. Pnina Sharvit Baruch & Ori Beeri, *The Coronavirus Crisis in Israel: When an Epidemic Meets a Political Crisis*, INST. FOR NAT'L SEC. STUD. (Apr. 2, 2020), <https://www.inss.org.il/publication/coronavirus-and-law-1/>; Carmit Padan, *The Coronavirus Crisis and the Opportunity for Social Transformation*, INST. FOR NAT'L SEC. STUD. (Oct. 6, 2020), <https://www.inss.org.il/publication/coronavirus-and-social-solidarity/>.

27. Basic Law: The Knesset, § 20 (Isr.). Before this amendment, the most veteran MK, who held no ministerial role, would serve as acting Speaker until the election of a new Speaker.

28. Yehonatan Lis, *Rivlin Met with Ganz and Netanyahu; the President Will Grant Tomorrow the Mandate to the Chair of Blue and White*, HAARETZ (Mar. 15, 2020), <https://www.haaretz.co.il/news/elections/1.8675677>.

Two days later, on March 18, Edelstein declared that he failed to form an Arrangements Committee.<sup>29</sup> This Committee is responsible to form all of the Knesset's standing committees, including a temporary committee that oversees the use of emergency powers during the COVID-19 pandemic.<sup>30</sup> As COVID-19 spread, Edelstein ordered that no more than ten people shall be simultaneously present in one space in the chamber or its committees.<sup>31</sup> In response, the Likud party's Bloc, composed of fifty-eight MKs ("58 Bloc"), demanded that each of the two blocs will be equally represented on the Committee. Blue and White MKs countered that they should control a majority of the regular composition of seventeen members. They claimed that the Likud was cynically taking advantage of COVID-19 to prevent them from exercising their parliamentary rights.<sup>32</sup>

On the same day, many legal scholars, including the author, signed a public letter calling on the Speaker to form the Arrangements Committee immediately.<sup>33</sup> The letter's signatories expressed concern regarding the lack of the Knesset's supervision over a caretaker government at a time of deep health and economic crises, while this government exercised emergency powers. This caretaker government even tracked civilians' movement through electronic collection of their phones' location data, without civilians' consent, to restrict the pandemic's spread. For this the government utilized the technological capabilities of the General Security Services (GSS), originally developed to fend off security threats.<sup>34</sup>

Additionally, the 61 Bloc requested Edelstein to include in the Knesset's agenda a proposal to elect a permanent Knesset Speaker for the Twenty-Third Knesset.<sup>35</sup> Edelstein refused, claiming that this hasty move would undermine the possibility of forming a much-needed unity government.<sup>36</sup> On March 19, in response to Edelstein's refusals to (1) form an Arrangements Committee,

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29. Press Release, Knesset News, The Knesset's Plenary Session Closed, Edelstein: There Will Be No Escape from Bringing the Matter to a Vote in the Plenary Session (Mar. 18, 2020), <https://m.knesset.gov.il/news/pressreleases/pages/press18.03.20.aspx> [hereinafter Press Release, The Knesset's Plenary Session Closed].

30. Knesset Law, 5754–1994, § 2a.

31. Zvi Zecharia, *The Knesset's Legal Advisor to Edelstein: There is an Urgent Need to Appoint an Arrangements Committee*, CALCALIST (Mar. 18, 2020), <https://www.calcalist.co.il/local/articles/0,7340,L-3802050,00.html>.

32. Bar-Siman-Tov, *supra* note 10, at 30–33, 39.

33. *An Open Letter to the Speaker and the Knesset's Legal Advisor*, VERFASSUNGSBLOG (Mar. 19, 2020), <https://verfassungsblog.de/an-open-letter-to-the-speaker-and-the-legal-advisor-of-the-knesset/>.

34. H CJ 2109/20 Ben Meir v. Prime Minister, ¶ 1 Nevo Legal Database (April 26, 2020); *see also* Rivka Weill, *Unique Dimensions of Israel's Struggle with Covid 19*, YOUTUBE (Feb. 22, 2020), [https://www.youtube.com/watch?v=I2OFp6\\_h\\_c](https://www.youtube.com/watch?v=I2OFp6_h_c).

35. *Edelstein Decision*, *supra* note 1, at ¶ 1–2 (President Hayut).

36. *Id.*

and (2) hold a vote on appointing a permanent Knesset Speaker, public petitioners (including political parties) approached the Court.<sup>37</sup> They claimed that Edelstein's refusal constituted a grave violation of the parliamentary fabric of life, justifying judicial intervention.

The Court held that because a majority wanted to replace the Speaker, the Speaker must allow for such a vote to reflect election results. MKs' right to elect a Speaker warrants special protection during the COVID-19 crisis, which involved the exertion of emergency powers that greatly infringed upon constitutional rights.<sup>38</sup> A further justification was Edelstein's carryover position as a stand-in for a caretaker government whose tenure carried through a third election cycle.<sup>39</sup> The Court cited my work for the proposition that a caretaker government suffers from a democratic deficit, and this is especially true after elections, when the people's will has already been expressed. Thus, there is a greater need for parliamentary supervision of the caretaker government's actions.<sup>40</sup>

People unfamiliar with current Israeli politics might have trouble comprehending this constitutional crisis's magnitude. The Court used a neutral tone that failed to capture Israel's state of polarization. The Court failed to mention that the decision was given at a time in which Prime Minister ("PM") Benjamin Netanyahu, who headed the caretaker government, was Israel's first indicted sitting PM. It also did not note that multiple petitioners petitioned the Court several times against an indicted PM's continued tenure.<sup>41</sup> Nor did it note that Speaker Edelstein belonged to Netanyahu's party.

The Court noted that Edelstein feared that the new emerging Knesset majority sought to elect a permanent Speaker to pass "controversial legislation,"<sup>42</sup> but did not elaborate on this legislation's nature and why petitioners were intent on passing it as soon as possible. In fact, this "controversial legislation" sought to amend Israel's Basic Laws to prevent a criminally indicted person from forming and heading a government.<sup>43</sup>

Israel is a constitutional democracy. The Knesset enacts and amends Basic Laws using its regular legislative process. Each Basic Law deals with a particular state institution or constitutional rights and principles. Despite their processes' enactment, the Court treats the Basic Laws as Israel's

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37. *Id.* ¶ 1 (Amit Justice), ¶ 8 (Deputy President Melcer).

38. *Id.* ¶ 9 (President Hayut).

39. *Id.* ¶ 9, 11 (President Hayut), ¶ 6 (Amit Justice), ¶ 3–5 (Deputy President Melcer).

40. *Id.* ¶ 4–5 (Deputy President Melcer).

