"... A government of laws, and not of men".[1]

THE JUDICIAL REVIEW CONTROVERSY: *MARBURY V. MADISON* AND ITS MANIFESTATIONS IN THE ISRAELI CONSTITUTIONAL REVOLUTION

By Arnon Gutfeld and Yoram Rabin[*]

I. INTRODUCTION

The limits placed upon the jurisdiction of the courts constitute one of the most fundamental issues of modern constitutional law. Should the courts be empowered to invade the realm of the legislature in order to invalidate legislation repugnant to the constitution? Would such power be justified? Different aspects of these questions, which hold the potential to affect the very character and nature of the modern democracy, will be the focus of this paper.

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*,[2] greatly clarified the jurisdiction of the three branches of government: legislative, executive and judicial. It is fascinating to discover that more than two hundred years later, and thousands of miles from the United States, the *Marbury* case still reverberates in the constitution rulings of the Israeli Supreme Court. After so many years, the revolutionary ruling of the Supreme Court of the United States in *Marbury* may sometimes be taken for granted. Thus, the question arises, why do similar "revolutionary" rulings by the Israeli Supreme Court on related questions remain controversial in Israel?

This paper tracks 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 Israeli Supreme Court decisions citing it.

1 J. Adams, *The Seventh Letter of Novanglus* (1775).

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2 *Marbury v. Madison*, 5 U.S. 137 (1803) (*Marbury* case or *Marbury v. Madison* case).

To date, *Marbury* has been cited by the Israeli Supreme Court in **seven** of its decisions.[3] This paper will focus on two of these instances. The main legal issues put before the court in those two decisions are among the most fundamental issues on which Israeli democracy is based, as is any legal system or form of government striving to build a liberal constitutional democracy: the principles of separation of powers and judicial review of laws enacted by the legislature.

Before reviewing and analyzing these decisions, the paper first discusses *Marbury*, the circumstances surrounding it, and its historical implications.[4]

II. THE MARBURY V. MADISON CASE

In September 1800, just two months before congressional and Presidential elections were to be held, U.S. Supreme Court Justice Oliver Ellsworth resigned. President John Adams, leader of the soon-to-be defeated Federalist Party, nominated John Jay for the position. Believing that the U.S. Supreme Court lacked any politically operative power, Jay declined the appointment. Following Jay's refusal, John Marshall, Secretary of State under Adams and one of the senior leaders of his party, accepted the nomination to replace Ellsworth as Supreme Court justice.

On December 12, 1800, following the November's Presidential election, the Republican Party, led by Thomas Jefferson, defeated the Federalist Party, led by the incumbent president Adams. It is important to note that the power of the federal judicial system, and its rulings on highly charged political issues, were the subject of some of the major conflicts between the Republicans and the Federalists during the latter's years in power, and therefore attracted a stormy focus of tension during the elections.[5]

3 HCJ 73/85 *Kach Faction v. Shlomo Hillel – Knesset Speaker*, PD 39(3) 141 (1985) (*Kach* case); HCJ 142/89 *Laor Movement – One Heart and a New Spirit v. Knesset Speaker*, PD 44(3) 259, 538 (1990); HCJ 1000/92 *Hava Bavli v. Rabbinical High Court – Jerusalem*, PD 48(2) 221 (1994); CA 6821/93 *Bank Hamizrahi v. Migdal Cooperative Village, Isr. L. Rpts.* 1, 220-221 (1995) (*Bank Hamizrahi* case); HCJ 6652/96 *The Association for Civil Rights in Israel v. Minister of the Interior*, PD 52(3) 117, 126 (1998); HCJ 1993/03 *Movement for Quality Government in Israel v. Prime Minister, Mr. Ariel Sharon*, PD 57(6) 817 (2003); HCJ 6427/02 *Movement for Quality Government in Israel v. The Knesset*, PD 61(1) 619 (2006).

4 The description of *Marbury* in this paper is principally based on the author's article on the subject. *See* A. Gutfeld, "The Principle of Separation of Powers and the case of Marbury v. Madison"*, American Democracy: The Real, the Imaginary, and the False*, 310, 316 (A. Gutfeld ed., 2002). [Hebrew]

5 *Ibid*, at 316.

On February 13, 1801, about two months after it became apparent that Jefferson had won, but before Jefferson had formally commenced his term in office, Congress passed the Circuit Court Act of 1801, which created sixteen federal judgeships for six new judicial circuits. Within thirteen days, Adams forwarded a list of sixteen new judges to Congress, all loyal members of the Federalist Party, and the appointments were subsequently approved on March 2, 1801. The Circuit Court Act 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 incoming president Jefferson the opportunity to appoint a judge to the Supreme Court. In addition, on February 27, 1801, at the very end of Adams's term and upon his initiative, Congress also passed the District of Columbia Organic Act of 1801, which regulated the appointment of justices of the peace to the District of Columbia and to the District of Alexandria, Virginia. Relying on this Act, and on an existing law passed by the Congress the previous year authorizing the President to make these appointments in the lower courts and to decide on the number of posts needed for each district, departing President John Adams appointed forty-two new justices of the peace for the District of Columbia. On March 3, 1801, the Senate confirmed these appointments, made purely on political grounds; William Marbury was among the appointees.

After Adams signed the commissions of the forty-two new judges, they were sealed by acting Secretary of State Marshall, who remained in this post despite having already been sworn in as Supreme Court Justice on February 4. The commissions, following their approval by the Senate, were returned by Adams to Marshall to be stamped with the Great Seal of the United States, as is required. This took place at nine o'clock on the evening of March 3; Adams' term as president would end at midnight of that same day. Marshall delivered the commissions, but some of them were overlooked, including that of Marbury. Consequently, Marbury and three others' appointments remained unsealed.

After he was sworn into office, Jefferson found the undelivered commissions and instructed that some 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 become a broad and unbridled Republican attack on 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. This attack was led by incoming President Jefferson, who proved himself a majoritarian and had no qualms about using an elected majority to achieve his goal, which had threatened the very foundations of American democracy. Furthermore, Jefferson, furious at Adams' last-minute deeds, changed the list of appointees, reducing their

number from forty-two to thirty and submitting the new list for Senate approval.

Jefferson also sought the repeal of the Circuit Court Act by Congress, and the elimination of sixteen circuit court judgeships that were to be filled by Adams' appointees. To complete the task, Congress passed an act that delayed the convening of the Supreme Court for approximately one year, fearing that the Court might try to repeal the law as unconstitutional. Congress also believed that the Republicans would win two thirds of both houses in the upcoming congressional elections of November 1802, which would enable Congress to impeach all Federalist judges who had been appointed for life before the Supreme Court was to convene in February 1803.

