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MARBURY V. MADISON AND ITS IMPACT ON ISRAELI CONSTITUTIONAL LAW

By Yoram Rabin and Arnon Gutfeld[*]

I. INTRODUCTION

On February 24, 1803, the U.S. Supreme Court handed down one of the most important decisions in American constitutional history. The decision, *Marbury v. Madison*,[1] greatly clarified the jurisdiction of the three branches of government: legislative, executive and judicial. It is fascinating to discover, more than two hundred years later and thousands of miles from the United States that *Marbury* still reverberates in Israeli constitutional law and the rulings of Israel's Supreme Court. While we may take this revolutionary ruling for granted, some revolutionary decisions by the Supreme Court in Israel, on questions similar to those

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[1] 5 U.S. 137 (1803) [hereinafter *Marbury*].

decided in *Marbury*, are not yet accepted by consensus. Additionally, under the Israeli legal system, the court's power of judicial review does not arise from an express constitutional provision, as it does in most Western legal systems. Rather, in Israel, the power of judicial review exists through an interpretation of several bodies of constitutional documents. Similarly, the origin of judicial review in the U.S. is the Supreme Court's interpretation of a constitutional document in *Marbury*, which makes for an interesting comparison.

This paper discusses the influences of the *Marbury* decision in Israeli constitutional law and the various contexts in which the Israeli Supreme Court has cited *Marbury* in its rulings. In so doing, this paper conducts a comparative analysis of the *Marbury* decision and those Israeli Supreme Court decisions for which provided support.

To date, *Marbury* has been cited by the Israeli Supreme Court in seven of its decisions.[2] This paper will focus on two of these decisions. The main legal issues put before the court in the decisions are among the most fundamental and important of issues on which Israeli democracy is based: the principles of the separation of powers and judicial review of laws enacted by the legislature.

Before reviewing and analyzing these decisions, this paper first discusses *Marbury*, the circumstances surrounding it and its historical implications.[3]

II. THE U.S.A.: *MARBURY V. MADISION*

On October 16, 1800, just a few weeks before congressional and presidential elections were to be held, U.S. Supreme Court Justice Oliver

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[2] HCJ 73/85 Kach Faction v. Shlomo Hillel—Knesset Speaker [1985] IsrSC 39(3) 141; HCJ 428/86 Yitzhak Barzilai, Adv. v. Government of Israel [1986] IsrSC 40(3) 505; HCJ 142/89 Laor Movement—One Heart and a New Spirit v. Knesset Speaker [1990] IsrSC 44(3) 529, 538 (hereinafter "Laor"); HCJ 1000/92 Hava Bavli v. Rabbinical High Court—Jerusalem [1994] IsrSC 48(2) 221; Civil Appeal 6892/93 United Mizrahi Bank v. Migdal Cooperative Village [1995] IsrSC 49(4) 221, 416 (hereinafter "*Bank Hamizrahi*"); HCJ 6652/96 The Association for Civil Rights in Israel v. Minister of the Interior, [1998] IsrSC 52(3) 117, 126; HCJ 1993/03 Movement for Quality Government in Israel v. Prime Minister, Mr. Ariel Sharon [2003] IsrSC 57(6) 817.

[3] *See* SUZANNA SHERRY, *The Intellectual Background of Marbury v. Madison, in* ARGUING MARBURY V. MADISON 47, 47–64 (2005).

Ellsworth resigned. President John Adams, leader of the soon-to-be-defeated Federalist Party, nominated John Jay for the position. Everyone was shocked by Adams' selection. Jay, a former Chief Justice and current governor of the state of New York, declined the appointment, as he believed that the U.S. Supreme Court lacked any politically operative power. From his own experience he knew that the Supreme Court did not play an important role in the national government.[4] The U.S. Supreme Court was, as Alexander Hamilton had contended, the "least dangerous branch" of government. Jay also declined the nomination because the justices were required to ride circuit. After receiving notice that Jay declined the nomination, Adams had little time to nominate another candidate because Jay delayed his reply. Thus, Adams turned to his secretary of state, John Marshall in an effort to avoid nominating William Paterson, who the Federalists supported as a candidate.

On December 12 of that year, it became clear that Thomas Jefferson and the Republican Party had won the presidential election. The power of the federal judicial system was one of the main conflicts between the Republicans and the Federalists during the latter's years in power, and therefore was a stormy focus of tension during the election.[5]

Two months after it became apparent Jefferson had won, but before Jefferson and his administration had formally commenced their term of office, Congress passed the Judiciary Act of 1801, which created six new federal judicial circuits.[6] Within thirteen days, Adams forwarded a list of sixteen new judges to Congress, all loyal Federalist Party

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[4] WILLIAM R. CASTO, THE SUPREME COURT IN THE EARLY REPUBLIC: THE CHIEF JUSTICESHIP OF JOHN JAY AND OLIVER ELSWORTH 124–125 (1995); JAMES PERRY, SUPREME COURT APPOINTMENTS 1789–1801: CRITERIA, PRESIDENTIAL STYLE AND THE PRESS OF EVENTS 6 (1998).

[5] JACK N. RAKOVE, *The Political Presidency: Discovery and Intervention*, *in* THE REVOLUTION OF 1800: DEMOCRACY, RACE AND THE NEW REPUBLIC 30 (2002); NORMAN K. RISJORD, THOMAS JEFFERSON 114–122, 135–136; BERNARD A. WEISBERGER, AMERICA AFIRE 227–277, 292–293 (2002); JOHN FERLING, ADAMS VS. JEFFERSON: THE TUMULTUOUS ELECTION OF 1800 at 162–196 (2004).

[6] Congress repealed the Judiciary Act of 1801 in March of 1802 and in April, declared the Judiciary Act of 1789 was once again operative. That meant that the Supreme Court would meet in February, skipping the June and December terms stipulated in the 1801 Act. *See* HERBERT A. JOHNSON, THE CHIEF JUSTICESHIP OF JOHN MARSHALL, 1801–1835 at 54–57 (1997).

members, and the appointments were subsequently approved on March 2, 1801. The Judiciary Act of 1801 also stated that the next Supreme Court vacancy would not be filled, thereby reducing the number of justices from six to five. This was an attempt by the Federalist Congress to deny Jefferson the opportunity to appoint a judge to the Supreme Court.

In addition, at the very end of Adams's term, Congress also passed the Organic Act of the District of Columbia, which regulated the appointment of justices of the peace to the District of Columbia adjoining Alexandria, Virginia. Relying on this law, and on an existing act of Congress passed the previous year, which authorized the President to make these appointments to the magistrates' courts in the districts and to decide on the number needed in each district, outgoing President John Adams appointed forty-two new justices of the peace to the magistrates courts in the District of Columbia. As a purely political decision, the Senate later confirmed each appointment. Most significantly, one of the forty-two justices appointed was William Marbury.

After Adams signed the commissions and the Senate approved, the commissions were returned to Marshall, then secretary of state, to be stamped with the Great Seal of the United States. This took place at nine o'clock in the evening on March 3. Coincidentally, Adams' term as president would end at midnight that same day. Marshall delivered the commissions, but in his haste, four of the commissions were overlooked, including that of Marbury. Consequently, the Marbury's appointment and three others remained unsealed.

After he was sworn into office, Jefferson found the undelivered commissions and instructed that some of them be withheld, an instruction that denied the validity of the appointment of four justices of the peace, including Marbury. This was the opening salvo in what would be a broad and unbridled Republican attack against one of the pillars of the American system: the autonomy and independence of members of the judicial system after their appointment and approval by the Senate. Jefferson, who proved himself a majoritarian, had no qualms about using an elected majority to achieve his goals, even at the price of destroying the very foundations of American democracy. Accordingly, Jefferson, furious at Adams's last-minute action, reduced the number of appointees from forty-two to thirty and submitted the new list for Senate approval.