41. Rivka Weill, *Is the Judicial Impeachment of the Israeli Prime Minister Constitutional?*, 21 *LAW & GOV.* 49, 50–51 (2020) (Isr.).

42. *Edelstein Decision*, *supra* note 1, at ¶ 2 (President Hayut).

43. See Rivka Weill, *The Rule of Law Protects Benjamin Netanyahu*, *HAARETZ* (Mar. 8, 2020), <https://www.haaretz.co.il/opinions/.premium-1.8639819>.

supreme formal constitution and exercises judicial review to enforce their superiority over regular legislation.<sup>44</sup> The petitioners' aimed to amend Israel's constitution to prevent an indicted political rival from forming a government.

## II. THE FORMATION OF THE ARRANGEMENTS COMMITTEE

Under the Knesset Law, the Knesset shall promptly elect an Arrangements Committee,<sup>45</sup> headed by an MK from the faction tasked with forming a government.<sup>46</sup> The Committee's composition shall correspond to the Knesset factions' relative size.<sup>47</sup> The Arrangements Committee shall bring to the Knesset's approval a proposal regarding the standing committees' composition. Until the Knesset Committee's election, the Arrangements Committee enjoys the power to decide on matters concerning the Knesset's rules and deliberations.<sup>48</sup>

In the plenary session, Edelstein explained that the Knesset's practice requires the Arrangements Committee to form with consensus. Yet, barring agreement, he committed to enable a vote. He subsequently postponed any discussion on the matter for a week.<sup>49</sup> On the same day, the Knesset's Legal Advisor, Eyal Yinon, sent Edelstein a legal opinion stating:

[T]he practice of subjecting only one agreed-upon committee composition option to the Knesset plenum, worthy as the makeup may be, cannot override the explicit provision of the law, which requires forming the Arrangements Committee "as soon as possible" . . . this is especially so in these critical times, when Israel is in the midst of an unprecedented health crisis . . . the most important democratic institution in our country, the Knesset, is effectively incapacitated.<sup>50</sup>

In the petition's shadow, Edelstein allowed the Arrangements Committee to form, unfreezing the Knesset's activity.<sup>51</sup> Edelstein could not afford to further wait because of a pending injunction against the government and Knesset. A few days prior, in a different petition, the Court made the

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44. On Israel's unique constitutional development, see Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L L. 349 (2012).

45. The Knesset Law, 5754–1994, § 2a(a).

46. *Id.*

47. *Id.* §2 a(b).

48. *Id.* §2 a(c) & (d).

49. Press Release, The Knesset's Plenary Session Closed, *supra* note 29.

50. Binyanim Berger, *The Knesset's Legal Advisor: There is a Duty to Establish the Arrangements Committee by the Beginning of Next Week*, JDN (Mar. 18, 2020), <https://www.jdn.co.il/news/1298918/>.

51. *Edelstein Decision*, *supra* note 1, at ¶ 1 (President Hayut).

Knesset's supervision a precondition for the GSS's continued deployment to track COVID-19 patients through their phones.<sup>52</sup>

On March 23, the plenum approved the Arrangements Committee's composition by a majority of 61 MKs. The members of the 58 Bloc boycotted the discussion and the vote, while Edelstein abstained.<sup>53</sup> He explained via media that the Knesset never ceased to function and that a petition was not needed to instigate parliamentary activity.<sup>54</sup>

The causal link between the petitions and the Arrangements Committee's formation is debatable. It is impossible to prove that Edelstein had relented *solely because of* the petition and would not have done so otherwise. Yet, ignoring the sequence of events is difficult. The fact that petitioners may challenge parliamentary procedures is extremely important, though this power is uncommon in comparative law.<sup>55</sup> The threat of petitions and their political price may have spurred the Knesset Speaker to act as expected, even without actual judicial intervention.

Did Edelstein abuse his power? My historical analysis of the Knesset's protocols reveals that, as of the Second Knesset (in the First Knesset there was only a standing committee) and until the Twenty-Third Knesset, every Arrangements Committee was appointed with all parties' agreement, in the first or second sitting of the Knesset.<sup>56</sup> Thus, the Twenty-Third Knesset's partisan appointment of an Arrangements Committee was unprecedented. Edelstein knew this, reasoning, "I do not have a choice but to create a precedent."<sup>57</sup>

If not for the extraordinary circumstances—a caretaker government that has remained in power for over a year and employed extensive emergency powers—it would have been appropriate to delay the Arrangements Committee's formation by a few days to ensure broad multi-party consent. Moreover, the Arrangements Committee brings the standing committees' composition to the Knesset's approval, and dissolves upon their formation.<sup>58</sup> Yet their composition may be later changed. Thus, the partisan

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52. HCJ 2109/20 Ben Meir v. Prime Minister, ¶ 4 Nevo Legal Database (Mar. 19, 2020) (an interlocutory injunction decision).

53. 23rd Knesset's Protocol, Sitting No. 4, at 37 (Mar. 23, 2020), <https://main.knesset.gov.il/Activity/plenum/Pages/Sessions.aspx>; Press Release, Knesset News, The Plenary Session Approved the Establishment of the Arrangements Committee (Mar. 23, 2020, 7:45 PM), <https://m.knesset.gov.il/news/pressreleases/pages/press23.03.20.aspx>.

54. *Wrong and Deceitful Hearsay: Yuli Edelstein Responds to Criticism*, KIPPA NEWS (Mar 19, 2020).

55. See generally Stephen Gardbaum, *Comparative Political Process Theory*, 18 INT'L J. CONST. L. 1429 (2020); Suzie Navot, *Judicial Review of the Legislative Process*, 39 ISR. L. REV. 182 (2006).

56. See Weill, *supra* note 20, at 340–41.

57. *Wrong and Deceitful Hearsay*, *supra* note 54.

58. See *supra* notes 45–48 and accompanying text.

appointment's effects were reversible. This, in turn, justified the public demand for the Speaker's swift action.

### III. THE REVOLUTIONARY JUDICIAL INTERVENTION

The petitioners' strategic grouping of the Arrangements Committee's formation and the permanent Speaker's election was beneficial. The Court concluded that the Knesset needed a permanent Speaker to function. Justice Amit determined that "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."<sup>59</sup> While forming an Arrangements Committee is critical to jumpstart the Knesset's regular activity, the Knesset can temporarily function even with an interim Speaker.