Marbury and the other three commissioned justices of the peace petitioned to the Supreme Court, requesting it to issue a writ of mandamus compelling James Madison, the new secretary of state in the Jefferson administration, to deliver their commissions, thus making their appointment formally and legally valid. Madison and Republican Attorney General, Levi Lincoln, ignored the petition out of loyalty to the executive branch and obligation to the safeguarding of its rights, despite their competing reverence for the Supreme Court. Marshall, a new chief justice who was also a political appointee, feared that by accepting the petition, filed by members of his own political party, he 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 untenable.

Conversely, dismissal of the petition would bear personal, intolerable consequences for Marshall: had the appointments of Marbury and the other three justices deemed illegitimate, the result of hasty political action by a lame duck president who had pushed the appointments "by whip and spur", as Jefferson had phrased it, the appointment of Marshall himself would also be deemed illegitimate. It is important to remember that Marshall was also appointed Chief Justice during the lame duck session, after Jefferson and his party had won the elections, and that the appointments were made when the outcome of the elections had already been acknowledged by all. Perhaps the public implication of denying the appeal would be the most detrimental: a reinforcement of the Supreme Court's inferior standing in the American political system at the time.

In view of this political and legal complication, Marshall, employing impressive legal dexterity, was able to produce a ruling that treated with reverence that "ostensibly powerless" institution—the U.S. Supreme Court.

With great foresight, Marshall unraveled the political tangle and raised the Supreme Court to unprecedented heights. The political solution he adopted also managed to satisfy most parties to the petition.

Marshall's decision contains not the slightest hint of the political drama that was raging in the background, or of the disrespectful attitude of the new Republican administration toward the Supreme Court. Marshall conducted the discussion regarding *Marbury* on a 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 the Court's ability to intervene in the Executive Branch's activity and instruct it to change its course of action, *i.e.,* to issue a writ of mandamus against Madison, ordering him not to delay the commissions any longer and deliver them, thus finalizing the official, legal appointment of the four petitioners as justices.

It is important to note that the court left the issue of court's right to intervene to the end of the discussion; this, despite it being a preliminary question that might have rendered superfluous other discussed topics by the court. It is the inquiry into this particular issue that eventually gave rise to the historical, vitally significant decisions in this case. There are those who maintain 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 opposed the Judicial Branch. This is particularly relevant as he recognized that an operative relief in the form of a writ of mandamus against the Executive was unrealistic under 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 judicial basis, the Judiciary Act of 1789 and the Constitution of the United States. Article III, Section 2, Clause 2 of the Constitution defines the original jurisdiction of the U.S. Supreme Court; this provision does not authorize the Court to issue writs of mandamus to federal officers. However, Section 13 of the Judiciary Act of 1789 authorized the Supreme Court to issue writs of mandamus to persons holding office under the authority of the United States. In fact, Section 13 was clearly intended to authorize the Supreme Court to issue writs of mandamus in cases that are, according to the Constitution, under the Court's jurisdiction. 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,

conflicts 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 defined its original jurisdiction in great detail. Marshall's interpretation that Section 13 violates the constitution enabled him to rule that the Judiciary Act was unconstitutional and therefore invalid.[6] Through his ruling, Marshall sought to achieve two goals:

(1) Solidifying the autonomy and independence of the Judicial Branch, 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 anticipation that was based on the recognition that any writ of mandamus requiring action would be met by strong opposition, and, as such, would be unrealistic and serve only to further curtail the power of the Court); and

(2) Condemning the inappropriate attitude of the Executive Branch under Jefferson toward the Judicial Branch, as well as its disregard for the law and the Constitution. He further sought to warn the Republican Congress against attempting to erode the autonomy and independence of the Supreme Court.

III. THE IMPACT OF MARBURY V. MADISON ON ISRAELI CONSTITUTIONAL LAW

A. The Kach Case and the Principle of Separation of Powers

Marshall's ruling in *Marbury* served as a source of inspiration for the Israeli Supreme court in the *Kach* case, on which it ruled in 1985. The importance of the principle of the separation of powers, as well as the justification underlying it, need not be expounded upon. The separation of

6 For the benefit of historical accuracy, it is important to note that Chief Justice Marshall in *Marbury* was not the first to conduct judicial review of a law passed by the legislature, but was preceded in doing so by several other U.S. justices. Additionally, the first time a judge conducted judicial review of the validity of a law is attributed to the English judge, Sir Edward Coke, in the well-known verdict on the *Thomas Bonham v. College of Physicians*, 8 Co. Rep. 114 (Court of Common Pleas [1610]). For more on the issue of judicial review, *see* M. S. Bilder, "The Corporate Origins of Judicial Review", 116 *YALE L. J.* 502, 504, (2006); M. Marcus, "The Rise of Judicial Review before Marbury v. Madison", 19 *Rechtsgeschichte*, 204-214 (2011); W. M. Treanor, "Judicial Review before Marbury", 58 *Stan. L. Rev.* 455, 562 (2005); P. Saikrishna & J. Yoo, "The Origins of Judicial Review", 70 *U. Chi. L. Rev.* 887, 993-996 (2003).

governmental powers into three main branches – legislative, executive and judicial – is a defining characteristic of a democracy. The core principle of the separation of powers is distributing governmental power between several actors, who check and balance each other in order to prevent abuse of their respective powers. The separation of powers is intended to guarantee that the government acts to promote the best interest of the citizens, and to ensure their liberty.[7]

The question of the separation of powers arose in full force in *Marbury*, and was addressed from two angles: first, in defining the boundaries of the Court's intervention in government action by the Executive Branch; second, the issue on which the *Marbury* case left its greatest mark – demarcation of the boundaries for intervention by the Judicial Branch, *i.e.* the U.S. Supreme Court, in the legislative work of Congress. The latter question includes the issue of judicial review, which in itself is a special case of the question of separation of powers. In the context of *Marbury*, the interpretation that the Court gave to the law of Congress under discussion, an interpretation which led to the law's nullification, was in itself one of the ways in which the Court intervened in the actions of Congress. 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 was given to it by the Constitution. In so doing, Marshall established that interpretation of the law is under the sole responsibility of the courts; that is to say, they give acts of legislation their final and complete meaning.

