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"UFO": WHEN THE AMERICAN DOCTRINE OF RIPENESS VISITED ISRAEL

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As part of the gradual preparation for the incorporation of the American ripeness doctrine into Israeli law, it has been justified on a number of grounds. A fundamental discussion of the scope of the doctrine may be found in three important legal cases, which coined the term "the ripeness doctrine, Israel style." A review of these cases reveals that while there is widespread consensus among the Israeli Supreme Court justices regarding the actual adoption of the ripeness doctrine, there is disagreement – and even confusion – regarding the manner of its implementation. In this article, I would like to present a principled position that opposes the adoption of the American ripeness doctrine in Israeli constitutional law. This position rests on four main arguments: (1) no methodology whatsoever has been employed to incorporate the American ripeness doctrine into Israeli constitutional law; (2) the objectives underlying the ripeness doctrine, as presented by the Court, even if worthy and correct in themselves, do not compel the incorporation of the American doctrine into Israeli law; (3) the adoption of the ripeness doctrine in Israeli law, including its development in terms of scope and application is ambiguous, replete with inconsistencies, and creates legal uncertainty; and, (4) it seems that the incorporation of the ripeness doctrine into Israeli law is motivated by the judiciary's desire to avoid conflict with the political authorities, principally the legislature, particularly in light of ongoing political threats to curtail the Court's powers.

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I. INTRODUCTION

Without undertaking to survey the intricacies of the ripeness doctrine it is fair to say that its basic rationale is to prevent the courts, through avoidance of premature adjudication, from entangling themselves

> in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties. The problem is best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.[1]

This is the American ripeness doctrine, which examines whether a particular constitutional issue is ripe for judicial review prior to a piece of legislation actually being implemented by the executive branch. This is the doctrine due to be introduced into Israeli constitutional law which declares that when a constitutional question arises, in the absence of a concrete set of facts, the judicial decision on the substantive issues must be delayed to a later time.[2] As part of the gradual preparation for the incorporation of the ripeness doctrine into Israeli law, it has been justified on a number of grounds: first, as a tool for regulating the stream of referrals and other matters submitted to the Court; second, to meet the need to save judicial time and increase efficiency; third, to deal with the possibility that, over time, the necessity to decide certain fundamental issues will be obviated; and fourth, the desire to increase public confidence in the judiciary by confining judicial intervention to cases where the dispute is concrete.[3]

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[1] *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148–149 (1967).

[2] HCJ 7190/05 Lobel v. Gov't of Israel, Nevo Legal Database (2006) (opinion of Naor, J.).

[3] *Id.*; *see also* HCJ 3429/11 Alumni Ass'n v. Minister of Fin., Nevo Legal Database (2012); HCJ 3803/11 Israel Capital Mkt. Trs.'Ass'n v. State of Israel, Nevo Legal Database (2012); AAA 7201/11 Rahmani DA Earthworks v. Airports Auth., Nevo Legal Database (2014)) (helping to show that the Court favours the concept that its main function is to resolve disputes and not restrain the government).

A fundamental discussion of the scope of the doctrine may be found in three important legal cases,[4] heard by expanded panels of judges, which coined the term "the ripeness doctrine, Israel style". This term signifies the following process: in the first stage, the Court examines whether a concrete set of facts is needed to determine the constitutional question itself; upon a positive answer being attained in the first stage, the Court will examine, as part of a second stage, whether other grounds exist which nonetheless require a judicial decision to be made on the constitutional question.[5] A review of the judgments in these three cases reveals that while there is widespread consensus among the Israeli Supreme Court justices regarding the actual adoption of the ripeness doctrine,[6] there is disagreement – and even confusion[7] – regarding the manner of its implementation. In this debate among the justices, three notable trends can be pointed out: first, emphasizing the need for a cautious approach to the adoption of the American doctrine as it stands; second, a reversion to first principles in relation to the Court's duty to decide disputes brought before it; and third, the extension of the list of exceptions to the principle of the applicability of the ripeness doctrine, with an emphasis on the presence of covert discrimination, the existence of broad governmental discretion which is missing clear criteria, the concern that the fundamental issue at hand will not be referred again to the Court for determination, the existence of a serious infringement of a constitutional right, and the absence of an alternative process for more effectively determining the claims.

In the legal literature, one may encounter the view that by adopting the ripeness doctrine the Court is expressing its reluctance to clash with the political authorities, among other things, in light of the ongoing political threats and attempts to erode the Court's

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[4] *See* HCJ 2311/11 Sabah v. Knesset, Nevo Legal Database (2014); HCJ 3166/14 Gutman v. Att'y Gen., Nevo Legal Database (2015); HCJ 5239/11 Avneri v. Knesset, Nevo Legal Database (2015).