The petitioners claimed that Edelstein's refusal to hold an immediate vote to elect a Speaker violated separation of powers because it frustrated majority will. They argued that Edelstein was motivated by personal interest to maintain his position. Thus, his exercise of discretion was unlawful.<sup>60</sup>

Edelstein responded that he may legally postpone the vote until a new government is formed.<sup>61</sup> He relied on the Knesset's past behavior. He explained that parliamentary systems avoid appointing a *hostile*, non-coalition Knesset Speaker.<sup>62</sup> The Knesset's Legal Advisor conceded the latter point and advised the Court to wait.<sup>63</sup>

Edelstein seemed to have strong arguments backing his stance, including the Knesset's Rules of Procedure, the constitutional practice, and judicial precedents. The Knesset's Rules of Procedure state: "The Speaker shall be elected no later than the date on which the Knesset convened for the purpose of establishing the Government."<sup>64</sup> They explicitly authorized the Speaker to schedule the vote within the time frame between the Knesset's swearing-in and the government's inauguration.

My examination of all appointments of a Speaker from the First Knesset until the *Edelstein* decision reveals that constitutional practice supported Edelstein's position. Until 1977, the year in which the first political transition of power occurred,<sup>65</sup> the Knesset Speaker's election and the Knesset's

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59. *Edelstein Decision*, *supra* note 1, at ¶ 4 (Amit, J.).

60. *Id.* ¶ 4 (President Hayut).

61. *Id.* ¶ 5 (President Hayut).

62. The Knesset Speaker's Submission to the Court on March 23, 2020 (on file with the author).

63. *Edelstein Decision*, *supra* note 1, at ¶ 6 (President Hayut).

64. KNESSET R.P. 2(b).

65. Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L. Q. 457, 463 (2012); ERAN ELDAR, *THE ROAD TO '77: THE COLLAPSE OF THE HEGEMONY OF THE LABOR PARTY, 1965–1977*, at 14, 18 (2018).

swearing-in always aligned.<sup>66</sup> In six out of eight Knesset terms, there was only one candidate, and he won broad multi-party support.<sup>67</sup> In the Seventh Knesset, two MKs contended for the role for the first time. One garnered wide support and the other only two votes.<sup>68</sup> In the Eighth Knesset, the Speaker won by a 3:2 margin.<sup>69</sup>

Between 1977 and 1996—when political power alternated between the two major political parties or when unity governments formed—at least two MKs contended for the role, but the gap in their support levels remained substantial.<sup>70</sup> Until the *Edelstein* decision, the closest vote on the Speaker occurred during the Tenth Knesset. The elected Speaker technically won by only five votes, but another party (Tehiya) abstained while voicing its support for the winner. Thus, the real gap between the contenders was eight votes. In this Knesset, MKs requested to hold this vote via a secret ballot but were denied.<sup>71</sup> Following this close election, in the next Knesset, the Speaker's election was moved closer to the government's establishment.<sup>72</sup>

Since 1996 and until the *Edelstein* ruling, there was only one *de facto* candidate each time and the vote occurred circa the government's establishment. Most years, there was only one candidate to begin with, except in 1996 and 1999 when Arab MKs nominated themselves on principle,<sup>73</sup> stating that it is important to demonstrate that Arab MKs can also serve as Knesset Speakers.<sup>74</sup> The primary opposition party did not nominate candidates during the entire era.<sup>75</sup> In 2015, interim Speaker Amir Peretz scheduled the vote in which Yuli Edelstein ascended to Speakership to coincide with the Knesset's swearing-in. Peretz said, "in many of the Knesset terms the permanent Speaker is elected only after a month, until the government's establishment . . . [in this case] it is absolutely obvious that [Edelstein] will indeed serve as Speaker at one point or another."<sup>76</sup> The fact that, after such an acknowledgement of the Knesset's practice, Peretz's Labor

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66. Weill, *supra* note 20, at 343.

67. *Id.*

68. 7th Knesset's Protocol, Sitting No. 1, at 8 (November 17, 1969), [https://fs.knesset.gov.il/7/Plenum/7\\_ptm\\_253115.pdf](https://fs.knesset.gov.il/7/Plenum/7_ptm_253115.pdf).

69. 8th Knesset's Protocol, Sitting No. 1, at 7 (January 21, 1974), [https://fs.knesset.gov.il/8/Plenum/8\\_ptm\\_253614.pdf](https://fs.knesset.gov.il/8/Plenum/8_ptm_253614.pdf).

70. Weill, *supra* note 20, at 343–44 (with supporting charts).

71. 10th Knesset's Protocol, Sitting No. 1, at 5-6 (July 20th, 1981), [https://fs.knesset.gov.il/10/Plenum/10\\_ptm\\_529601.PDF](https://fs.knesset.gov.il/10/Plenum/10_ptm_529601.PDF).

72. Weill, *supra* note 20, at 343–44.

73. *Id.* at 344–46 (with a supporting chart summarizing the data).

74. *See, e.g.*, 14th Knesset's Protocol, Sitting No. 3, at 26 (June 24th, 1996) (Speech of Abdulwahab Darawshe MK), <https://main.knesset.gov.il/Activity/plenum/Pages/Sessions.aspx>.

75. Weill, *supra* note 20, at 344–46 (with a supporting chart summarizing the data).

76. 20th Knesset's Protocol, Sitting No. 1, at 14 (March 31, 2015), <https://main.knesset.gov.il/Activity/plenum/Pages/Sessions.aspx>.

party joined the petitioners in the *Edelstein* case, denouncing Edelstein's improper conduct, is astonishing.

Edelstein's behavior was, therefore, in accordance with the Knesset's practice, which has a binding status according to Basic Law: The Knesset.<sup>77</sup> The Knesset's practice also affects the Rules of Procedure's interpretation.<sup>78</sup> The practice's rationale is that if this had been a vote for a temporary Speaker, then a temporary Knesset majority would suffice. However, since speakers are elected for the entire Knesset's term, and are practically impossible to remove, this ensures that they enjoyed the support of a stable Knesset majority representing a government coalition.

Regarding judicial precedents, the Court's intervention in intra-parliamentary procedures is very rare. The Court has never intervened with the Knesset's schedule until *Edelstein*, even when facing a violation of the Knesset's Rules of Procedure and even when the government's fate was at stake.<sup>79</sup> This amounted to recognition that scheduling votes is the prerogative of the Knesset. Edelstein's case did not even concern a violation of the Knesset's Rules of Procedure or a deviation from constitutional practice, thus making the Court's intervention extraordinary.

#### IV. THE EDELSTEIN RULING'S CANONIZATION

Why then did the Court intervene in the *Edelstein* case? The Court seemed to justify the decision by the need to strengthen the Knesset, stating that it is not "the Government's cheerlead[er]."<sup>80</sup> The Court opined that the majority's will to elect a permanent Speaker should not be thwarted,<sup>81</sup> reasoning that it was "unclear" whether the vote might lead to the election of a *hostile* Speaker.<sup>82</sup> The Deputy President, Justice Hanan Melcer, even suggested that a *hostile* Knesset Speaker might be desirable and strengthen "the *independence* of the Knesset and the *required checks and balances*."<sup>83</sup>

This legal reasoning is problematic in a parliamentary system, which does not have separate elections for the government and legislature, because the government is a subset of the legislature. The parliamentary system seeks to prevent deadlocks between the legislature and executive, which sometimes ensue in presidential systems when different parties control parliament and

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77. Basic Law: The Knesset, § 19.