In Israel, as in other modern democracies, the democratic system of government is based on the modern understanding of the separation of powers. In the Israeli system, the main tension exists between the Legislative Branch – which in Israel's parliamentary system reflects the will of the people, and as such is the primary and most essential source of governmental power – and the Supreme Court, when it is required to intervene in the way in which the former exercised its powers and to review its actions. The question of the Court's authority and power to interpret the products of the Legislative Branch, as well as the standing of the Court's interpretation *vis-à-vis* that of the legislature, were also at the heart of the debate over the *Kach* case.[8] In *Kach*, Meir Kahane, a Knesset member who was the only parliamentary representative of Kach, 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 Kahane from initiating a vote of no confidence. The Knesset Speaker explained that he had thwarted

7 A classic expression of this principle is Montesquieu's famous depiction of the British system of government; *see generally*, C. Montesquieu, *The Spirit of the Laws* (1748).

8 *See Kach* case, *supra* note 3.

Kahane's motion because Kach was a one-man party, and according to Knesset bylaws – as well as previous resolutions by the House Committee based on interpretations of the bylaws and on longstanding parliamentary tradition – a one-man party cannot initiate a vote of no confidence.

In order to decide the case, the Court was required to interpret the relevant section of the Knesset Rules of Procedure, which addresses votes of no confidence. First, the Court opined that the decision of the House Committee must be based on this section, and that if the section conflicts with parliamentary tradition, the rules prevail. Second, the court ruled that given the language, purpose and constitutional rationale of the section, its proper interpretation would be that a one-man party must not be prohibited from initiating a vote of no confidence. The third point, which is the most pertinent to our purpose, is that the Court rejected the assertion by the Knesset Speaker that the interpretation provided by the House Committee overrides that of the Court, were the two to be in conflict. To support this holding, Justice Aharon Barak cited Marshall in *Marbury*:[9] "[i]t is emphatically the province and duty of the judicial department to say what the law is."

In light of this, and upon rejecting the assertion that the Court lacks the authority to intervene in the Knesset's interior procedures, Justice Barak accepted the petition, ruling that the Knesset Speaker is not allowed to prevent the petitioner from submitting a motion of no confidence due to being a one-man party.

To the authors' best knowledge, the ruling handed down in the *Kach* case, and Justice Barak's reliance on *Marbury* for establishing the principle of separation of powers, was not a source of controversy. However, President Barak's reliance on *Marbury* in the *Bank Hamizrahi* case discussed hereafter has been, and still is, highly controversial.

B. Bank Hamizrahi and the Principle of Judicial Review

1) Historical Background: The Constitution as "a Ship Built at Sea"

To understand the Israeli constitutional reality, and the Israeli Supreme Court's utilization of Chief Justice Marshall's ruling on *Marbury* in the *Bank Hamizrahi* case, we must first offer a brief description of the constitutional

9 Justice Barak in *Kach* case, *ibid.*, at 152. Additionally, Justice Barak also relied in this context on two rulings of the U.S. Supreme Court: *United States v. Nixon*, 418 U.S. 683 (1974); *Powell v. McCormack*, 395 U.S. 486 (1969).

developments in Israel since its establishment.[10] When Israel was founded, the widespread assumption was that a constitution soon would be forthcoming. Indeed, the declaration of the establishment of the State of Israel, known as the Israeli Declaration of Independence, made on May 14, 1948, contained an explicit promise for the establishment of a constitution to be prepared by a constituent assembly. The declaration approached the issues thus:

> We declare that, with effect from the moment of the termination of the Mandate being tonight, the eve of Sabbath, the 6th Iyar, 5708 (15th May, 1948), until the establishment of the elected, regular authorities of the State **in accordance with the Constitution which shall be adopted by the Elected Constituent Assembly not later than the 1st October 1948**, the People's Council shall act as a Provisional Council of State, and its executive organ, the People's Administration, shall be the Provisional Government of the Jewish State, to be called "Israel."[11] (Emphasis added.)

In spite of this promise, after the declaration of the establishment of the State of Israel, events took an utterly different course. The first Knesset held extensive discussions regarding a constitution.[12] It was widely accepted that the Knesset, being a constituent assembly, holds the authority to formulize the state's constitution. The disputes revolved around the question of whether the Knesset is obliged to prepare a constitution, and what the content of such a constitution should be. This debate persisted over several months, both in sessions of the Knesset's Constitution, Law and Justice Committee, and in the plenum of the first Knesset.[13] It is widely accepted that the first Prime Minister, David Ben Gurion, opposed a constitution; however, he did not dispute the Knesset's authority to form one. In his words: "No one could have said, and still now no one can say, that there will be no constitution. The issue depends on the Knesset's decision. If the Knesset decides that there will be a constitution – there will be a constitution. If the Knesset decides that, for now, there will not be a constitution – there will not be."[14] The discussion on the establishment of a

[10] The historical background provided here is taken mainly from D. Barak-Erez, "From an Unwritten to a Written Constitution: the Israeli Challenge in American Perspective", 26 *Colum. Hum. Rts. L. Rev.* 309 (1995).

[11] Translation of the Israeli Ministry of Foreign Affairs.

[12] *See History of the Knesset Protocols*, 5, 714 (1950).

[13] *Bank Hamizrahi* case, *supra* note 3, at 155-157.

[14] *See History of Knesset Protocols*, *supra* note 12, at 813 (1950) (based on an unofficial translation). In light of the MAPAI party's standing and Ben-Gurion's dominance in the party at the time, it seems that Ben-Gurion's objection to a possible constitution was a deciding factor. *See* G. Sapir, *Constitutional Revolution in Israel – Past, Present and Future,* 38 (2010) [Hebrew].

constitution concluded with a compromise proposed by Yizhar Harari, a member of the first Knesset, which was accepted on June 13, 1950. The so-called 'Harari Resolution', named after its sponsor, 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 chapters together will form the State Constitution. [unofficial translation][15]

The Harari Resolution meant that the establishment of a constitution for Israel would not be a one-step process, through the writing of a single constitutional document regulating all constitutional issues. Instead, it was decided that controversial constitutional matters would be resolved and regulated in a gradual manner, by a series of laws to be termed "Basic Laws." These Basic Laws are to be legislated layer upon layer, and would eventually form the future formal constitution of the State of Israel. While this resolution was not seen as ideal, it did gain traction among government circles, especially in light of the constitutional model of the English system, which operates in a liberal-democratic fashion based on only an uncodified constitution.