Jefferson also sought abrogation of the Circuit Court Act by Congress and the dismissal of the sixteen new federal judges appointed by Adams. To complete the task, Congress passed an act that delayed the convening of the Supreme Court for approximately one year because they feared that the Court might try to abrogate the law as unconstitutional. Congress also believed that the Republicans would win two-thirds of both houses in the congressional elections of November 1802, which would precede the convening of the Supreme Court in February 1803, the result of which would be that Congress could then impeach all the federalist judges who had been appointed for life

A petition filed in the Supreme Court by Marbury, and the other three commissioned justices of the peace, asked the Court to issue a writ of mandamus commanding James Madison, the new secretary of state in the Jefferson administration, to deliver their commissions as justices of the peace for the District of Columbia. Madison and the Republican Attorney General, Levi Lincoln, ignored the petition out of loyalty to the Executive and the obligation they felt to protect its rights, despite a competing respect for the Supreme Court. Marshall, a new chief justice who was also a political appointee, feared that, the petition, filed by the members of his own party, might well arouse the ire of the President, Congress and the public. The possibility that President Jefferson and Secretary of State Madison would simply ignore a ruling against them as they had ignored the petition itself was far from untenable.

Conversely, dismissal of the petition from Marbury and his colleagues was inherently intolerable to Marshall. At issue was whether the appointments of Marbury and the other three justices of the peace were legitimate where they were a result of a hasty political action by a lame duck president. Additionally, Adams had pushed through these appointments "by whip and spur" as Jefferson phrased it

In view of this political and legal complication, Marshall, employing impressive legal dexterity, was able to produce a judicial tour de force which bore aloft that "ostensibly powerless" institution—the Supreme Court. With great wisdom, Marshall unraveled the political tangle and raised the Supreme Court to unprecedented heights. However, the Federalists, the parties to the case, and the Republicans all found reason to quarrel with the opinion, although not on the issue of judicial review. Marbury and the others were denied their commissions; the Federalists thought the decision cowardly; the Republicans were furious

with Marshall's lecture to Jefferson about executive power, believing that the Court in this matter lacked jurisdiction

Marshall's decision contains not the slightest hint of the political drama that took place in the background, or of the disrespectful attitude of the new (Republican) administration toward the Supreme Court. *Marbury* was dealt with by Marshall on the technical, formal level, along a narrow and clearly delineated path. First, he ruled that the commissions were written, signed and sealed, and thus were lawful and valid. He then turned to the question of his ability to intervene in the activities of the executive branch and instruct it to act in a contrary way (i.e. to issue a writ of mandamus against Madison, instructing him not to delay the commissions any longer).[7]

For the purpose of this paper, it is appropriate to discuss the right of the Court to intervene. The Court left this question to the end of the inquiry, even though its natural place was earlier on since to discuss it first would have rendered the discussion of the other issues superfluous. It is the inquiry into this issue in particular that eventually gave rise to the historical and vitally important decisions in this case. There are those who believe that Justice Marshall reversed the logical order in his opinion so that he could "lecture" Secretary of State Madison on his duty to deliver the commissions in compliance with the law and launch a daring and shrewd attack condemning Jefferson's administration for the way in which it had opposed the Judiciary. This is particularly relevant as he recognized that an operative relief in the form of a writ of mandamus against the Executive was unrealistic in the circumstances, and his only option was therefore to employ piercing legal rhetoric against the administration's conduct in the affair.

In discussing the last and most decisive matter concerning the Court's ability to intervene in an executive act, the Court referred to the relevant constitutional basis, the Judiciary Act of 1789 and the Constitution of the United States. Article II, Section 2 of the Constitution defines the original jurisdiction of the U.S. Supreme Court. However, this provision does not authorize the Court to issue writs of mandamus to federal officers. Yet, Section 13 of the Judiciary Act of 1789 authorized the

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[7] THOMAS N. SHEVORY, JOHN MARSHALL'S LAW: INTERPRETATION, IDEOLOGY, AND INTEREST 45–51 (1994); FRANCIS N. STITES, JOHN MARSHALL: DEFENDER OF THE CONSTITUTION 81–92, 129–137 (1981); CHARLES F. HOBSON, THE CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 47–71 (1996).

Supreme Court to issue writs of mandamus to persons holding office under the authority of the United States. In practice, Section 13 was clearly intended to authorize the issue of writs of mandamus in cases that conferred jurisdiction to the Supreme Court. Nevertheless, Justice Marshall construed Section 13 differently, ruling that the last sentence of Section 13, which authorized the Supreme Court to issue writs of mandamus to public officers, does not dovetail with the Constitution. He further held that the legislation of that section was an attempt by Congress to broaden the jurisdiction of the Supreme Court in contravention of the Constitution, which delineated its original jurisdiction in great detail. Marshall's interpretation that Section 13 violates the constitution enabled him to instruct that the Judiciary Act be abrogated as unconstitutional.

Marshall intended to establish the autonomy and independence of the Judiciary, thus preventing it from being "brought to justice and impeached" by the Jefferson administration, and to block the expected opposition by Jefferson and the Executive branch (an expectation that was based on the knowledge that any writ of mandamus requiring execution would meet strong opposition and was therefore unrealistic, and would serve merely to further curtail the powers of the court). Marshall also sought to decry the Executive branch, under Jefferson's leadership, for its inappropriate attitude toward the Judiciary for disobeying the law and the Constitution. He further sought to warn the Republican Congress not to erode the autonomy and independence of the Supreme Court. Thomas Jefferson understood the ramifications of this decision. In a letter to a friend, he wrote that, according to the Marbury decision, the Constitution gives the Supreme Court the right to prescribe rules for the other branches of government. Jefferson emphasized his dismay at the fact that only the unelected branch of government could overrule the other elected branches and he concluded that "the Constitution on this hypothesis is a mere thing of wax in the hands of the judiciary, which they may twist and shape into any form they please."[8]

There is a great deal of evidence that the Founding Fathers intended to establish the practice of judicial review in the Constitution. The issue was controversial, but the Supreme Court employed it in the

[8] 10 THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 141 (Paul L. Ford ed., G.P. Putnam's Sons 1899).

1790s.[9] The Marbury decision was initially ignored and was later rediscovered after the Civil War. Law professors have turned it into the momentous decision that it is today, but as a historical matter, it was not the case that introduced the precedent of the doctrine of judicial review.[10]

Across the Atlantic and almost two centuries later, the Israeli Supreme Court in *Bank Hamizrahi*[11] was influenced by Marshall's decision in the matter of judicial review. Israel's Chief Justice, Aharon Barak once called the *Bank Hamizrahi* decision "our Marbury v. Madison"[12] The decision in *Bank Hamizrahi* was the first in which the Israeli Supreme Court reviewed a law legislated by Israel's House of Representatives, the Knesset, and in so doing, determined that the Supreme Courthas the power of judicial review. The following discussion will therefore describe the constitutional basis and background of the Israeli system as it was immediately before *Bank Hamizrahi.*

III. ISRAEL: CONSTITUTION AS "A SHIP BUILT AT SEA"

To understand the Israeli constitutional reality and the use of Marbury by Israel's Supreme Court, this section offers a brief description of the constitutional development in Israel since its establishment.[13]

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[9] *See* MAEVA MARCUS, *Judicial Review in the Early Republic*, *in* LAUNCHING THE "EXTENDED REPUBLIC": THE FEDERALIST ERA 25–53 (1996); William M. Treanor, *Judicial Review before Marbury*, 58 STAN. L. REV. 455 (2005); GORDON S. WOOD, *Launching the "Extended Republic": The Federalist Era*, *in* LAUNCHING THE "EXTENDED REPUBLIC" : THE FEDERALIST ERA 12–15 (1996); Gordon S. Wood, *The Origins of Judicial Review*, 22 SUFFOLK U. L. REV. 1293 (1988); LEONARD LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 89–99 (1988); RAOUL BERGER, CONGRESS V. THE SUPREME COURT 47–143 (1969).

[10] *See* Marcus, *supra* note 9; CHRISTOPHER WOLFE, THE RISE OF MODERN JUDICIAL REVIEW: FROM INTERPRETATION TO JUDGE-MADE LAWS 40–46, 90–117 (1986).

[11] *See Bank Hamizrahi*, *supra* note 2. Aharon Barak, *The American Constitution and Israeli Law*, *in*, AMERICAN DEMOCRACY: THE REAL, THE IMAGINARY AND THE FALSE 81 (Arnon Gutfeld ed., 2002) (Ganei Aviv-Lod, Israel) [Hebrew].