78. KNESSET R.P. 141–43.

79. See Weill, *supra* note 20, at 347–48.

80. *Edelstein Decision*, *supra* note 1, at ¶ 11 (Hayut, President) (citing H CJ 4374/15 Movement for Quality Gov't in Israel v. Prime Minister, Nevo Legal Database (Mar. 27, 2016)).

81. *Id.* ¶ 11 (President Hayut); *Id.* ¶ 3 (Amit, J.); *Id.* (Vogelman, J.); *Id.* ¶ 5 (Deputy President Melcer).

82. *Id.* ¶ 13 (President Hayut).

83. *Id.* ¶ 12 (Melcer, Deputy President, concurring).

the government. Therefore, only a parliamentary system authorizes the legislature to dissolve a government which loses majority support through a non-confidence motion,<sup>84</sup> including failure to pass budgetary legislation. In a pure presidential system, the president is not ousted even if the budget does not pass and a government shutdown occurs.<sup>85</sup>

In a parliamentary system, a government must control the legislature vis-à-vis the Speaker to prevent a hostile Speaker from utilizing agenda-setting powers to create gridlock. This reality conforms with the democratic effort of parliamentary regimes around the world, which allows governments to control parliamentary time allocation through the Speaker.<sup>86</sup>

Thus, even the parliamentary system's logic supported waiting for a government to form before electing a Knesset Speaker while it was unclear which bloc would succeed in forming a government. The Knesset's Speaker enjoys broad authority to manage the Knesset's internal affairs, and thus determines whether the government's agenda will succeed.<sup>87</sup> The government's need to appoint the Speaker is even greater since Israel's constitutional system requires the Knesset's approval, and even express legislation, as a precondition for government activity in contentious areas with long-term effects, especially on constitutional rights.<sup>88</sup>

The Court noted that it expects the Knesset Speaker to act in an appropriate manner for such a public figure, and that the Speaker is forbidden from weighing in on political considerations when determining the Knesset assembly's daily agenda.<sup>89</sup> However, such ideals do not reconcile with the prevalent, and even preferred, political reality. The legislature is the abode of politics and its Rules of Procedure were designed in consideration of the government's edge over the opposition in setting the agenda.<sup>90</sup> Accounting for political considerations is a primary component of the Speaker's role.

The Court's experience with the multiple petitions against intra-parliamentary procedures since the 1980s only reinforces this. Even in the *Sarid*<sup>91</sup> decision—which first established the judicial authority to intervene

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84. Weill, *supra* note 21, at 1395–96; Weill, *supra* note 11, at 1097–04.

85. See Rivka Weill, *Healing the Budget's Ills or Budgeting the Healing of the Ill—Is the Constitutional Dilemma*, 6 L. & BUS. 157, 186–87 (2007) (Isr.).

86. Weill, *supra* note 12, at 434; Herbert Döring, *Time as a Scarce Resource: Government Control of the Agenda*, in PARLIAMENTS AND MAJORITY RULE IN WESTERN EUROPE 223, 227 (Herbert Döring ed., 1995).

87. KNESSET R. P. 6(a), 25(b).

88. See Rivka Weill, *Juxtaposing Constitution-Making and Constitutional Infringement Mechanisms in Israel and Canada: On the Interplay between Common Law Override and Sunset Override*, 49 ISR. L. REV. 103, 118–19 (2016).

89. *Edelstein Decision*, *supra* note 1, at ¶ 9, 11 (President Hayut).

90. See Weill, *supra* note 12, at 429.

91. H.C.J. 652/81 *Sarid v. Chairman of the Knesset*, 36 P.D. 197 (1982).

in intra-parliamentary procedures if the Court identifies a grave breach of the parliamentary system's most fundamental values—the Court did not intervene. This allowed the Speaker to postpone a no-confidence vote from 11:00 AM to 5:00 PM to enable coalition MKs to return from abroad and vote. This delay saved the government, but the petitioners criticized it as a deviation from the Knesset's protocol.<sup>92</sup>

The Court also declined to intervene in the *Ratz Faction* decision.<sup>93</sup> In this case, the Deputy Speaker scheduled a no-confidence motion that would lead to the government's fall later than mandated in the Knesset's Rules of Procedure. He sought to buy time for PM Yitzhak Shamir to fire his Deputy PM, Shimon Peres—who orchestrated the no-confidence motion—before the government's fall.<sup>94</sup> Peres's infamous “dirty trick” was the only time in Israel's history that a government fell because of a no-confidence vote. Other governments voluntarily dissolved to pre-empt public disgrace.<sup>95</sup>

In the *Hanan Porat*<sup>96</sup> decision, the Court dodged a petition to intervene in the Speaker's judgement to block MK Porat's proposal to mandate a nation-wide referendum before proceeding to the second stage of the Oslo Accords. The Knesset's plenary session decided on an earlier day to hold debate on Porat's proposal, but the Speaker prevented it. This is but a sample of examples proving the Court's awareness that the Knesset Speaker's discretion always entails political considerations.

The only way to justify and canonize the *Edelstein* ruling is to pay attention to what the Court said between the lines. The Court feared that Edelstein, as Netanyahu's agent, sought to prevent a proper transfer of political power. The Court's President, Esther Hayut, said Edelstein was “undermin[ing] . . . the democratic process . . . [and] the status of the Knesset as an independent [authority] and the *process of governmental transition*.”<sup>97</sup> Deputy President (ret.) Hanan Melcer wrote that Edelstein's actions

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92. *Id.* at 197–99.

93. H CJ 1179/90 *Ratz Faction v. Deputy Knesset Speaker*, 44 P.D. 31 (1990).

94. *Id.* at 34. See generally Asher Arian, *Political Parties and the Emergence of Israel's Second Republic*, in *POLITICAL PARTIES AND THE COLLAPSE OF THE OLD ORDERS* 165, 170–72 (John Kenneth White & Philip John Davies eds. 1998).