In the years after the Harari Resolution, a series of Basic Laws were gradually passed. Three such laws laid out the institutional infrastructure for Israel's parliamentary system of government, similar to that of England. Those were *Basic Law: The Knesset* (passed in 1958), the original *Basic Law: The Government* (passed in 1968), and *Basic Law: The Judiciary* (passed in 1984). These three laws regulated the activity of the three branches of government, the Executive, Legislative, and Judicial branches. However, it was clear that the project of establishing a constitution could not be completed without a clear regulation of civil and human rights, which would include Basic Laws that would explicitly define them and determine the scope of their protection. That being said, although civil and human rights were not grounded in a formal constitution, the Israeli Supreme Court did succeed in establishing, through its rulings, the protection of basic human rights, such as: individual liberty, freedom of expression, and the freedom of religion and conscience; not just as a matter of legal rhetoric, but

15 *See History of the Knesset Protocols*, *supra* note 12, at 1743 (1950).

in an operative manner, by enforcing the obligation of the Executive Branch to protect these rights. During this time, the Supreme Court enjoyed a high standing. Despite the lack of a formal constitution to protect the basic rights of the individual, the Supreme Court required that government authorities abide by principles of human rights and declared government actions that conflicted with them as overstepping their authority and therefore null and void. In so doing, the Israeli Supreme Court carried the banner of the existence of an uncodified Israeli constitution.

Nevertheless, alongside this contribution, without a constitutional grounding of human rights, the Supreme Court avoided the judicial review of Knesset laws that were in breach of basic civil and human rights.[16] This situation changed in 1992, when the Knesset passed two new Basic Laws: *Basic Law: Human Dignity and Liberty*, and *Basic Law: Freedom of Occupation*. These Basic Laws protected the rudimentary rights established in them[17] by safeguarding them from the legislator with fundamental conditions explicitly defined in sections termed 'limitation clauses'.[18] However, the enactment of these two Basic Laws was not accompanied by any formal change in the standing powers of the Supreme Court, nor was it backed by any expansion of its authorities, as defined in the previously mentioned *Basic Law: The Judiciary*. As such, alongside protection of some of the basic rights through their explicit grounding in the new Basic Laws, the question of judicial review remained unanswered, *i.e.* what is the power of the Supreme Court to order the invalidation of a Knesset law that

16 However, it should be noted that the Supreme Court had proved willing to impose judicial review over Knesset laws claimed to conflict with explicit provisions in Basic Laws protected by procedural limitation clauses, when those were passed by a majority smaller than that required by the limitation. *See, e.g.,* H.C.J. 98/69 *Bergman v. Minister of Finance*, 23(1) P.D. 693 (1969) ("*Bergman*" case), translated in 4 *Israel Law Reports* 1 (1969): The case required the Court to address the question of whether the term "equal" in article 4 of *Basic Law: The Knesset* applies also to the right to be elected, and whether the "regular" statute which was the subject of the discussion, conflicts with the principle of equality in elections. In these cases, the review of the Court amounted to determining whether a contradiction between the statute and a Basic Law exists, and whether the Knesset met the requirements of the procedural entrenchment in the legislation process. This action was of a mostly technical nature, and did not require the Court to intervene in either the content of the legislation or the legislators' reasoning.

17 *Basic Law: Human Dignity and Liberty* protects the following human rights: the person's right to life, body and dignity (art. 2 and 4); the right to property (art. 3); the right to personal liberty (art. 5); the right to leave and reenter the country (art. 6); and the right to privacy and intimacy (art. 7). *Basic Law: Freedom of Occupation* protects the freedom of occupation of Israeli citizens and residents (art. 3).

18 *See, e.g.,* article 8 of *Basic Law: Human Dignity and Liberty*, which states: "There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required."

unlawfully infringes upon the rights defined in the Basic Laws? The Supreme Court provided an answer to this question in its 1995 ruling on the *Bank Hamizrahi* case, which, alongside the Basic Laws concerning human rights of 1992, laid down the cornerstone for the "constitutional revolution" that would take place in Israel.[19]

2) The Reliance of President Barak on Marbury

In the *Bank Hamizrahi* case, a law passed by the Knesset was presented to the Supreme Court with the claim that it was unconstitutional due to unlawfully contradicting *Basic Law: Human Dignity and Liberty*. The petition to the Supreme Court 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 the agricultural sector.[20] *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. The petitioners – a number of financial institutions, including Bank Hamizrahi – contended that the aforementioned law is unconstitutional, in that it unlawfully violates their constitutional right to property, explicitly anchored in Section 3 of *Basic Law: Human Dignity and Liberty*. 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 Supreme Court to examine the status of the Basic Laws concerning human rights, and through this to carry the revolutionary message of the establishment of a constitution for Israel. In the decision, which was unprecedented in its length,[21] 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 at hand. After it ruled that the Knesset holds the power to enact Basic Laws whose normative status is superior to primary legislation passed by the Knesset in its capacity as a legislature, the Court examined the

19 *See* A. Barak, "The Constitutional Revolution – 12th Anniversary", 1 *Law and Business* 3 (2004) [Hebrew]. In his paper, President Barak notes that credit for publicly coining the phrase "constitutional revolution" should apparently go to Prof. Claude Klein, who in an article for the Israeli newspaper Ma'ariv [in Hebrew] described that with the legislation of the two Basic Laws regarding human rights, the "quiet constitutional revolution" took place. (C. Klein, "The Quiet Constitutional Revolution", *Ma'ariv* 27 March 1992); *see also* A. Barak, "The Constitutional Revolution: Protected Human Rights", 1 *Law and Gov't* 9 (1992) [Hebrew].

20 Family Agricultural Sector Law *(Amendment)*, 1993, S.H. No. 178 (1993).

21 The ruling spanned 367 pages in the official Israeli Case publication.

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 limitation 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 his decision, President Barak relied on Justice Marshall's ruling in *Marbury*, to which he devoted special attention. President Barak explained that since *Marbury*, the idea took hold in the United States (and elsewhere) that a statute that conflicts with the clauses of a constitution is void, and any court is empowered so to declare. The United States Supreme Court reached this conclusion in 1803, despite the absence of an express provision authorizing the Supreme Court to conduct judicial review of statutes.[22] In this context, President Barak quoted Justice Marshall as follows:[23]

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.

22 Nonetheless, the U.S. Constitution does include a supremacy clause. See U.S. Const. art. VI paragraph 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

23 President Barak, *Bank Hamizrahi* case, *supra* note 3, at 220 (quote from *Marbury* case, *supra* note 2, at 176).

Later in his opinion, President Barak added that a constitutional restriction upon the legislature will only have meaning if an ordinary law cannot supersede the provisions of the Basic Law. There is no middle ground – either the constitution is supreme and cannot be changed by ordinary means, or it is the same as an ordinary law, which the legislator can change by ordinary means. To support these assertions, President Barak further quoted from Justice Marshall's ruling:[24]

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.