[12] *See* WILLIAM E. NELSON, MARBURY V. MADISON AND THE LEGACY OF JUDICIAL REVIEW 104-113 (2000) on the impact of judicial review worldwide.

[13] The historical background provided here is taken mainly from Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 COLUM. HUM. RTS. L. REV. 309 (1995).

A. The Basic Laws

When Israel was founded in 1948 after thirty years of the British Mandate, its founders assumed that a constitution and a bill of rights would be forthcoming.[14] Indeed, the Declaration on the Establishment of the State of Israel (also known as the Declaration of Independence) contained an explicit promise to draft a written constitution. However, soon after the Declaration was proclaimed, events took a different course. Internal political squabbles regarding the content of the future constitution prevented agreement upon a text that would gain broad-based support in a heterogeneous Israeli society, comprised of immigrants coming from diverse cultural backgrounds with strongly held opposing ideologies—nationalist, socialist and religious.[15] In 1950 it became apparent that MAPAI—the ruling party at the time (an antecedent of the current Israel Labour Party) was unwilling to draft a constitution against the opposition of the religious parties, which formed part of the coalition government.[16] Consequently, the first Knesset adopted an historical compromise—the 'Harari Resolution' (named after its sponsor). This resolution stated the following:

> The first Knesset charges the Constitutional, Legislative and Judicial Committee with the duty of preparing a draft Constitution for the State. The Constitution shall be composed of individual chapters in such a manner that each of them shall constitute a basic law in itself. The individual chapters shall be brought before the Knesset as the Committee completes its work, and all the

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[14] For this history in general *see* Barak-Erez, *supra* note 13; Menachem Hofnung, *The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585 (1996).

[15] Barak-Erez, *supra* note 13, at 312.

[16] Hofnung, *supra* note 14 at 588; *see also* Asher Maoz, *Constitutional Law*, *in* THE LAW OF ISRAEL: GENERAL SURVEYS 5 at 7 (Itzhak Zamir & Sylviane Colombo eds., Jerusalem, Sacher Institute, 1995). There are also speculations that Prime Minister Ben-Gurion was reluctant to restrict, through the enactment of a constitution, his freedom of political manoeuvring. *See* Barak Cohen, *Empowering Constitutionalism with Text from an Israeli Perspective*, 18 AM. U. INT'L L. REV. 585, 629 (2003).

> chapters together will form the State Constitution" (unofficial translation).[17]

The wording of the Harari Resolution represents a political compromise that has enabled the Knesset to evade the obligation articulated in the Declaration of Independence to produce a formal constitution, while at the same time preserving its legal competence to enact one.[18] Although academics questioned whether the First Knesset's authority to enact a constitution was validly delegated to subsequent elected Knessets,[19] in practice, the Knesset (from the third Knesset onwards) enacted a series of eleven basic laws.[20]

The first nine Basic Laws enacted before 1992 addressed the structure of the State's political and legal system and the powers of its principal institutions. Some Basic Laws defined the powers of the legislative,[21] the executive,[22] the president,[23] the judiciary[24] and the State comptroller.[25] Other Basic Laws contained essential principles concerning the management of State lands,[26] the State economy,[27] the armed forces[28] and the designation of Jerusalem as the national capital of Israel.[29] However, until 1992, the Basic Laws did not, by and large,

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[17] DK (1950) 1743.

[18] Hofnung, *supra* note 14, at 588.

[19] Maoz, *supra* note 16, at 7. *See* Amnon Rubinstein, *Israel's Piecemeal Constitution*, 16 Scripta Hierosolymitana 201 (1966); *see also* Melville B. Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217 (1970).

[20] This practical custom received a legal approval by the majority opinion in *Bank Hamizrahi*.

[21] Basic Law: the Knesset, 1958, S.H. 69

[22] The original Basic Law: the Government, 22 L.S.I 257, 1968, S.H. 226, was replaced by two new Basic Laws: first in 1992 (Basic Law: the Government, 1992, S.H. 214) and then again in 2001 (Basic Law: the Government, 2001, S.H. 158).

[23] Basic Law: the President of the State, 1964, S.H. 118.

[24] Basic Law: The Judicature, 1984, S.H. 78.

[25] Basic Law: the State Comptroller, 1988, S.H. 30.

[26] Basic Law: Israeli Land, 1960, S.H. 56.

[27] Basic Law: State Economy, 1975, S.H. 206.

[28] Basic Law: The Armed Forces, 1976, S.H. 154.

[29] Basic Law: Jerusalem, the Capital of Israel, 1980, S.H. 186.

protect human rights.[30] As a result, the pre-1992 'Israeli constitution' was described as a 'body without a soul'—an institutional and political legal framework lacking meaningful safeguarding of substantive values.[31]

This phenomena changed dramatically in 1992 when the Knesset adopted two new Basic Laws designed to protect human rights: Basic Law: Human Dignity and Liberty[32] and Basic Law: Freedom of Occupation[33]—establishing the constitutional supremacy of several important human rights: the right to life, the right to bodily integrity, the right to human dignity, the right to property, the right to personal liberty, privacy, freedom of occupation, and the right of citizens to leave and reenter the country. Most significantly, both basic laws included 'entrenchment clauses' (or supremacy clauses)—i.e., specific language prohibiting infringement upon these protected rights, included by way of legislation, unless it meets four basic conditions (contained in 'limitation clauses'): (1) it is prescribed by law, (2) it is compatible with Israel's basic values as a Jewish and democratic State, (3) it promotes a worthy purpose; (4) and it does not introduce excessive restrictions.[34] Hence, the effect of

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[30] An exception could be found in article 4 of the Basic Law: The Knesset, which pronounces, among other things, the right to equality in voting to the Knesset. Basic Law: The Knesset, 5718-1958, 12 LSI 85 (1957–1958) (Isr.). This article contains a so-called 'entrenchment clause' providing that its provisions shall not be amended except by a special majority vote in the Knesset. In 1969, the Supreme Court recognized the validity of this entrenchment clause and invalidated legislation conflicting with the entrenchment provision since the requisite majority had not adopted it. See H.C.J. 98/69 Bergman v. Minister of Finance, 23(1) P.D. 693 (1969), translated in *Judicial Review of Statute,* 4 *Isr L. Rev.* 559, 559–565 (1969).

[31] Barak-Erez, *supra* note 13, at 315 ('The constitutional project could not be completed without an agreement on the heart of every modern constitution: a definition of individual rights and the form of their protection').

[32] Printed in Basic Law: Human Dignity and Liberty, 31 *Isr. L. Rev.* 21–23 (1997).

[33] Basic Law: Freedom of Occupation, 1992, S.H. 114. This Basic Law was replaced in 1994 by Basic Law: Freedom of Occupation, 1994, S.H. 90. The full text of this Law is also reprinted in Basic Law: Human Dignity and Liberty, 31 *Isr. L. Rev.* 21–23 (1997).

[34] Basic Law: Human Dignity Basic Law: Human Dignity and Liberty (1992), art. 8, 9; Basic Law: Freedom of Occupation (1994) art. 4. This language was

these Basic Laws has been to subject subsequent Knesset legislation to their provisions (Basic Law: Freedom of Occupation even subjected antecedent legislation to its provisions).[35]

B. Judicial Bill of Rights

Basic Laws represent only one part of Israel's constitutional scheme and that important jurisprudence concerning human rights protection was generated by the Supreme Court even *before* 1992. In fact, promotion of human rights by Supreme Court judgments[36] could be viewed as a reaction by the part of the Court to the prolonged inaction by the Knesset in promoting human rights through the enactment of Basic Laws.[37]

In its pre-1992 case law, the Supreme Court recognized and enforced several important human rights such as the right to personal

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clearly inspired from comparative constitutional law and international law. See eg, See, e.g., Constitution Act, 1982, Part 1 [Can.]; International Covenant on Civil and Political Rights, art. 12, 18–19, 21–22, Mar. 23, 1976, 999 U.N.T.S 172.; Convention for the Protection of Human Rights and Fundamental Freedoms, art. 10–11, Nov. 4 1950, 213 U.N.T.S 222. It may be noted that Basic Law: Freedom of Occupation also contains in article 7 a "procedural entrenchment clause", which requires absolute majority in the Knesset in order to amend the Basic Law. While it is not completely clear what Parliamentary majority is needed to amend other basic laws, the dominant view is that any majority will suffice. Hofnung, *supra* note 14, at 594, 598.