[5] HCJ 2311/11 Sabah, at paras. 17, 21 (opinion of Grunis, J.).

[6] *See* HCJ 5239/11 Avneri, at para. 1.

[7] Ariel Bendor, *Ripeness and More*, 8 MISHPATIM 33, 35 (2016) ("[S]ome of the judges agreed with the position of other judges . . . but described the position with which they agreed in a manner different to that in which it was presented by other judges who espoused it.").

powers.[8] In substantive terms, a review of the legal literature shows that there are, almost, no legal expositions fundamentally criticizing the adoption of the doctrine *per se*.[9] According to Yitzhak Zamir's approach – which, in my humble opinion, is erroneously perceived to express principled opposition to the ripeness doctrine – adoption of the ripeness doctrine does not offer any benefit given the traditional threshold criteria (for example, relating to the petition being 'premature'). On the contrary, in his view, the doctrine creates legal uncertainty and even makes the legal process more complex.[10] I am not convinced that Yitzhak Zamir is, in principle, opposed to the ripeness doctrine. I understand his argument to be that this doctrine does not offer anything novel, but rather forms part of the long-standing threshold criteria, for example, in the case of a premature petition. It seems to me that this argument can, if anything, support the ripeness doctrine as forming part of a well-established and well-known body of law: one that does not change fundamental principles. In any case, in contrast to Yitzhak Zamir's approach, Elena Chachko[11] confines her critique to the manner in which the American doctrine is applied in Israeli law. In her view, the substantive application of the American doctrine would actually lead the Court to deliberate and decide upon the merits of the constitutional questions before it.[12] Like Chachko, Ariel Bendor criticizes the manner in which the ripeness doctrine is applied in Court rulings, while at the same time pointing out the power of the Court to expand the scope of judicial review by utilizing the doctrine to develop a discourse which relates not only to the constitutionality of the law itself but also to the constitutionality of its

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[8] *See* Adam Shinar, *Restoring the Former Glory of the High Court's Threshold Criteria – Another Look at the Nakba Case*, HATRAKLIN - THOUGHTS ON THE LAW (June 1, 2012). *Cf.* YITZHAK ZAMIR, ADMINISTRATIVE AUTHORITY 1896 (Vol. 3, 2014); Daphne Barak-Erez, *Putting Man at the Center – On Man's Place in Law*, 39 IYONI MISHPAT 5, 24–25 (2016).

[9] *See* Suzie Navot, *The Constitutional Dialogue: Dialogue with Institutional Tools*, 12 MISHPATIM 99, 121–124 (2018) (I wrote "almost" because Suzie Navot raised several contemplations in regard to the compatibility of the American doctrine to the Israeli legal system.).

[10] ZAMIR, *supra* note 8, at 1896–897.

[11] Elena Chachko, *On Ripeness and Constitutionality*, 43 MISHPATIM 419, 419 (2012).

[12] *Id.* at 451.

implementation.[13] In this article, I would like to present a principled position that opposes the adoption of the American ripeness doctrine in Israeli constitutional law. The critical approach presented here is based on an analytical-critical examination of the circumstances that have led Israeli constitutional law to adopt the American doctrine. This position, which expands on the criticisms already presented by scholars, rests on four main arguments:

First, no methodology whatsoever has been employed when incorporating the American ripeness doctrine into Israeli constitutional law. Notwithstanding that a number of judges have referred to the need to exercise particular caution with regard to the manner of adopting the American doctrine as it stands, in fact the doctrine has been adopted intact. In my view, therefore, there is no basis to the argument that the "ripeness doctrine, Israel style" is indeed "Israel style." In addition, although some judges have been clear about the institutional and normative differences between the American legal system and the Israeli legal system, at the end of the day, the Court has never truly examined the ramifications of these differences for the application of American doctrine in Israeli law. Moreover, it would seem that it is the constitutional differences between the two legal systems, referred to by the Court, which indeed support the view that the ripeness doctrine is foreign to Israeli law and that its adoption is both contrived and artificial.

Second, the objectives underlying the ripeness doctrine, as presented by the Court, even if worthy and correct in themselves, do not compel the incorporation of the American doctrine into Israeli law. This is because the incorporation of the doctrine has not resulted in any real saving in judicial time or improved efficiency. On the contrary, the rulings dealing with the ripeness doctrine are spread over hundreds of pages, and include long, complex, and even cumbersome legal opinions. In addition, the Israeli constitutional tradition contains more than enough traditional threshold criteria that provide a proper response to classic cases of premature petitions, for example, where there are adequate alternative remedies or the petitioner has failed to exhaust prior proceedings. Moreover, the

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[13] Bendor, *supra* note 7, at 51.