Subsequently, President Barak explicitly emphasized that "since that decision, it is beyond doubt in the United States that legislation conflicting with its Constitution is void, and it is the role of the courts – in interpreting the Constitution and the laws – to determine the existence of a conflict, as well as its consequences. Thus arises the doctrine of the judicial review of constitutionality. This doctrine is a cornerstone of the American constitutional system. Remove it and the entire structure collapses."[25] President Barak concluded:

> The American experience with judicial review of constitutionality has spread well beyond that country. That experience has influenced constitutional thinking throughout the entire world. It has dominated the various

24 President Barak, *Bank Hamizrahi* case, *supra* note 3, at 220-221 (quote from *Marbury* case*, supra* note 2, at 176); President Barak repeated these quotes, originally by Chief Justice Marshall, in his books. *See*, *e.g.*, A. Barak, *The Judge in a Democracy*, 336-337 (2004) [Hebrew].

25 President Barak, *Bank Hamizrahi* case, *supra* note 3 at 220-221.

> constitutional systems established since the Second World War. It has been accepted as the guideline in all of the Eastern Bloc states since the liberation from Soviet control[26] … This may be the central contribution of American constitutional thought to constitutional thinking throughout the world. As we have seen, express provisions in this regard appear in the constitutions that have been adopted by many states after the Second World War (see, e.g., the constitutions of Germany, Japan, Italy, Ireland, Austria, Cyprus, India, and Turkey). Even in states whose constitutions do not include express provisions in this regard – and that are part of the common law legal culture – the view has become accepted that an unconstitutional law is invalid, and the court is empowered so to decree.[27]

Seven years after the ruling on *Bank Hamizrahi* case, Chief Justice Barak wrote the following: "The most central ruling in American constitution law was on *Marbury v. Madison*. The ruling was made in 1803, about thirty years after the American Declaration of Independence. We are now [in Israel] in a similar period. As stated, **our *'Marbury v. Madison'* was written not long ago**". (Emphasis added)[28] These statements clearly show that the comparison that the Chief Justice made between the two cases was intentional and conscious.

For our purpose, the opinion of another justice – Justice Yitzhak Zamir – is also important. Justice Zamir agreed with Justice Barak and Justice Meir Shamgar that the Court is competent to invalidate primary Knesset legislation that unlawfully impairs the new Basic Laws of 1992. However, Justice Zamir opined that the "revolution" did not occur when the Basic Laws regarding human rights were passed, but many years before, in the *Bergman* case[29] of 1979.[30] In this vein, Justice Zamir opined that the

26 On this subject, President Barak refers to the following research: H. Schwartz, "The New East European Constitutional Courts", 13 *Mich. J. Int'l. L.* 741 (1992).

27 President Barak, *Bank Hamizrahi* case, *supra* note 3, at 221.

28 A. Barak, "The American Constitution and Israeli Law", *American Democracy: The Real, the Imaginary and the False* 81, 95 (A. Gutfeld ed., 2002) [Hebrew].

29 See *Bergman* case, *supra* note 16.

30 *See* Justice Zamir, *Bank Hamizrahi* case*, supra* note 3, at 283: "The constitutional revolution did not begin now, with the enactment of the Basic Laws on human rights. It began a generation ago, with the *Bergman* decision. As is well known, the *Bergman* decision first established that the Knesset can bind itself by means of an entrenched provision in a Basic Law, and that the Court is authorized to annul an ordinary law that is repugnant to such a provision. Justice Landau's opinion in that decision began

revolutionary ruling of Justice Marshall on *Marbury* recalls in its success the revolution accomplished by Justice Landau in the *Bergman* case. Aside from that, Justice Zamir agreed with Chief Justice Barak that reliance on the American constitutional revolution, and on *Marbury*, is appropriate.[31] These statements bear significance since Justice Landau himself expressed reservation about this framing, as will be discussed hereafter.

3) Objections to the Constitutional Advance and to Reliance on Marbury

Chief Justice's reliance on *Marbury*, and the analogy he drew between that case and *Bank Hamizrahi* case, faced harsh criticism by some. The foremost critic was Justice Michael Cheshin, who wrote a one-man dissent in the ruling. Justice Cheshin, in his dissenting opinion, made no mention of *Marbury*. In a long, well-detailed opinion, Justice Cheshin explained his objection to conferring the new Basic Laws constitutional status. He opined that the constituent authority granted to the first Knesset has expired, and that current Knesset plenums do not hold constitution authority. As such, it is impossible to grant the Basic Laws normative superiority over other statutes. In Justice Cheshin's opinion, a constitution should be enacted in a festive, clear and uncontroversial occasion, as the act of the giving of the Torah at Mount Sinai. The focus of his criticism is on what he describes as an attempt to "sneak" a constitution into the Israeli agenda.[32] In his words:[33]

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a revolution, because it came to the legal community as a complete surprise and introduced a fundamental change: it reversed what had until then constituted the axiomatic view of the status of the Knesset, the status of the Court, and the relationship between them. The Court did not resort to theory in order to bring about this revolution. On the contrary, it intentionally refrained from addressing 'very weighty preliminary constitutional questions regarding the status of the Basic Laws and the justiciability before this Court of the question of whether the Knesset did in fact comply with a limitation that it imposed upon itself...'"

31 Justice Zamir, *Bank Hamizrahi* case, *ibid*, at 283: "Nevertheless, the revolution succeeded. It succeeded, as revolutions do, because it occurred at the right time, under the pressure of the eve of elections; because it was implemented through wise tactics that left the government with the means for achieving its ends despite the annulment of the law), either by amending the law or by re-enacting it with a special majority; and perhaps also because it refrained from a debate upon the weighty constitutional questions. In these respects, it is reminiscent of the successful revolution that took place in the United States approximately 200 years ago, also in the area of the relationship between the judiciary and the legislature, in the *Marbury* case. Indeed, the *Bergman* decision provides additional proof of the famous statement of Justice Holmes that a page of history is worth a volume of logic."