[35] David Kretzmer, *"Israel's Basic Laws on Human Rights," in* ISRAELI REPORTS TO THE XV INTERNATIONAL CONGRESS OF COMPARATIVE LAW 293 at 302 (Alfredo Mordechai Rabello, ed., Jerusalem, Sacher Institute, 1999). Article 10 of the Basic Law: Freedom of Occupation did however provide that review of antecedent legislation would only be possible 10 years after its entry into force. This period had expired on 14 March 2002.

[36] Supreme Court judgments constitute binding precedents under the Israeli legal See Basic Law: The Judicature, article 20 ("Precedent issued by the Supreme Court is binding upon all instances except upon the Supreme Court").

[37] *See* Cohen, *supra* note 16, at 636–642; Stephen Goldstein, *Protection of Human Rights by Judges: The Israeli Experience,* 38 St. Louis U. L.J. 605, at 605 (1994) ("In Israeli law, human rights have been protected almost exclusively by judge-made law. Indeed, almost uniquely in the world, Israeli courts have fashioned the law of human rights out of whole cloth").

liberty;[38] freedom of occupation;[39] freedom of speech;[40] freedom of religion and conscience;[41] the right to equality;[42] and certain procedural due process rights (normally referred to in Israeli jurisprudence as 'rules of natural justice').[43] These judge-made rights have sometimes been referred to as 'the Israeli judicial bill of rights'[44] or 'fundamental principles of the Israeli legal system'.[45] Having no constitutional text to rely upon, the Court based its findings upon the Israeli legal system through reference to principles derived from the democratic nature of the State, from its 'national spirit' and from the 'social consensus', all reflected in the State's Declaration of Independence[46] and in the history of Israel and

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[38] HCJ 7/48, Al-Karbutli v. Minister of Defence [1949] IsrSC 2 5

[39] HCJ 1/49, Bejerano v. Minister of Police [1949] IsrSC 2 80.

[40] HCJ 73/53, Kol Ha`am v. Minister of Interior [1953] IsrSC 7(3) 871. *See also*, 1 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL, "Kol Ha'am Company Limited v. Minister of the Interior", at 90 (E. David Gotein ed., The Ministry of Justice 1962) (English version).

[41] HCJ 262/62, Peretz v. Local Council of Kfar Shmaryahu [1962] IsrSC 16(3) 2101 *See also*, 4 SELECTED JUDGMENTS OF THE SUPREME COURTOF ISRAEL, "Peretz v. Local Council of Kfar Shmaryahu", at 191 (Asher Felix Landau ed., The Ministry of Justice 1975) (English version).

[42] *Id. See also* H.C.J. 509/80, Younes v. Director General of the Office of the Prime Minister [1981] IsrSC 35(3) 589.

[43] HCJ 3/58, Berman v. Minister of the Interior [1958] IsrSC 12(2) 1493. *See also*, 3 SELECTED JUDGMENTS OF THE SUPREME COURT OF ISRAEL, "Berman v. Minister of the Interior", at 29 (Asher Felix Landau ed., The Ministry of Justice 1968) (English version).

[44] Neta Ziv, "Combining Professionalism, Nation Building and Public Service: The Professional Project of the Israeli Bar 1928-2002" 71 *Fordham L. Rev.* 1621, at 1639 (2003).

[45] See e.g. HCJ 292/83, Mount Temple Faithful Association v. Chief of the Jerusalem District Police [1984] IsrSC 38(2) 449, 454; HCJ 680/88, Shnitzer v. Chief Military Censure[1989] IsrSC 42(4) 617, 627.

[46] Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3 (1948) (Isr.). ("The State of Israel ... will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holly Places of all religions; and it will be faithful to the principles of the Charter of the United Nations".

the Jewish people.[47] In reality, it may be asserted that these judge-made human rights derive largely derived from natural law.

The implications of recognizing human rights as part of the Israeli judicial bill of rights were twofold: (a) statutory interpretation—a presumption that legislation should be construed, as far as possible, as being consistent with recognized human rights;[48] (b) limitation of administrative power—administrative law presumed that State officials were not authorized to violate recognized human rights, unless explicit and contrary authorizing language in Knesset legislation could be shown.[49] This last proposition also implied that secondary legislation conflicting with recognized human rights was invalid (unless there was explicit authorization in primary legislation to override human rights).

Powerful as the Israeli judicial bill of right might be,[50] one caveat is obvious. The doctrine never purported to authorize the courts to

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[47] Barak-Erez, *supra* note 13, at 315-316. A landmark precedent in this context is *Kol Ha`am.*, H.C.J. 73/53, *supra* note 40, at 884 ("The system of laws under which the political institutions … have been established and function are witness to the fact that this is indeed a State founded on democracy. Moreover, the matters set forth in the declaration of Independence—especially as regards basing the State 'on the foundation of freedom' and securing freedom of conscience—mean that Israel is a freedom-loving country. It is true that the Declaration 'does not include any constitutional laying down in fact any rule regarding the maintaining or repeal of any ordinances or laws' … but in so far as it `expresses the vision of the people and its faith, we are bound to pay attention to the matters set forth therein when we come to interpret and give meaning to the laws of the State").

[48] See e.g., CA 6871/99, Rinat v. Rom, [2002] IsrSC 56(4) P.D. 72, 92; V.C.P 4459/94, Salmonov v. Sharbani, [1994] IsrSC 49(3) 479, 482; CA 524/88, Pri Ha'Emek—Agricultural Cooperative Association Inc. v. Sde Ya'akov—Workers Cooperative Village [1991] IsrSC 45(4) 529, 561; HCJ 693/91, Efrat v. Population Registry Supervisor, Ministry of the Interior [1993] IsrSC 47(1). 749, 763; Goldstein, *supra* note 37, at 610; Yoram Rabin, *The Right to Education* 339 (Jerusalem, Nevo, 2003) [in Hebrew].

[49] See e.g., HCJ 5128/94, Federman v. Minister of Police [1995] IsrSC 48(5) 647, 652; Goldstein, *supra* note 37, at 610; Rabin, *ibid.* at 339.

[50] In fact, an analogy could be drawn between the powers of the Israeli judiciary under the judicial bill of rights doctrine and the powers of the English judiciary under the Human Rights Act, 1998 to construe legislation and to review administrative acts. The main difference between the two systems of human

invalidate Knesset legislation.[51] Hence, it gave only limited legal protection to human rights.

To conclude, the Israeli court recognized human rights in extensive case law long before the 1990s. In 1992, the Knesset passed the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation, which expressly protected several human rights. However, recognition of basic rights in Israel, both in case law and in these basic laws, was not accompanied by a formal change in the power of the Supreme Court. So, while some basic rights were now specifically protected, both materially and procedurally, the question of judicial review remained unchanged, i.e. what power does the court have to pronounce void a law of the Knesset that violates the rights protected by the basic laws, without meeting the criteria allowing such violation? The answer to this question was given by the Supreme Court in *Bank Hamizrahi*, which laid the cornerstone for a constitutional revolution in Israel.

Bank Hamizrahi concerned a law that was allegedly unconstitutional in that it unlawfully violated Basic Law: Human Dignity and Liberty. In its comprehensive and extensive analysis of the changing constitutional reality and while citing Justice Marshall in *Marbury*, the Supreme Court held that it, has power of judicial review of any unconstitutional law enacted by the Knesset. *Bank Hamizrahi* and the Court's reference to *Marbury* therein are discussed at length below.

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rights protection is that Israeli judges are not competent to issue a declaration of incompatibility like their English counterparts. For a comparative analysis of Israeli and English systems of human rights protection, see Ariel L. Bendor and Zeev Segal, , *Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, A New Judicial Review Model*, 17 *Am. U. Int'l L. Rev.* 683 (2002).