95. Rivka Weill, *Twilight Time: On the Authority of Caretaker Governments*, 13 L. & GOV'T. 167, 213 (2010) (Isr.). It should be noted that the unity government, which was headed by Netanyahu and Ganz, decided not to pass the budget act in 2020. Under Israeli law, and in accordance with Israel's parliamentary system, the failure to pass a budget act automatically prompts elections. See *supra* note 84 and accompanying text. See also Steve Hendrix, *Israel Staves Off New Elections by Approving First Budget in Three Years*, WASH. POST (Nov. 4, 2021, 9:46 AM), [https://www.washingtonpost.com/world/middle\\_east/israel-budget-elections-bennett/2021/11/04/0c63d6b4-3d48-11ec-bd6f-da376f47304e\\_story.html](https://www.washingtonpost.com/world/middle_east/israel-budget-elections-bennett/2021/11/04/0c63d6b4-3d48-11ec-bd6f-da376f47304e_story.html).

96. H CJ 4064/95 *Porat v. Knesset Speaker*, 49 P.D. 177, 177–79 (1995).

97. *Edelstein Decision*, *supra* note 1, at ¶ 15 (President Hayut) (emphasis added) (quote translated from the original in Hebrew).

“violate[] the tradition of a proper transfer of governance.”<sup>98</sup> This rationale aligns with John Hart Ely’s political process theory that justifies judicial review to remedy failures of democracy in order to, *inter alia*, enable smooth transfer of power following elections.<sup>99</sup>

The Court’s fear aligned with the charged atmosphere in the public arena. As this drama unfolded, the “Black Flags” protest movement endeavored to oust Netanyahu for his alleged corruption, arguing that his continued rule amounts to raising a black flag over Israel’s democracy.<sup>100</sup> Demonstrators further claimed that Edelstein forcibly refused, in a non-democratic fashion, to vacate his office in defiance of election results.<sup>101</sup> In an op-ed, the philosopher Yuval Noah Harari characterized Edelstein’s refusal as a coup.<sup>102</sup> The Court acted swiftly to prevent a scenario like the assault on the U.S. Capitol on January 6, 2021. Perhaps this is why Professor Daniel Friedman, a former Minister of Justice and a great opponent of judicial intervention in parliamentary affairs, stated: “We should welcome this [Edelstein] decision, which is sharp, practical, to the point, and no less important—was decided as quickly as needed.”<sup>103</sup>

## V. SUBSEQUENT CONSTITUTIONAL DIALOGUE

Defying the Court’s order, Edelstein did not include the Knesset Speaker’s election in the agenda.<sup>104</sup> On March 25, 2020, at 11:00 AM, Edelstein declared on the Knesset’s floor that the Court’s decision constitutes an unprecedented undermining of Israel’s democratic foundations. In his words:

The Supreme Court ruling is not based on the letter of the law, but on a one-sided and extreme interpretation. . . . The Court ruling constitutes a crude and arrogant intervention of the judiciary in the matters of the elected legislature. The Court decision causes unprecedented harm to the People’s and the Knesset’s sovereignty. The Court decision undermines the foundations of Israeli

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98. *Id.* ¶ 9 (Deputy President Melcer).

99. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

100. Idan Zonshine, *Black Flags Movement Disbands After over a Year: “Mission Accomplished”*, JERUSALEM POST (June 25, 2021, 11:29 AM), <https://www.jpost.com/israel-news/black-flags-movement-disbands-after-over-a-year-mission-accomplished-672012>.

101. Jushua (Josh) Brainer, *A Convoy of Hundreds of Cars Demonstrates in Jerusalem over the Weakening of the Knesset in the Shadow of the Corona*, HAARETZ (Mar. 23, 2020), <https://www.haaretz.co.il/news/politi/1.8701561>.

102. Yuval Noah Harari, *Yes, This is What a Coup Attempt Looks Like*, YNET (Mar. 22, 2020, 10:35 AM), <https://www.ynet.co.il/articles/0,7340,L-5699445,00.html>.

103. Daniel Friedman, *This Time, the High Court of Justice’s Intervention is Justified and Warranted*, YNET (Mar. 24, 2020), <https://www.ynet.co.il/articles/0,7340,L-5700619,00.html>.

104. *Contempt Decision*, *supra* note 8, at ¶ 2.

democracy. . . . And, therefore, as a democrat, as a Zionist Jew, as someone who has fought against dark regimes [in the Soviet Union], and as the Speaker of this house, I will not allow Israel to descend into anarchy. I will not lend a hand to civil war. I will act in the spirit of Menachem Begin, who, in June 1948, in the days of the Altalena Affair, prevented civil war.<sup>105</sup>

Edelstein announced his resignation as Speaker because he could not conscientiously comply with the decision. Since the Knesset Speaker's resignation comes into effect only after forty-eight hours, Edelstein violated the Court's decision.<sup>106</sup>

If not for the pressing timetable, a resignation would have been the most appropriate step for public officials who feel that their conscience does not enable them to uphold a Court order. By resigning, they enable their successor to fulfill the Court's order, as the order concerns the function of a titular office, not the personal identity of the civil servant currently occupying it.

A storm followed. One hundred and sixteen retired judges signed on to an unprecedented petition against this fatal attack on the rule of law.<sup>107</sup> Professor Suzie Navot said that "we are the closest we have ever been to anarchy," and that this struggle centers on the Court's need to protect the Knesset from the government.<sup>108</sup> Hundreds gathered outside the Knesset to protest against this attack on democracy.<sup>109</sup>

Edelstein, however, did not retract, and maintained his claim that the Court is the one harming democracy. He, in contrast, fulfilled his public duty and paid for following his conscience. Edelstein asserted that he prevented a modern iteration of the Altalena Affair, which occurred in June 1948 and involved a military confrontation between the IDF and the Jewish National Military Organization over the control of weapons and ammunition shipped by the latter to Israel.<sup>110</sup> MK Yariv Levine—then Minister of Tourism who eventually ascended to Speakership—criticized the Court, saying:

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105. 23rd Knesset's Protocol, Sitting No. 6, at 3–4 (Mar. 25, 2020), <https://main.knesset.gov.il/Activity/plenum/Pages/Sessions.aspx>.

106. KNESSET R.P. 5(a)(2).

107. Tova Zimoki, *116 Retired Judges Against Edelstein: An Undermining of the HCJ—The Destruction of Democracy*, YNET (Mar. 25, 2020), <https://www.ynet.co.il/articles/0,7340,L-5701545,00.html>

108. Suzie Navot, *We Are the Nearest to Anarchy That We Have Ever Been*, 103FM (Mar. 26, 2020), <https://103fm.maariv.co.il/programs/media.aspx?ZrqvnVq=HLMMKJ&c41t4nzVQ=FJL>.

109. *Hundreds Protest Against Edelstein, Government Outside the Knesset*, TIMES ISRAEL (Mar. 25, 2020, 12:36 PM), [https://www.timesofisrael.com/liveblog\\_entry/hundreds-protest-against-edelstein-government-outside-the-knesset/](https://www.timesofisrael.com/liveblog_entry/hundreds-protest-against-edelstein-government-outside-the-knesset/).