32 Sapir, *supra* note 14, at 98.

33 Justice Cheshin, *Bank Hamizrahi* case*, supra* note 3, at 348-349.

> Let the act be done and let a constitution be adopted. But it should be performed in the way of all the nations. Let a constitution be drafted and submitted for a referendum. Let the constitution be adopted in a process of six readings spread out over the two Knessets. Let any act be done, provided that it involves a substantial deviation from regular legislative proceedings, and provided that the people are involved in the enactment of the constitution. All of these are legitimate acts, and we will acquiesce to them and cherish them. But with all my might I will oppose our recognition of the Knesset's authority to enact a constitution by force of a judicial ruling, via a legal analysis of a document dating back forty seven years, in reliance on disputed conceptions which have no firm roots in Israeli society. And where is the people? Should we not ask its opinion? On the contrary, let us call the people and consult them… If the people and its leaders desire a constitution, the means will be found for adopting one. And, if they don't want one, then the constitution will not be enacted. But I cannot agree to enacting a constitution without consulting the people. In fact, what basis is there for asserting that the fundamental conceptions of Israeli society point to recognition of the Knesset's authority to enact a constitution? How do we know that the Israeli consensus is that the Knesset possesses constituent authority? Has today's nation conferred upon its Knesset representatives the power to limit the tomorrows, even if only on constitutional matters? And if they tell me: Yes indeed, forty-seven years ago, then I too will respond that our concern is with the people of today. Did it grant its delegates in the Knesset today the power to frame a constitution? When did the people give a mandate to its Knesset delegates to enact a rigid constitution for Israel?

Shortly after the Court's ruling on *Bank Hamizrahi*, critics began questioning the usurpation of legislative authority made by justices in the majority, led by Chief Justices Shamgar and Barak. Chief Justice (Emeritus) Moshe Landau was one of the most prominent and decisive critics of the constitutional revolution, and of reliance on the *Marbury* ruling. In 1996 – about a year after the ruling of *Bank Hamizrahi* – Chief Justice Landau delivered a lecture to the Israeli Association of Public Law and the Faculty

of Social Sciences at Tel Aviv University, in which he made the following remarks:[34]

> Regarding the issue of judicial supremacy, Chief Justice Barak and his supporters attach great importance to the famous ruling of Chief Justice John Marshall in the Federal Supreme Court of the United States, on *Marbury v. Madison*, in 1803. It should be noted that this ruling was made under tense political circumstances, which would have demanded, in our terms, Marshall recuse himself from the case. In a letter he wrote to one of his fellow justices after the ruling, he even expressed willingness to retract the doctrine of judicial supremacy, so long as he is not himself to face impeachment.[35] As for the significance of *Marbury v. Madison* as a precedent to our matter, in order to answer the question of judicial supremacy, we must note that that ruling was made on the basis of an existing rigid constitution, which stands above all other laws of the state. On this basis, the Court reached its decision regarding judicial supremacy. We, on the other hand, do not possess such a constitution, and it is all a product of the judicial construction of the Court itself, including the very idea of judicial supremacy. (Unofficial translation)

Ruth Gavison, who was also in opposition to the majority opinion on *Bank Hamizrahi*, voiced her opinion that "there is no precedent, anywhere in the world, wherein the court decides on the supremacy of Basic Laws, and confers to itself the power of judicial review of Knesset legislation, without the existence of a full constitutional document and without explicit provision."[36] In doing so, Gavison referred to what she regarded as Chief Justice Barak's misplaced reliance on *Marbury*:[37]

34 The lecture was published in a paper; *see* M. Landau, "Giving Israel a Constitution through the Supreme Court's Decisions", 3 *Law and Gov't* 697, 705-706 (1996) [Hebrew].

35 For details of the case, Justice Landau refers to the following source: *Constitutional Rights and Liberties – Cases – Comments – Questions*, 9 (W. B. Lockhart et al. eds., 7th ed. 1991).

36 R. Gavison, "The Constitutional Revolution: Reality or Self-Fulfilling Prophecy?" 28 *Misphatim* 21, 28 (1997) [Hebrew]: "In my opinion, this is not an appropriate manner to enact a constitution in Israel, and furthermore: this manner does not reflect a natural development (let alone a necessary development) of the process started with the Harari Resolution. I worry that the description of these fragments of a process as a "constitutional revolution" encourages the tendency to complete this process without

> In *Marbury v. Madison*, Chief Justice Marshall called for the judicial review of laws repugnant to the constitution, with no provision explicitly stating that such power exists. This assertion was based on the fact that American constitution has been enacted in a festive manner, that it contains clear and stern instructions, and that it was explicitly declared as the supreme law of the system. It should be noted that the statute invalidated in that ruling was one that conferred to the Court powers akin to those of the Israeli High Court of Justice, making the ruling a creative means of diminishing the scope of conflicts between the Court and the primary legislator, as well as the Supreme Court's say on real-time political questions. In spite of this, legal literature in the United States is not lacking in criticism over Marshall's actions[38] […] The *Gal* ruling[39] includes an interpretation of the power of judicial review, despite the limitation clauses of Basic Laws of 1992 containing no such explicit provision. *Basic Law: Human Dignity and Liberty*, discussed in the same matter, is not rigid. A full constitutional document was not enacted, and the ruling expands the supremacy of the Basic Laws prior to 1992, despite most of them not being procedurally or substantially secured. (Unofficial translation.)

Landau and Gavison emphasize the difference between the constitutional reality preceding *Marbury* and that which precedes *Bank Hamizrahi*. Indeed, it cannot be denied that the circumstances surrounding the creation of the institutional-governmental constellation, as well as the conditions for accepting such a noteworthy change, differed in the American and Israeli cases.[40] Revolutionary as they may have been, Marshall's legal analysis and

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conducting the consolidation, public discourse and obtaining broad acceptance, all of which are essential for the construction of a rigid, trusted in constitution." (unofficial translation)

37 *Ibid*., at 28.

38 In this context, Gavison refers to the first chapter of Bickel's influential book: A. M. Bickel, *The Least Dangerous Branch* (2nd edition, 1986).