[51] However Justice Barak (as he was then) has opined in *obiter dicta* that in extreme circumstances the Court could conceivably invalidate legislation, which is inconsistent with fundamental principles of the legal system. *Laor*, *supra* note 2, at 554.

IV. THE IMPACT OF *MARBURY V. MADISON* ON ISRAELI CONSTITUTIONAL LAW

A. Bank Hamizrahi case and the principle of judicial review

In *Bank Hamizrahi*, a number of creditors, including financial institutions such as United Mizrahi Bank, which in Hebrew is called Bank Hamizrahi, petitioned the Supreme Court in relation to agricultural settlements in Israel that owed the creditors hundreds of millions of shekels. The petition revolved around a new law enacted by the Knesset (or rather, an amendment to an existing law), which intervened in the terms for debt repayment to creditors by debtors from this sector. *Inter alia*, the law granted protection, on certain conditions, against the standard court proceedings for debt collection, and instead allowed for their rescheduling through an outside entity appointed for that purpose.

In its extreme format, the law also permitted in certain cases, the write-off of considerable parts of those debts. The creditors contended that the law is unconstitutional in that it violates their property rights, as specifically anchored in Section 3 of Basic Law: Human Dignity and Liberty, and that this violation is not in accordance with the requirements of the "Violation of Rights" clause. This was the first petition considered by the Supreme Court after the legislation of two new Basic Laws that attacked a Knesset law for unconstitutionality in relation to one of these two new Basic Laws.

This petition was a golden opportunity for the President of the Supreme Court and most of the other justices who concurred with his judgments, sitting en banc, including, as a one-time precedent, a retired president of the Supreme Court, to carry the revolutionary message of the establishment of a constitution for Israel. In the decision, which is an unprecedented 368 pages, numerous constitutional issues were expounded and discussed, many of which extended far beyond what the Court was required to address for its decision on the issues before it. After it ruled that the Knesset has the power to enact basic laws whose normative status is superior to primary legislation passed by the Knesset in its capacity as Legislature, the Court examined the argument of the petitioners on its merits, and eventually dismissed it, ruling that while the new law violates the petitioners' property rights, this violation meets the conditions of the "Violation of Rights" clause.

The Court also considered the question of judicial review, and ruled that even though Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation do not contain a primacy provision stipulating that any norm that does not meet the requirements set forth therein is void, the Court is nevertheless competent to declare such violating norms void. After a comparative review on this point, in countries other than the U.S., the Court explained that judicial review is an implementation of the principles of the rule of law, democracy and the separation of powers. In this analysis, the Court cited Justice Marshall in *Marbury*. Justice Barak explained that after *Marbury*, a law that contravenes the provisions of the American Constitution is void, and any court may declare it so, even though there is no specific provision authorizing this in the Constitution. Justice Barak quotes Justice Marshall as follows[52]:

> The powers of the legislature are defined and limited and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act. Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

Later in his opinion, Justice Barak adds that a constitutional restriction upon the legislature will only have meaning if an ordinary law

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[52] See *Bank Hamizrahi*, *supra* note 2, at 416 and *Marbury*, 5 U.S. at 176.

cannot supersede the provisions of the Basic Law. Here too, Justice Barak cites Justice Marshall[53]:

> If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply.

Justice Barak concludes that since *Marbury* no court in the United States has questioned whether a law repugnant to the Constitution is void, and that it is the duty of the court in interpreting the constitution and the law, to determine whether the ordinary act violates the Constitution, and if so what the consequences should be. Barak contends this is how the theory of judicial review of constitutionality, a cornerstone of the American constitutional system, was born.

The power of judicial review declared by the Court in *Bank Hamizrahi* was not restricted to cases in which the ostensibly unconstitutional law conflicts with the specific provisions of the two new basic laws and the individual rights enumerated in them. In such cases there was consensus that the Court can review the conflicting law and pronounce it void if the Court finds that the conflicting law does not

[53] See *id.*

correspond to the requirements of the Basic Law. As became apparent over time, the Court broadened its ruling so that the court could also, in practice, exercise the power of judicial review over cases in which it was alleged that the unconstitutional law violates human rights that are not expressly enumerated in the Basic Laws, and which are constitutionally protected solely as an exegetical derivative of Basic Law: Human Dignity and Liberty by the Court. Note that this protection was granted by the Court despite the fact that many of these derived rights were deliberately omitted from the Basic Laws because of disagreements in the Legislature about their inclusion. Such disagreements were a reflection of the complex and unstable conditions surrounding the issue of the Israeli constitution. Moreover, the Court applied its ruling, retroactively, to Basic Laws enacted prior to 1992 and whose provisions do not include any form of protection[54]. Among the Justices who delivered the majority opinion, there were a few who warned against the presentation of *Bank Hamizrahi* as a constitutional revolution and against the over-broadening of its application. Those Justices believed it was better to see the new Basic Laws as a further development in a process that started many years earlier. In other words, this was not a cornerstone, but just another milestone.[55]

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[54] See HCJ 212/03 Herut National Movement v. Chairman of the Central Election Committee for the 16th Knesset, [2003] IsrSC 57(1) 750, at 754–756 (hereinafter: "*Herut*").

[55] For example, in *Bank Hamizrahi* the opinion of Justice Y. Zamir, who sided with the majority, is worded modestly and carefully as to the role of the court in starting a constitutional revolution. Zamir refrains from saying that the Court has started a revolution; rather, he tones down and smoothes the rough edges of the dramatic and precedent-setting dimension of the Court's actions. In his opinion, the legislation of new basic laws in 1992 was merely a further development, just another layer, in the Israeli constitutional system, which had started many years earlier in *Bergman* (supra note 30), and that we should proceed gradually in this process, since leapfrogging could undermine the stability which is essential to constitutional development (*Bank Hamizrahi*, *supra* note 2, at pp. 504–505). See also: HCJ 453/94 Israel Women's Network v. Government of Israel et al, 501, [1994] IsrSC 48(5) 534–536 (hereinafter: "*IWN*"), where Justice Zamir expresses his opinion on whether the phrase "human dignity" in Sections 2 and 4 of the Basic Law: Human Dignity and Liberty, also includes the principle of equality. He says that the Court should beware of making obiter dicta on constitutional issues and other matters of principle where they are not essential for the decision

Both the decision in *Marbury* and the decision in *Bank Hamizrahi* were revolutionary in their time. In both cases, the Supreme Court used the judicial tools available to respond to an unstable and complex political and social reality. In both cases the Court also strove to generate a historic change in the existing governmental-institutional map by changing the balance of power among the branches of government. Furthermore, in both cases the signs of public unrest and the seething political reality that gave rise to the need for a new direction were not expressly reflected in the decision. Yet, these raucous, emotional and often tempestuous political struggles touched on urgent and substantial issues concerning the identity of the two countries (Israel and the U.S.) as liberal democracies, but because of the limitations of a court decision and the legal platform, they can only be recognized between the lines.

Yet, the political circumstances in the U.S. and in Israel that awoke the need for a precedent-setting constitutional step, and the conditions for the acceptance of such a step, were entirely different. No matter how revolutionary, the legal analysis and conclusions of Marshall in *Marbury* were based on a strong constitutional reality and related to a formal constitution that had been enacted fourteen years earlier and was imbued with all the characteristics essential to its strength.

Unlike the sectarianism and the social polarization that existed in Israel from its very first days, the American Constitution was designed and drafted by the representatives of a relatively homogeneous society who shared a similar background and aspirations. These are essential and indispensable conditions for achieving the consensus from which a strong constitution can emerge. The difference between the characteristics of the pre-constitution Israeli and the American society is key to the distinction between the Israeli and American constitutional narratives.