110. Yehuda Lapidot, *The Irgun: The Altalena Affair*, JEWISH VIRTUAL LIBR. (June 20, 1948), <https://www.jewishvirtuallibrary.org/the-altalena-affair>.

“[I]f President Esther Hayut wants to put herself above the Knesset, she is welcome to come to the Knesset building with the Court’s guard and open the Assembly’s session herself. That way, it will be clear that this amounts to a coup carried by a bare handful of Justices who appoint themselves in the secrecy of private rooms.”<sup>111</sup>

Following Edelstein’s resignation as Speaker, the petitioners requested to hold Edelstein in contempt of Court.<sup>112</sup> The petitioners also asked for a declaratory judgment that would state that Edelstein’s tenure was effectively terminated. Therefore, the regulations that mandate that the Knesset Speaker’s resignation comes into effect after forty-eight hours would not apply. They requested the Court to set a procedure for the immediate election of a new Speaker.<sup>113</sup>

President Hayut ruled that, although the Court has seen cases in which the political branches “dragged their feet” to postpone compliance with Court injunctions, “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.”<sup>114</sup> In doing so, the President declared that Edelstein *gravely injured* the public interest of ensuring that the rule of law perseveres. She said, “[i]f that is how a person of authority behaves, why should a common citizen act differently?”<sup>115</sup> Because the Court opined that there was a lacuna in existing law to solve the drama, it decided to follow the advice of the Knesset’s Legal Advisor. The Court decreed that the most senior MK would reconvene the plenum the next day to hold a vote on replacing the Speaker, although it was not a day in which the Knesset usually convenes. The Court opined that, this way, the judicial order from March 23, 2020, would be upheld.<sup>116</sup> The Court declared that, because this was an unprecedented case, it required “unprecedented remedies.”<sup>117</sup>

Because Edelstein resigned on Wednesday at 11:00 AM, his resignation would not have taken effect until Friday, a day in which the Knesset does not convene. It seems that this was Edelstein’s way to stall and allow the behind-

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111. Tal Schnieder, *Senior Ministers to the Knesset’s Speaker Edelstein: Disobey the HCJ’s Rule*, GLOBES (Mar. 23, 2020), <https://www.globes.co.il/news/article.aspx?did=1001322995>.

112. *Contempt Decision*, *supra* note 8, at ¶ 3.

113. *Id.*

114. *Id.* ¶ 4.

115. *Id.*

116. *Id.* ¶ 5–6.

117. *Id.*

the-scenes negotiations between the Likud and Ganz to continue.<sup>118</sup> If not for Edelstein's maneuver, MK Meir Cohen from the Yesh Atid party of the 61 Bloc would have been elected Knesset Speaker. Since a Knesset Speaker can only be removed for the cause of unbecoming conduct and such a removal requires the support of at least ninety out of one hundred and twenty MKs, appointing Cohen would have made it almost impossible to form a unity government; it would have been an irreversible act.<sup>119</sup>

In the mere hours that had passed between Edelstein's resignation and the time in which MK Amir Peretz—as the most senior MK—held a vote for electing a permanent Knesset Speaker, the unity government took shape. After campaigning under the slogan “Blue and White or Erdoğan [suggesting Netanyahu was like the Turkish President]”<sup>120</sup> and despite promising voters that he would not cooperate with Netanyahu,<sup>121</sup> Ganz was elected Knesset Speaker with the Likud's support.<sup>122</sup> His former running mates, including the Yesh Atid party, opposed this move.<sup>123</sup> Ganz joined Netanyahu's unity government and the Blue and White party disbanded.<sup>124</sup> Ultimately, Ganz became Speaker, supported by seventy-four MKs, with eighteen opposed.<sup>125</sup> For the first time, the Court dictated the Knesset Speaker's election date. This was also the first time that an Israeli Speaker has been elected in a roll call vote.<sup>126</sup>

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118. Yehuda Shlezinger, *Towards Unity: Behind the Scenes*, ISR. TODAY (Mar. 26, 2020), <https://newsrnd.com/news/2020-03-26--towards-unity--behind-the-scenes-%7C--israel-today.S1wUrj9LU.html>.

119. Knesset Law, 5754–1994, § 8(a).

120. Eric Bender, *Ganz: “Netanyahu Has No Boundaries, It's Either Blue and White or Erdoğan Entrenched,”* MAARIV (Feb. 24, 2020, 11:40 AM), <https://www.maariv.co.il/breaking-news/Article-750072>.

121. Yisrael Ohayon, Ganz in a series of interviews: “[W]e will not sit in unity with bibi – we have understandings on religious issues with Yisrael Beiteinu,” Actualic-Election (Feb. 15, 2020, 8:34 PM), <https://actualic.co.il/%d7%92%d7%a0%d7%a5-%d7%91%d7%a1%d7%93%d7%a8%d7%aa-%d7%a8%d7%90%d7%99%d7%95%d7%a0%d7%95%d7%aa-%d7%9c%d7%90-%d7%a0%d7%a9%d7%91-%d7%91%d7%90%d7%97%d7%93%d7%95%d7%aa-%d7%a2%d7%9d-%d7%91%d7%99%d7%91/>.

122. Oliver Holmes, *Benny Gantz Elected Israeli Speaker, Signalling Deal with Netanyahu*, GUARDIAN (Mar. 26, 2020, 2:01 PM), <https://www.theguardian.com/world/2020/mar/26/benny-gantz-elected-israeli-speaker-signalling-deal-with-netanyahu>.

123. *Id.*

124. Jonathan Lis & Chaim Levinson, *Blue and White Dismantled: Ganz Will Join a Government Headed by Netanyahu*, HAARETZ (Mar. 26, 2020), <https://www.haaretz.co.il/news/politi/.premium-1.8712453>.

125. 23rd Knesset's Protocol, Sitting No. 7, at 25 (March 26, 2020), <https://main.knesset.gov.il/Activity/plenum/Pages/Sessions.aspx>.