39 The ruling on *Bank Hamizrahi* case is also known by this name.

40 *See also* D. Friedmann, *The Purse and the Sword: The Trials of the Israeli Legal Revolution*, 578 (2013) [Hebrew]: "The fact that the Supreme Court invented and created a constitution for the State of Israel is, without doubt, a unique phenomenon in the history of nations. The comparison drawn by Aharon Barak to the famous ruling in the United States on *Marbury v. Madison* is misplaced. In that ruling, made in 1803, Justice Marshall

his conclusions in *Marbury* were based on a solid constitutional reality, and referred to a formal constitution, the legislation of which was completed fourteen years earlier. The American constitution was, and still is, a written document that reflects a broad solid 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 born out of a long and comprehensive process of deliberation, persuasion and compromise.[41] 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. This, in spite of deep disagreements on matters related to the very essence of the American system of government, as well as the ethical and moral foundations on which it was to be grounded, including: the power allocation between the federal government and the governments of the states; regulation of inter-state trade; the question of slavery; the power to impose and collect taxes; and the safeguarding of human rights.[42] Furthermore, the process of the enactment of the Constitution, which was one of review and selection, was backed by extraordinary and unparalleled efforts to mobilize the American public, by means of essays in *The Federalist Papers*. This process enabled the people, who are the sovereign, to absorb and internalize the Constitution,[43] and allowed them to consider themselves full partners in this process, thereby granting the Constitution the full legitimacy that is so crucial for its application and enactment in society.[44] As such, the U.S. Constitution was not forced down from the top, but rather enacted only after grass roots support was secured, through winning the hearts and minds of the American elites. In this way, the founding fathers of the American nation succeeded in creating a common and mature constitutional framework in which the struggles of ordinary, everyday politics could be waged under agreed and accepted ground rules. This framework could contain disputes or conflicts of interests without threatening to impair or collapse the state itself, and give effective review of the government to all segments of the public, without diminishing the state's ability to act efficiently; while also awarding proper protection from the

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declared that the U.S. Constitution empowers the Court to review legislation, and to invalidate it if it clashes with the Constitution. But there is no similarity between *Basic Law: Human Dignity and Liberty* and the U.S. Constitution." (unofficial translation)

41 R. Gavison, "Lessons from the Federalist and the Constitutional Process in Israel", 11 *Azure J. Isr. Thinking* 21, at 27–29 (2001) [Hebrew].

42 *Ibid.*

43 However, it should be noted that the "people" at the time referred to a minority of property owners, due to the narrow scope of the right to vote, which was given only to an elite group of owners of substantial property.

44 Gavison, *supra* note 41, at 31.

threats of corruption of power or arbitrary government, and defending individuals and minorities from violations of their rights.

Under these circumstances, Chief Justice Marshall's ruling on *Marbury*, as it relates to the question of judicial review, had been deeply rooted in existing judicial frameworks – even as it took them a step further. This had not been the case in *Bank Hamizrahi*. As the Court assumed the power of judicial review in *Bank Hamizrahi*, it was taking a stance much more complex and problematic. Whereas the U.S. Supreme Court was called upon to rule in *Marbury* at an early 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 – a period when Knesset legislation that violated human rights was immune to invalidation by the Court. Most importantly, the ruling on *Bank Hamizrahi* resolved the issue of judicial review during a time in which the very question of the existence of a constitution was the subject of controversy.[45]

However, despite the aforementioned objections and dissention, it is the opinion of the authors of this paper that Chief Justice Barak's reliance on *Marbury* was, in fact, appropriate. This view will be the subject of the final section of this paper.

[45] It is interesting to note that in both rulings, the Court avoided taking practical action against the Executive Branch, against which the petitions were filed. In *Marbury*, Marshall ruled that the Supreme Court lacked the power to grant Marbury the requested relief and to impose on Marbury, a member of the Executive Branch, a writ of mandamus as he was asked. Marshall understood that such action would be futile, and would risk further eroding the standing of the Supreme Court, which at the time was already inferior and threatened. Marshall's declaration of the Court's power of judicial review, as well as its implementation in relation to the Judiciary Act of 1789 and its eventual invalidation, were all means for the legitimization of this final conclusion. It should be noted that the Judiciary Act, which was invalidated by the Court, expanded, according to Marshall's interpretation, the authority of the Supreme Court. Thus, in its review of the law and its eventual invalidation, the Court intervened in an arrangement by the legislator pertaining to [the Court] itself, an intervention which diminished its powers and reflected on its standing. In this respect, the Court's first step in the path of judicial review was moderate and restrained. In *Bank Hamizrahi* case, although the Court had conferred to itself the power of judicial review, its final conclusion was that the statute that was the subject of the discussion did, in fact, meet the conditions of the limitation clause in the *Basic Law: Human Dignity and Liberty*, and therefore should not be invalidated. Alongside its declaration of the power of judicial review conferred to it, and despite such statements, the Court avoided any practical action against the Legislative Branch, and only set the ground for judicial review in future cases.

4) Support for a Constitutional Reform and Reliance on Marbury

Opponents of the constitutional revolution make various claims against the 1992 Basic Laws regarding human rights, and against the Court's ruling in *Bank Hamizrahi*, which established the supremacy of the Basic Laws and the power of the Supreme Court to carry out judicial review of primary Knesset legislation. In the following paragraphs, we will lay out the main arguments raised by the detractors, and provide brief responses to them. For this purpose, we rely on Rubinstein's recent, seminal study.[46]

Misleading of Knesset Members – the first argument is based on an attempt to read into the reasoning and understanding of members of Knesset during the legislation of the Basic Laws of 1992. According to this argument, throughout the legislation process, Knesset members did not at all comprehend that the Basic Laws have the power to allow the Supreme Court to conduct judicial review of laws passed by the Knesset. This lack of understanding created, ostensibly, a situation of "hijacking" in which the Basic Laws were passed without serious, substantial discussion in the Knesset. In contrast to this argument, and as Rubinstein proves in his research, a close reading into the protocols of discussions in the Knesset plenum and its various committees, as well as into the obstacles laid down by Knesset members and the compromises reached in their light, an understanding of the political background for the legislation, and an examination of statements made by Knesset members during legislation and in its aftermath, all lead to one clear conclusion – Knesset members possessed full understanding of the implications of the Basic Laws, and acted based on that understanding.[47]

Scale of Support – a substantial claim raised against the process the legislation and enactment of the Basic Laws is that they were passed by a minority of Knesset members. This claim is mostly based on the second and third readings of *Basic Law: Freedom of Occupation*, in which only twenty-three Knesset members were present, and on the second and third readings of *Basic Law: Human Dignity and Liberty*, in which fifty-four Knesset members were present.[48] Rubinstein shows in his research that the poor attendance in these votes stemmed not from a lack of understanding by Knesset members regarding the laws and their importance, but rather from the circumstances of the votes – the fact that they took place at the same time

46 A. Rubinstein, "The Story of the Basic Laws", 14 *Law and Business* 79 (2012) [Hebrew].

47 *Ibid*., at 82.