The American Constitution is a written document that reflects a broad and solid social consensus, which is essential for maintaining social-political stability, even in the face of frequent social change. The strength of the American Constitution is nurtured by the fact that it was

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at hand and without in-depth discussion. In the circumstances of *IWN*, it would be better to refrain from ruling that the principle of human dignity, as protected by Basic Law: Human Dignity and Liberty, contains the principle of equality, since in the circumstances of IWN, a decision could be reached without such an analysis whose implications transcend beyond the specific case.

born out of a long and comprehensive process of deliberation, persuasion and compromise.[56] Furthermore, the rules laid down at the Philadelphia Convention, where the Constitution was debated, were also based on a consensus. This enabled all the participants at the Convention to support the final product, even if the road to such support was not an easy one where there were deep differences on key issues about the American form of government and the value system upon which it would be established. Among these issues were the allocation of power between the federal government and the states, interstate trade regulation, slavery, the power to impose and collect taxes, and the protection of human rights.[57]

Furthermore, the process of establishing the Constitution was accompanied by enormous and unprecedented efforts to mobilize the American public, by means of essays in *The Federalist*. This enabled the citizens to absorb and internalize the Constitution, i.e., they believed themselves to be full partners in the process that imbued the Constitution with the complete legitimacy so vital for its application and implementation in society.[58] The establishment of the American Constitution was imposed only after support from the grass roots was guaranteed by calling upon the American public as a whole. The Founding Fathers of the American nation were able to form a common and mature constitutional framework within which the normal daily political struggle could be waged under agreed and accepted rules. Within that framework, disputes and conflicts of interests could be decided without threatening, weakening or bringing down the state. Furthermore, the Constitution gave effective review of the government to all segments of the public, while allowing it still to function efficiently. Additionally, the Constitution limited the following risk: corruption of power, arbitrariness of government, and the violation of the rights of individual and minorities. In these circumstances, the ruling of Justice Marshall in *Marbury* on the issue of judicial review although a small step forward, was a step taken on a firm footing

When the Supreme Court assumed the power of judicial review in *Bank Hamizrahi*, it was taking a stance far more complex and problematic. Whereas the U.S. Supreme Court was called upon to rule in

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[56] Ruth Gavison, "*Lessons from The Federalist and the Constitutional Process in Israel*", 11 *Azure, Journal for Israeli Thinking* 21, at 27–29 (2001).
[57] *Id.*
[58] *Id*, at 31.

Marbury at an early and "virginal" stage in the life of the American nation, the Israeli Supreme Court was required to consolidate its constitutional powers after almost fifty years during which time its status had taken shape and its powers had been given content. Also during this time the Knesset legislation that violated human rights was immune to repeal by the Court.

The decision in *Bank Hamizrahi* resolved the issue of judicial review during a time in which the very issue of a constitution was the subject of controversy, as opposed to *Marbury* in which this issue did not exist. Also, prior to its decision on the controversial question of judicial review, the American Supreme Court wisely consolidated its status as a constitutional court. In contrast, the Israeli court, dealt with the matter of judicial review during of national development that was far more complex. In current-day Israel, many heavily disputed constitutional issues still find their way to court, notwithstanding the fact that the first and more adequate forum would be the political arena.[59]

As in *Marbury*, the decision of Israel's Supreme Court did not expressly reflect the political turmoil and the opposing centrifugal forces at work below the surface, or the fierce dispute surrounding the question of the constitution that remained unresolved even after the legislation of the two new Basic Laws. Underlying that legislation, upon which President Barak built the constitutional revolution, was a non-parliamentary initiative aimed at breathing life into the constitutional project which had been nipped in the bud, reviving it in a gradual process. This constitutional process which would involve Basic Laws would start with the consolidation of individual rights, although the need to protect these rights against Knesset legislation is not disputed. Officials hoped this would create momentum that would turn the wheels of the constitutional project, reawaken discussion of the most intense disputes and eventually lead to the birth of an Israeli constitution, valid in every respect.

The two new Basic Laws were the result of that initiative. However, the Israeli public was not partner to this legislation, neither to the process leading up to *Bank Hamizrahi* nor to the news of the "constitutional revolution" that these laws heralded. In fact, the public was unaware of the "fact" of its existence. It was not by chance that the legislation of these two Basic Laws was termed a "quiet constitutional

[59] *See* Barak-Erez, *supra* note 13, at 346.

revolution". Thus, it comes as no surprise that their enactment did not reverberate loudly among the public, was not accompanied by the requisite lively public and political dialog and was therefore not perceived by the average Israeli as revolutionary. Only the community of jurists was excited by the legislation of the Basic Laws, and was the first to discuss the recent constitutional revolution.

Most important of all, the legislation of the new Basic Laws and those legislated before them, lacked all the constitutional elements so necessary for imposing stable constitutional order in a society as fractured and unstable as the Israeli society.[60] The legislation of the Basic Laws has never been collated as a single unified, harmonious and coherent formal constitutional document and they did not come into being on the basis of predetermined principles and rules Further, the legislation of the Basic Laws was not accompanied by suitable regulation of the checks and balances and by reallocation of the power of the branches of government. Yet, such checks and balances were necessary as a complementary step for the creation of statutes that would be superior to ordinary Knesset laws, and in particular, would empower the Supreme Court to give operative meaning to such superiority through judicial review.

Furthermore, the legislation of the Basic Laws was not based on consensus and was not a celebratory and symbolic national act, as is fitting for the establishment of a constitution. On the contrary, the Basic Laws were passed in an ordinary process in an atmosphere of an end-of-season sale. Thirty-two Knesset members voted in favor of Basic Law: Human Dignity and Liberty, twenty-one voted against it and one abstained—fifty-four members in total, a tiny figure, taking into account that this was a constitutional piece of legislation. Basic Law: Freedom of Occupation was approved unanimously by twenty-three Knesset members.

The reason that Israel had no formal constitution is not that there was no need or that no attempt had ever been made to establish one. On the contrary, Israel desperately needed a formal constitution because of the problems it had faced since its inception. Unfortunately, the inability

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[60] For a comprehensive review of the establishment of a constitutional revolution in Israel by the Supreme Court, see Ruth Gavison, "*A Constitutional Revolution?*" *in* "TOWARDS A NEW EUROPEAN IUS COMMUNE" 517 (A. Gambaro, A.M. Rabello, eds., 1999, Sacher Institute, Jerusalem).

of Israel's parliaments to formulate a constitution and the stubborn opposition of the Knesset to vest the Supreme Court with the power of judicial review, are proof that when President Barak announced the constitutional revolution in *Bank Hamizrahi*, the conditions were not yet ripe. When *Bank Hamizrahi* was delivered, Israeli society was too deeply fissured, too polarized, too divided over the most central questions of its existence, and therefore unprepared to contain the constitutional revolution that Justice Barak had created. And certainly the revolution could not be imposed by an action of the Supreme Court. It is therefore obvious why at first many legal scholars challenged the statement that Israel now had a constitution. Yet, this concept was internalized in time, and there is now almost no controversy over the fact that Israel has a constitution, although incomplete and feeble.

This tangled and emotional constitutional reality has, of necessity, implications for the status and power of the Supreme Court, and it limits the Court in exercising judicial review. Granted, in *Marbury*, Justice Marshall declared the Court's power of judicial review even though the Constitution did not contain any specific provision granting the Court such power. Still, Marshall's historic ruling was made as part of an interpretation of the American Constitution, a formal constitutional document that reflected a strong and stable constitutional reality, valid as a supreme norm whose content was never disputed and which served as a unifying element for a homogeneous American society. In this sense, Marshall's revolution did not arise sui generis, but represented another layer added to a solid constitutional foundation. Justice Barak, on the other hand, created two revolutions—the first is a constitutional revolution, which dealt with the superiority of the basic laws, and the second, which is built upon the first, the judicial review revolution. Both are founded on shaky ground compared to that on which the U.S. Supreme Court was built.[61]

It is interesting to note that both in *Marbury* and in *Bank Hamizrahi*, the court refrained from countermanding the legislature, against which the petition was addressed. In *Marbury*, in view of his analysis of the political reality, Marshall held that the Court was not competent to grant Marbury the relief applied for and to impose upon the Executive a mandamus as requested. Marshall understood that such

[61] *See* Gavison, *ibid*, at 524.

action would be pointless and would only erode even further the status of the Supreme Court. Marshall's declaration that the Court had the power of judicial review, his exercise of this power in relation to the Jurisdiction Act of 1789 and his subsequent repeal of this Act were intended to prepare the ground for his final conclusion. Additionally, the Jurisdiction Act, which was invalidated by the Court, broadened the power of the Supreme Court. Thus, when reviewing and eventually abrogating the Act, the Court intervened in the affairs of the legislature relating to the Court itself, effectively curtailing its own powers. In this sense, the first step of the Court in the path of judicial review was careful and calculated.