126. Weill, *supra* note 20, at 355.

## VI. THE LIMITS OF JUDICIAL INTERVENTION IN PARLIAMENTARY AFFAIRS

The *Edelstein* decision manifests all the perils of judicial intervention in intra-parliamentary procedures. The decision involves both politicization of the judiciary and judicialization of politics. Judicial politicization risks undermining the Court's legitimacy because intervention in blatantly political matters might paint the Court as partisan.<sup>127</sup> Judicialization of politics might weaken political institutions since judicial intervention in political procedures might prevent institutions from fully realizing the political process.<sup>128</sup>

The *Edelstein* ruling entailed politicization of the judiciary because the petitioners from the Blue and White party's Bloc wanted to use the Court to alter the political reality. They enjoyed majority support to appoint a Speaker but not to form a government. Some members of this Bloc did not agree to sit in a government with members of the Arab Joint List party and vice versa.<sup>129</sup>

They sought to overtake political power in two stages: first, seize control of the legislature, and later, through legislation, create the conditions to form a government. Once they controlled the Speakership, the petitioners planned to pass "controversial legislation," in the Justices' words.<sup>130</sup> Those are code words for preventing Netanyahu—Israel's longest serving PM<sup>131</sup>—from serving by amending Basic Law: The Government to forbid an indicted MK from serving as PM.<sup>132</sup> This constitutional amendment would have negated the rule of law principle because the purpose and effect of passing the amendment was influencing a particular person's political fate. It would have amounted to retroactive personal enactment while law should be general and typically prospective in nature.<sup>133</sup>

The petitioners hoped that ousting Netanyahu would create the political conditions necessary for realignment of political power, which would enable a majority to form a government.<sup>134</sup> Alternately, if no MK successfully forms

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127. Alfred Witkon, *Justiciability*, 1 ISR. L. REV. 40, 43–44 (1966).

128. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV L. REV. 129, 142 n.1 (1893).

129. Lahav Harkov, *Hauser and Hendel: The Matchmakers Behind the Netanyahu-Gantz Unity Deal*, JERUSALEM POST (April 24, 2020, 9:21 AM), <https://www.jpost.com/israel-news/political-affairs-the-matchmakers-behind-netanyahu-gantzs-unity-deal-625738>.

130. *Edelstein Decision*, *supra* note 1, at ¶ 2 (Hayut, President).

131. Oliver Holmes, *Benjamin Netanyahu Becomes Longest-serving Israeli PM*, GUARDIAN (July 20, 2019, 2:00 PM), <https://www.theguardian.com/world/2019/jul/20/benjamin-netanyahu-becomes-longest-serving-israeli-pm>.

132. See Rivka Weill, *Personal Legislation: The Knights of the Rule of Law Against the Rule of Law*, HAARETZ (Mar. 8, 2020), <https://www.haaretz.co.il/opinions/.premium-1.8639819>.

133. *Id.*

134. *Id.*; Weill, *supra* note 20, at 356.

a government, Basic Law: The Government provides for holding new elections<sup>135</sup>—this time, sans Netanyahu. Thus, rather than using the Court to prevent the Speaker from blocking a proper transfer of power, the petitioners wanted to use the Court to *create* a situation in which the transfer of political power was a realistic possibility.

The *Edelstein* ruling also involved judicialization of politics, placing the political players with their backs to the wall. It inadvertently contributed to the fact that the winners in Court, especially the Yesh Atid party, lost in the political arena. Had Ganz, who was initially entrusted with composing a government,<sup>136</sup> been given more political time, he might have succeeded in forming a narrow majority government with his original allies. The Court's deadline forced Ganz to choose within an extremely narrow timetable whether he sticks with his allies or defects to the Likud party's Bloc. The Likud posed an ultimatum that Ganz must present his candidacy for the Speakership or lose the opportunity to co-form a unity government.<sup>137</sup>

The Court's ruling arguably helped Ganz. As a Speaker, he enjoyed a better bargaining chip for negotiations with the Likud over forming a unity government. Ganz could not be compelled to resign as Speaker, absent a super-majority of MKs and for cause. The Likud thus depended on Ganz's good will to resign and allow for the election of a coalition-approved Speaker.

However, this bargaining chip came at the price of an irreversible decision: Ganz needed to dissolve his party, a decision that was, to a great extent, dictated by the Court's intervention. The 61 Bloc's transition from victory in *Edelstein* to disintegration within days was unexpected by the petitioners (except by Ganz and his closest allies), the Court, or the public. The petitioners believed their legal victory secured majority support for their intended Speaker—Meir Cohen. The 61 Bloc treated Ganz's actions as “a betrayal to voters and a theft of votes.”<sup>138</sup>

It is ironic that, in *Edelstein*, the petitioners demanded the Court's intervention in parliamentary affairs to protect majority rule while their political motive was preventing Netanyahu from forming a government. Yet, within a month, with *Edelstein* as precedent, and based on the same principle of majority rule, the Court ruled that Netanyahu could legally be tasked with forming the government although he was indicted on serious criminal charges

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135. Basic Law: The Government, § 11.

136. See *supra* note 28 and accompanying text.

137. Isabel Kershner & David M. Halbfinger, *Benny Gantz, Breaking Vows, Says He Would Serve Under Netanyahu*, N.Y. Times (Mar. 26, 2020), <https://www.nytimes.com/2020/03/26/world/middleeast/israel-netanyahu-gantz-government.html>.

138. Moran Azulay, *Lapid: Gantz Stole Votes, Gave Them to Netanyahu*, YNET NEWS (Mar. 26, 2020), <https://www.ynetnews.com/article/rylCEdLL>.

concerning bribery, fraud, and breach of trust. The Court held that it cannot overrule the popular will absent a criminal conviction.<sup>139</sup> Thus the petitioners' victory in *Edelstein* set the stage for their defeat in the Netanyahu ruling.

I would like to suggest that these dynamics might have played out differently had the Court settled for declaratory relief in *Edelstein*. Although President Hayut declared that there has never been a precedent for open defiance of a judicial order by a public figure, Israel's history proves otherwise. In 1985, the Speaker, Shlomo Hillel, decided not to approve MK Meir Kahane's private bill proposals because they were racist.<sup>140</sup> Meir Kahane's petition against the Speaker's stance marked the Israeli Court's first intervention in intra-parliamentary procedures.

In a unanimous verdict, written by Justice Barak, the Court asserted that Speaker Hillel's decision to block Kahane from submitting private bills gravely violated the parliamentary system's most fundamental values, preventing Kahane from fulfilling his duty as an elected representative.<sup>141</sup> Speaker Hillel chose to defy the Court's order, believing that his stand better protects core democratic values. MK Kahane proposed a no-confidence vote, prompted by the Knesset's contempt of the judicial order.<sup>142</sup> The Knesset did not waver, but rather amended the Rules of Procedure to forbid the Knesset Presidium from approving private members' bills that were *inter alia* racist.<sup>143</sup> The amendment was also applied retroactively to include Meir Kahane's pending bill proposals.<sup>144</sup>

Kahane petitioned the Court to hold the Knesset's Speaker in contempt of the Court.<sup>145</sup> However, the Court dismissed his petition.<sup>146</sup> Justice Barak explained that, in the original petition, Kahane requested an injunction, but the Court only gave a declaratory decree, which "did not correspond to the petition."<sup>147</sup> The Court stated that "regarding the duty to act in accordance with the law . . . there is no difference between a decree that is completely declaratory and a decree that has an operational element."<sup>148</sup> Nonetheless,

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139. HCJ 2592/20 Movement for Quality Gov't v. Attorney General, Nevo Legal Database (May 6, 2020).