48 The passage of a statute by the Israeli Knesset requires that the draft law be reviewed three times, during which legislators may comment and debate the proposal. Such reviews of the law are called "readings".

period as the primary elections preceding the elections to the thirteenth Knesset. In opposition to this argument, however, an examination of all votes on the Basic Laws regarding human rights throughout their legislation clearly indicates that both *Basic Law: Human Dignity and Liberty* and *Basic Law: Freedom of Occupation* were widely supported by most members of Knesset.[49]

Lack of Public Discussion – an additional argument made is the claim that the legislation process of the Basic Laws of 1992 could not be considered a proper process, and lacked a broad public discussion concerning them. This claim criticizes the legislation process of the Basic Laws from the viewpoint that the proper way of enacting a constitution in Israel would include a wide public discussion aimed at reaching broad consensus. The claim regarding the lack of public discussion, however, is partially true. Rubinstein's study shows that the legislation process of the Basic Laws regarding human rights was almost completely ignored by the media, and subsequently by the general public. That being said, the direct conclusion from this is not necessarily that Knesset members did not understand the extent of the importance of these proposals, but, plainly, that the media was disinterested in them (perhaps due to the assumptions that the proposals are unlikely to pass). However, throughout the legislation process, the Knesset's Constitution, Law and Justice Committee issued press releases regarding the ongoing discussions; discussions in the plenum and in the committees were open to the media and to the public; and there were even some Knesset members who gave interviews to the media, clearly explaining the implications of the Basic Laws.[50]

Lack of a Provision Granting the Court Power to Conduct Judicial Review of Legislation – the most important argument pertaining to the influence of *Marbury* is that in the Basic Laws there is a notable lack of a provision regarding judicial review. A provision of this nature explicitly appeared in the draft of the Basic Laws, but was left out of both *Basic Law: Freedom of Occupation* and *Basic Law: Human Dignity and Liberty*. This omission is claimed to show that the Knesset expressly avoided granting the power of judicial review under the Basic Laws.[51] However, the research shows that there were two reasons for this omission: first, that both Basic Laws were passed at a time when the general understanding of the members of the Constitution, Law and Justice Committee was that the formal protection of a law, *i.e.*, it cannot be changed or abrogated with a simple majority, indicates that there is in fact judicial review. This understanding is based on the norms

49 *Ibid*.
50 *Ibid*., at 83.
51 *See* Landau, *supra* note 34, at 705.

formed by the *Bergman* ruling[52]; and second, in discussions between parties it was agreed that the issue of judicial review would be left for *Basic Law: Legislation*, which was then on the Knesset's agenda, which would pave the way for all Basic Laws.[53] Most importantly, an examination of discussions in the plenum and in committees indicates that the intention of the proponents of the law was clear: to grant the courts the power to conduct judicial review of laws.[54]

However, one could claim that despite all of the above, the power of judicial review was not mentioned in a manner which is sufficiently clear and direct. This claim is somewhat rooted in reality, as, ultimately, the mechanism for judicial review was not explicitly mentioned in any Basic Law. However, in this context the contribution of *Marbury* becomes clear and apparent: As was discussed, in *Marbury*, the U.S. Supreme Court claimed the power of judicial review, despite it not being mentioned in the Constitution itself. In a groundbreaking paper from 1966 – written 29 years prior to the ruling on *Bank Hamizrahi* – Rubinstein shows that it is the way of the common law (and not just of Chief Justice Marshall in *Marbury*) that such explicit provision is not always necessary, and that where there is a law there is also jurisdiction, as in the Latin phrase *ubi jus ibi remedium* – where there is a right, there must be a remedy.[55]

In conclusion, and in light of all of the above, the authors of this paper believe that Chief Justice Barak's reliance on *Marbury* in the *Bank Hamizrahi* case was, ultimately, appropriate and desirable. Additionally, one cannot ignore the fact that to this day – more than twenty years after the legislation of the Basic Laws regarding human rights – the Knesset has not abrogated the power of judicial review determined by the justices of the majority opinion in *Bank Hamizrahi* case.

52 *See Bergman* case, *supra* note 16, at 559, 559– 565 (1969). Nonetheless, it should be noted that the formal entrenchment that was present in the draft of *Basic Law: Human Dignity and Liberty* was dropped at the last moment – in the second and third readings – due to a change in the vote of MK Charlie Biton.

53 Rubinstein, *supra* note 46, at 98.

54 For quotes from the Knesset discussions that prove this claim, *see* Rubinstein, *ibid*. 98-103; *see*, *e.g.*, statements made by MK Elyakim Haetzni in discussions regarding the Basic Laws (*ibid*. 103): "There's a wish to sneak in a written constitution, which would limit the Knesset from passing laws that contradict certain principle, and who will be the supreme arbiter? – the Court." (unofficial translation)

55 A. Rubinstein, "Israel's Piecemeal Constitution", 16 *Scripta Hierosolymitana* 201 (1966).

IV. EPILOGUE

Since *Bank Hamizrahi*, over a period of decades, the Israeli Supreme Court has repealed about ten Knesset laws for reasons of unconstitutionality. [56]Additionally, the Supreme Court demonstrated in many cases "judicial activism" in order to protect basic principles and rights, in ways other than judicial review of primary legislation. [57]Nevertheless, despite the triumphs of the Supreme Court in defending fundamental democratic principles and human rights, the scope of the Supreme Court's power to intervene in Knesset legislation is still very much contested. In recent years, the legitimacy of the Supreme Court, as well as its numerous achievements, are under constant, unjustified attacks by both politicians and jurists. In this paper, we hoped to show that the power of the Israeli Supreme Court to conduct judicial review of primary Knesset legislation, as well as the power to intervene in, and supervise and regulate the actions of the Legislative Branch is justly rooted in well-established Western legal tradition, based on the groundbreaking ruling on *Marbury v. Madison*.

[56] *See, e.g.,* the following well-known cases: HCJ 1715/97 *Israel Investments Administrators Office v. the Minister of Finance*, PD 51(4) 367 (1997); HCJ 6055/95 *Tzemach v. Minister of Defense*, PD 53(5) 241 (1999); HCJ 1030/99 *Oron v. Speaker of the Knesset*, PD 56(3) 640 (2002); HCJ 2605/05 *Academic Center of Law and Business v. Minister of. Finance* (delivered on November 19, 2009).

[57] A discussion of the fascinating subject of "judicial activism" in Israel exceeds the scope of this paper. For more on that, *see generally Judicial Activism* (A. Porat ed., 1993) [Hebrew].