In *Bank Hamizrahi*, although the Court assumed and exercised the power of judicial review, the final conclusion was that, contrary to the position held by the petitioners, the law meets the requirements authorizing violation as laid down in Basic Law: Human Dignity and Liberty, and is therefore constitutional and should not be repealed. Accordingly, along with its declaration of the constitutional revolution and the power of judicial review vested in it, the Court refrained from taking any operative action against the legislature. The final conclusion of the Court in that specific case, i.e., refusing to abolish the statute, spared the Court from calling upon its own rulings for a practical step that would erode the power of the legislature. This was a tool in the hands of the Court to soften the revolutionary and dramatic implications of the decision. Because the Court was not required to exercise the power it had assumed, it did not test its willingness to use the "fruits" of the revolution immediately upon the announcement of these powers; in this way, the Court prepared the ground for the slow absorption and gradual internalization of its sensational and precedent-setting decision over a period of time.

Needless to say, a judicial review "revolution" without specific authorization in a constitution, is contingent on the status of the Supreme Court and its powers being fortified in a constitution founded on the characteristics mentioned above; the first of which is universal acceptance of normative superiority. That was the situation in America. Conversely, Basic Law: The Judiciary, that provides the normative basis for the operation of the Supreme Court and which was legislated in 1984, prior to the new Basic Laws and the constitutional revolution, does not even contain procedural protection. Thus, while the Supreme Court

assumes the baton of judicial review in *Bank Hamizrahi*, the status of the norm that gave it birth is itself disputed as part of the controversy concerning the status of the basic laws legislated before 1992.[62]

There is a structural-institutional difference between the American system of government and the Israeli system, within which lies the distinction between *Marbury* and *Bank Hamizrahi*. The system of government in the American democracy is presidential. The focus of power and authority is the president, who is elected by the citizens in direct elections, and accordingly, draws his power from them. Concurrently, administrative power is shared with two other branches of government—the two houses of Congress and the Supreme Court, so that the allocation of power places the three institutions on the same level where they monitor and review each other in accordance with a procedure defined in a formal constitution whose normative status is superior to ordinary law, and which stands above all of these institutions.

Israeli democracy, by contrast, is built upon the parliamentary system. The constitutional structure, which was formed upon the establishment of the State of Israel, perpetuated and gave legal imprimatur to the institutions of government as they had developed within the Jewish community under the British Mandate. This structure places the Israeli House of Representatives, the Knesset, at the head of the pyramid of three authorities, and tilts the center of gravity of power and authority toward the Knesset.[63] The basis of the entire Israeli system is therefore the principle of the autonomy of the Knesset. The Executive is grounded in, grows from and relies upon the parliamentary coalition for its support. Therefore, because of the absence of a formal constitution, at least prior to *Bank Hamizrahi*, the norm creating the Supreme Court and defining its powers could be amended by the Knesset by a simple majority. Thus, the Israeli system lacks the balanced allocation of power between the Legislature and the Judiciary that is present in the American system, even though the Israeli judicial system enjoys a large degree of autonomy and independence. The power of the president of the United States to veto an act of Congress is one of the expressions of the power

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[62] *Id.* at 520. Until the Court ruled in *Bank Hamizrahi* that a basic law can be amended only by means of another Basic Law, Basic Law: The Judiciary could have been amended by an ordinary law passed by a simple majority of members of the Knesset.

[63] *Id.* at 520–521.

of the Executive in the U.S., a counterweight to the strength of Congress, and additional testimony to the structural difference between the American system and the Israeli one, in which the Knesset is superior to the other two branches. Moreover, in the U.S., the intervention of the Judiciary in the activities of the Legislature is not so far-reaching a step, as in any case the Executive has the power to do the same, but in a different way.[64]

Furthermore, the difference in the procedure for the nomination and appointment of Supreme Court Justices in the U.S. and Israel is analogous to the distinction between the two countries. American Supreme Court Justices are appointed for life, directly by the President, yet another expression of the power of the American Executive Branch compared with the Israeli. Obviously, the political nature of these appointments detracts from the principle of autonomy and independence of the judicial branch, which is so vital to democracy. Yet, the counter to this is that the appointment of justices by the president awards the American Supreme Court a representative dimension that facilitates the drafting of revolutionary rulings and extends the legitimate basis for such decisions.

Conversely, the system by which Justices are appointed to the Supreme Court in Israel is one of the most apolitical in the world.[65] Supreme Court Justices are appointed by the Nominations Committee, whose nine members are mainly representatives of the three branches of government, including two Justices of the Supreme Court and the President of the Court. The Israeli Supreme Court is therefore a non-representative body and even defines itself as one that must reflect the mood, worldviews, values and norms of Israeli society, but *not* represent it. The system by which judges are appointed, which embodies the principle of checks and balances and keeps the Court autonomous, objective, independent and unbiased, is a fitting one even though the Court is neither elected nor representative; it is the source of the Israeli public's great confidence in the Supreme Court and the reason that the Supreme Court is perceived as the least unbiased institution.

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[64] Although the final legislative power remains with Congress, which can overrule a veto by a special majority, the special majority requirement reflects the structural difference between the Israeli and the American system as to the status of the legislature compared with that of the other branches of government.

[65] *See* Gavison, *supra* note 60, at 522–523.

In view of the distinctions described above, it is safe to say that in some aspects, Marshall's judicial review revolution in *Marbury* was far more groundbreaking, but far less dramatic, than that of the Israeli Supreme Court in *Bank Hamizrahi*. Accordingly, it seems that the rulings of the American court cannot be automatically applied for the purpose of judicial review in Israel.

B. Kach Case and the Separation of Powers

The separation of powers is the cornerstone of democracy and a precondition for human liberty. The question of the separation of powers was reflected in its fullest in *Marbury* in two ways. First, the boundaries of the Court's intervention in an action of the executive arm of government; second, the demarcation of the boundaries for intervention by the Judiciary into the work of Congress. The next few paragraphs will be dedicated to the second aspect, as addressed by Israel's Supreme Court and the U.S. Supreme Court.

In Israel, as in other modern democracies, the system of government is based on the modern understanding of the separation of powers: it is not the traditional, classical concept as expressed by Montesquieu, i.e., three branches—legislative, executive and judiciary with a firewall between them, such that each has exclusive jurisdiction in its realm without any review by the other branches.[66] The modern understanding of the separation of powers is founded on the concept of checks and balances, which means that the three branches are independent, but continually review one another based on predefined mechanisms.[67]

According to this system, while each of the three branches implements its primary power independently of the others, defined checks and balances exist among them. In this way, the responsibility for the decisions of the sovereign is distributed among the three because none of the branches has absolute and unlimited responsibility for the decisions that will be implemented by any of the others.

Balancing the powers of the three branches is a delicate task. In the Israeli system, the main tension is between the Legislative, which in

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[66] *See generally,* CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* (1748).

[67] HCJ 306/81 Shmuel Plato Sharon v. Knesset Committee, [1981] IsrSC 35(4), 118, 141; HCJ 910/86 Ressler et al. v. Minister of Defense [1988] IsrSC 3242(2) 441, 491.

Israel's parliamentary system reflects the will of the people, and the Supreme Court. The tension tends to arise when the Court is required to review the way in which the Legislative exercises its powers.

The interpretation the U.S. Supreme Court gave the Act of Congress, which led to the declaration of the Act as void, was in and of itself an intervention in the Executive Branch. As noted, Marshall interpreted Section 13 of the Judiciary Act of 1789, which authorized the Supreme Court to issue writs of mandamus to civil servants, as granting the Court more power than given to it by the Constitution. Marshall held that the court system is exclusively responsible for the interpretation of the law: "It is, emphatically, the province and duty of the judicial department, to say what is the law."