140. HCJ 742/84 Kahane v Knesset Speaker, 39 P.D. 85 (1985).

141. *Id.* at 94–96.

142. 11th Knesset's Protocol, Sitting No. 136, at 406 (Nov. 12, 1985), [https://fs.knesset.gov.il/11/Plenum/11\\_ptm\\_530511.PDF](https://fs.knesset.gov.il/11/Plenum/11_ptm_530511.PDF).

143. Knesset R.P. 75(e).

144. 11th Knesset's Protocol, Sitting No. 137, at 434 (Nov. 13, 1985), [https://fs.knesset.gov.il/11/Plenum/11\\_ptm\\_530513.PDF](https://fs.knesset.gov.il/11/Plenum/11_ptm_530513.PDF).

145. HCJ 306/85 Kahane v. Knesset Speaker, 39 P.D. 485, 487–88 (1985).

146. *Id.* at 488.

147. *Id.* at 487.

148. *Id.*

the distinction between the decrees was important in the sense that “one can characterize someone’s actions as unlawful [for failing to follow a declaratory judgment], but not hold him responsible for contempt of the Court.”<sup>149</sup>

As I elaborated elsewhere, Justice Barak was highly strategic.<sup>150</sup> He did not hesitate to create a precedent in establishing judicial authority to intervene in intra-parliamentary procedures but was very careful in the choice of relief. He anticipated that the Knesset might disobey a judicial order and prevented a head-on collision between the Knesset and the Court by granting declaratory relief alone. The Court intentionally averted a tempest à la *Edelstein*.

Moreover, strategic considerations are not the sole reason for issuing a mere declaratory judgment when intervening in intra-parliamentary procedures. I argue that the Court’s toolbox for these cases does not include injunctions because of the need to protect MPs’ parliamentary privilege. This privilege includes “the right of each House to control its own proceedings and precincts, and the right of those participating in parliamentary proceedings . . . to speak freely without fear of legal liability or other reprisal.”<sup>151</sup>

This privilege is intended to protect the independence of the legislative branch and its members. In fact, when the petitioners asked to hold Edelstein responsible for contempt of the Court, President Hayut replied that MK Edelstein’s substantive immunity is still in force.<sup>152</sup> Justice Amit added that digging into the Speaker’s property to impose fines would be “inappropriate.”<sup>153</sup>

Under Israeli law, “MKs shall . . . be immune from exposure to any legal action, due to a parliamentary vote, or for expressing an oral or written opinion . . . if [ ]done in the fulfillment of their duties.”<sup>154</sup> Supposedly, one could argue that, if the Court finds that MPs have exercised discretion unlawfully, then their actions should not be characterized as conducted for “fulfillment of their duties.”<sup>155</sup> Thus, they supposedly should not enjoy

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149. *Id.* at 488.

150. See generally Rivka Weill, *The Strategic Common Law Court of Aharon Barak and its Aftermath: On Judicially-led Constitutional Revolutions and Democratic Backsliding*, 14 L. & ETHICS HUM. RTS. 227 (2020).

151. JOINT COMMITTEE ON PARLIAMENTARY PRIVILEGE, PARLIAMENTARY PRIVILEGE 3 (2013), <https://publications.parliament.uk/pa/jt201314/jtselect/jtprivi/30/30.pdf>.

152. *Protocol in HCJ 2144/20 Movement for Quality Gov’t in Israel v. Knesset Speaker*, Calcalist (Mar. 25, 2020), <https://z.calcalist.co.il/assets/pickerul/3b63da10-a269-4443-81e3-f0ab25c349de.docx>.

153. *Id.* at 20.

154. Knesset Members’ Immunity, Rights and Duties Law, 5711–1951, § 1 (a).

155. *Id.*

parliamentary privilege. However, this position is problematic because it transforms parliamentary privilege into a principle whose content is subject to what an external institution—the Court—decides to define as *legitimate* work of MPs within parliament. Such an approach would devoid parliamentary privilege of meaning.

The *Edelstein* decision differs from any precedent in which MKs were exposed to legal sanction because, for the first time, MKs' exposure to criminal charges stemmed solely from disobeying another branch's order on how to exercise parliamentary discretion. This is different from cases in which an MK violated a *separate, independent* criminal prohibition like fraud, bribery or breach of trust. If any other governmental branch, Court included, can instruct an MK—*let alone* the Knesset Speaker—on how to exercise parliamentary discretion and enforce these orders through contempt of court, then Parliament loses its independence.

While critics may argue that declaratory relief is powerless, its advantage lies in its relative weakness. Declaratory relief states what the Court's interpretation of the law is and directs public personas to act appropriately without forcing political actors to translate a judicial decision into time-bound action.<sup>156</sup> Rather than usurping the legislature's role by using an injunction, issuing declaratory relief transforms the Court into a *supporting actor*. It contributes to a political dynamic that seeks to carry out the Court's declaration while accounting for the legislature's independence.

#### EPILOGUE

The study of the *Edelstein* decision is an interesting exercise in comparative constitutional law. Reading the judicial decision without its broader political and legal contexts would lead to a misunderstanding of its precedential nature. The Court failed to state that the Speaker's election was practically irrevocable absent a general election. Yet, without understanding this feature of Israeli law, one cannot understand why the decision is so difficult to justify. The Court cannot rewrite the law that the Speaker's position is practically irrevocable for the duration of Parliament. So, too, it should not be authorized to rewrite the law that the outgoing Speaker serves until the permanent Speaker's election.

At the same time, the *Edelstein* drama suggests that the 2016 amendment of Basic Law: The Knesset, which provides that the outgoing Speaker should continue in its role on a carry-over basis, is undesirable. It might lead the interim Speaker to abuse political power in setting the parliamentary agenda. The previous regiment, under which the most veteran

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156. See, e.g., Edwin M. Borchard, *Declaratory Judgment a Needed Procedural Reform*, 28 YALE L.J. 105, 149 (1918).

MK served as an interim Speaker, is more desirable because it better expresses the idea that the interim Speaker is only a stand-in until the election of a permanent Speaker. The *Edelstein* case is thus an illustration of the fact that constitutional design of institutions matter.

If any lesson may be drawn from the Edelstein affair, it is that the dangers of judicial intervention in parliamentary affairs may be mitigated if courts restrict themselves to issuance of declaratory relief alone. Courts can aid, but not replace, representative institutions to uphold the democratic process.