The Israeli court followed suit even though Marshall's interpretation was not the only one possible. In fact, it was farfetched. A careful reading of Section 13 shows that the last sentence, on which the Court based its opinion that this Section was an attempt to extend the jurisdiction of the Supreme Court in violation of the Constitution, relates to petitions only, so that the interpretation of the Section as dovetailing with Constitution was in fact the appropriate analysis. Yet, Marshall chose an interpretation whereby Section 13 conflicted with the Constitution because this enabled him to hold the Act void. Marshall's move, which is built on an unlikely interpretation of Section 13, was a maneuver between the obstacles that the Court was facing in *Marbury* and the implications that Marshall feared, but it was also a reflection of his resolve to remind the three branches of government that they are interdependent. The question of the Court's competence and power to interpret the product of the Legislative Branch and the question of the Court's interpretation vis-à-vis the interpretation provided by the legislature, were also at the heart of the debate in the Israeli decision in the *Kach* case.[68] In *Kach*, a Member of the Knesset, Meir Kahane, who was the only parliamentary representative of his party, petitioned the Supreme Court, in its capacity as the High Court of Justice, to declare void the decision of the Knesset Speaker prohibiting him from initiating a vote of non-confidence. The Knesset Speaker explained that he had stopped Kahane from submitting his bill because Kach was a one-man party, and according to the Knesset Bylaws and based on previous

[68] HCJ 73/85 Kach Party v. Knesset Speaker Shlomo Hillel,[1985] IsrSC 39(3) 141 (hereinafter: "*Kach*").

resolutions of the House Committee that interpreted the Bylaws, and on a longstanding parliamentary tradition, a one-man party cannot submit a bill of no-confidence.

In order to decide the case, the Court was required to interpret the relevant section of the Knesset Bylaws, which addresses votes of no-confidence. First, the Court opined that the decision of the House Committee must be based on this section, and if the section conflicts with parliamentary tradition, the Bylaws prevail. Second, given the language, purpose and constitutional rationale of the section, a one-man party must not be prohibited from submitting a bill of no-confidence. The third point, which is the most important, is that the interpretation provided by the Court overrides that of the House Committee; the Court has the final authority to interpret any piece of legislation and the principles of separation of powers and checks and balances, which are a precondition for democracy, require this interpretation to be binding upon the parties. To support this holding, the Israeli court cited Marshall in *Marbury*.

In the context of the separation of powers, in order to understand the boundaries for the implementation of *Marbury* in the Israeli arena, a distinction should be drawn between the circumstances of *Marbury* and those of *Kach*. In *Marbury*, the Court was reviewing a section of a principal piece of legislation, an act of Congress—Article 3 of the Judiciary Act of 1789. In *Kach*, the court was reviewing a section of the Bylaws of the Israeli parliament, the Knesset. These Bylaws are adopted by the Knesset, under the authority vested in it in Article 19 of Basic Law: The Knesset. The bylaws regulate internal parliamentary procedures, such as those of the Plenary, the Knesset committees and the Legislature. The interpretation of a section of the Bylaws of the Knesset, especially one that conflicts with a longstanding parliamentary custom, constitutes interference by the Supreme Court in a purely inter-parliamentary affair. This can therefore be viewed as meddling in the activities of the Knesset and as an intervention that violates the balance between the Judiciary and the Legislative in a far more radical way than Marshall did in *Marbury*.

Indeed, the Speaker of the Knesset, who represented the respondent in *Kach,* noted that the Court should exercise particular caution before reviewing the parliament's internal mechanisms. While this comment related generally to the intervention of the Court in the

decision of the Knesset Speaker, rather than to its interpretation of the specific section of the Bylaws, the underlying logic is the same. In its pleadings, counsel for the Knesset Speaker said that this dispute was not adjudicable, i.e., the Court must refrain from deciding the dispute between the petitioner and the respondent. According to this approach, with regard to inter-parliamentary affairs, the Court must act with restraint and avoid any unnecessary friction between the Legislative and the Judiciary.[69] As mentioned, the Court rejected this view.

Granted, interpretation by the court of the laws enacted by the Legislature also constitutes intervention; but this kind of intervention is an integral role of the court and lies within its jurisdiction. This is because of the principle of checks and balances and is in congruity with the desired manner of balancing, decentralizing and allocating the power between the Legislative Branch and the Judiciary. The internal procedures of parliament as an institution have practically no such influence—even though these internal procedures can eventually impact

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[69] The advocates of this approach maintain that even if the standard view in England, whereby parliamentary procedures are carved out of the realm of judicial review (R.F.V. HEUSTON, *ESSAYS IN CONSTITUTIONAL LAW* (Stevens & Sons ed. 2nd ed. 1964); Bradlaugh v. Gossett (1884)), is not to be followed, the Court's intervention in inter-parliamentary affairs must be restricted according to the "parameters of functional authority". This parameter allows the Court to review inter-parliamentary affairs only where they exceed the functional authority of the entity perform the act under review. In *Kach*, counsel for the Respondent argued that this was also the yardstick defined in the U.S. in *Powell v. McCormack,* 395 U.S. 486, 589 (1969). As noted, despite the arguments made on behalf of the Knesset Speaker, the Court opted for the majority opinion as expressed in the case law before, and implemented the less restrained parameter whereby the Court's intervention in inter-parliamentary affairs is not limited to cases of act performed *ultra vires*. Even if not performed *ultra vires*, the relevant question—the Court opined—is the extent of the alleged violation of the "fabric of parliamentary life" and the impact of this violation on the foundations of the constitutional structure—two questions which are up to the Court to decide. The Court insisted on this approach despite the argument made on behalf of the Respondent, that this yardstick does not offer certainty; it is vague, loose and obscure, and therefore invites excessive interference by the Court. "Parameters of functional authority" and the "fabric of parliamentary life" are legal tests initiated by Chief Justice Barak. According to these legal concepts the Supreme Court will interfere with internal legislative processes of the Knesset only when parliamentary acts threatened the fabric of democratic life.

the way society conducts itself because the institutional structure and procedures might have an impact on the substance of the acts of parliament.

Furthermore, the fact that Israel employs the parliamentary system also impacts the question of the court's intervention in inter-parliamentary procedures. As noted, the Israeli system, which is based on the principle of the sovereignty of the Knesset, puts the parliament above the two other branches of government. That, combined with the fact that the Supreme Court is not a representative institution because of the mechanism by which justices are appointed, leads to the conclusion that the structure of the Israeli system calls for special care with regard to the interference of the Court in the internal activity of the representatives of the people. In any event, it seems that there is room to question the unqualified way in which the Court implemented *Marbury* in *Kach*, without drawing the necessary distinction that while Marshall was analyzing an act of Congress, *Kach* related to the bylaws of the Knesset.

V. EPILOGUE

In this paper we tried to compare two cases in which Israel's Supreme Court cited *Marbury*, and Marbury itself.

The courts in both *Bank Hamizrahi* and *Marbury* empowered themselves to conduct judicial review, and thus forever changed the balance of powers among the three arms of government. In *Marbury*, the purpose of the American court was to reinforce its own status in balance with the other two arms of government. In *Bank Hamizrahi*, the goal of the Israeli court was, in the face of a moral decline in the political and public sector, to put Israel among the enlightened, civilized nations whose systems are founded upon formal constitutions.

We have shown that, in the absence of a solid constitutional foundation, such as the one existing in the U.S. when Marshall delivered *Marbury*, the ability of the Israeli court to implement *Marbury* was a bit limited. We have further explained the structural and institutional differences between the American and Israeli systems and the implications of these differences on the relationship between the Israeli Supreme Court and the Knesset. We have shown that the structural difference between Israel's parliamentary system, which is based on the principle of the wide sovereignty of the Knesset, and the American presidential system, in which the status of the Congress is inherently

more balanced, gives rise to the distinction that the Israeli Court has less liberty to interfere with the operations of the Knesset than does the U.S. Supreme Court in the acts of Congress—and certainly this is the case when the operation at hand is an inter-parliamentary affair, as in *Kach*.

The comparative analysis provided above indicates that the dispute surrounding the intervention of Israel's Supreme Court in the operations of the Knesset does not revolve around the principle of intervention, but rather around the degree of intervention that should be allowed. Although most jurists in Israel agree that the Court has the power to review the acts of the Knesset, they are divided on the extent of this power. The question of degree is also the focus of the distinction between *Marbury* and the way it was implemented in the Israeli cases described herein.