'respect clause' which, pursuant to Basic Law: Human Dignity and Liberty that underpins the constitutional revolution,[14] requires every governmental authority to respect the rights under that Basic Law, is binding on all government authorities, including the legislature. Further, it is the Court's duty to hear and decide constitutional questions relating to alleged infringements of fundamental rights, including, in particular, infringements ostensibly committed by the legislature. Additionally, the principle of the separation of powers – in its substantive sense, as a mechanism for checks and balances and mutual supervision of governmental authorities – actually demands that the ripeness doctrine be rejected. While public trust in the professionalism, fairness, and neutrality of the judiciary is a factor which may properly be considered, public trust in the sense of avoiding publicized clashes with the political authorities is a consideration which is both extraneous and invalid.

Third, the adoption of the ripeness doctrine in Israeli law, including its development in terms of scope and application, is ambiguous, replete with inconsistencies, and creates legal uncertainty. On the one hand, in the absence of a concrete factual foundation, the Court has rejected constitutional petitions even when these involve important legal questions. On the other hand, in other cases, even when a detailed factual foundation has been demonstrated, the Court has dismissed the petitions *in limine*, this time on the ground that it is necessary to demonstrate the existence of a cumulative practice of infringement of a fundamental right. In addition, one may identify a gross inconsistency regarding the existence of an alternative procedure as an exception to the applicability of the ripeness doctrine. In one case, even though an alternative procedure existed, the Court nonetheless refrained from applying the ripeness doctrine out of concern that the fundamental issue would not be referred to it for consideration again. In another case, even in the absence of such an alternative proceeding, and despite the anticipated damage from failing to consider and decide the constitutional issue on the merits, the Court still clung to the ripeness doctrine, while declaring that it was concerned with a *fait accompli*, albeit one which was temporary

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[14] CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Vill., 49(4) PD 221, 307–08, 313, 411–12, 458 (1995) (Isr.)

(temporary injury over a sustained period). Moreover, even substantively, an examination of all the legal cases concerning the ripeness doctrine clearly demonstrates inconsistencies regarding the manner of application of the doctrine, including the exceptions thereto. For example, in one case, the Court restricted itself to an analysis of the law, attaching no relevance to the psychoanalysis of the legislature, while in another case, the intent of some of the legislators was considered to have acute legal significance for the application of the ripeness doctrine. Finally, the legal uncertainty enveloping the manner in which the ripeness doctrine is being developed and implemented increases when judges are required to apply the common sense test. Such a process could lead two judges, possessing common sense, and hearing the same case to reach two opposing legal conclusions concerning the applicability, or at least the scope and manner of implementation of the doctrine.

Fourth, it seems that the incorporation of the ripeness doctrine into Israeli law is motivated by the judiciary's desire to avoid conflict with the political authorities, including principally the legislature, particularly in light of ongoing political threats to curtail the Court's powers. Emphasizing this is the fact that the cases applying the ripeness doctrine, as explained in this article, dealt with issues that are at the core of social, political and ideological rifts in Israeli society. However, it also seems that while the ripeness doctrine is presented as a tool for self-restraint applied by the judiciary, it is, in reality, designed in such a way as to leave the absolute discretion as to its actual application, scope and manner of implementation to the Court itself. In many cases, even though the Court chose to dismiss petitions *in limine* on the grounds of the ripeness doctrine, its rulings still contained detailed instructions, directed at the executive branch, as to how the latter should interpret the statutory provisions under consideration in such a way as to avoid the violation of fundamental rights in the future. In my view, the adoption of the ripeness doctrine in Israeli law expresses a form of judicial diplomacy; it is in the nature of tactical judicial review that creates an indirect constitutional dialogue with the legislative authority, through the executive branch. This judicial diplomacy is possible precisely because of the parliamentary characteristics of Israeli democracy, where the members of the executive branch are, for the most part, also

members of the legislature. In my opinion, this trend is extremely worrying, and may impair both the independence and the equilibrium of Israel's judiciary, not least by blurring the institutional boundaries between the legislature and the executive branch.

Therefore, in the second section, I will review the first four legal cases in the framework of which the ripeness doctrine took its initial steps toward Israeli constitutional law. In the third section, I will present the three main legal cases in which the "ripeness doctrine, Israel style" was shaped. In the fourth, fifth and sixth sections, respectively, I will discuss critically: the question of the methodology of using comparative law as a tool for importing legal doctrines; the purposes underlying the ripeness doctrine; and the ambiguity, inconsistency, and legal uncertainty involved in the adoption and application of the ripeness doctrine in Court rulings. Finally, in the seventh section, I will discuss the implications of adopting the ripeness doctrine for the institution of judicial review.

II. THE EVOLUTION OF THE AMERICAN RIPENESS DOCTRINE IN ISRAELI CONSTITUTIONAL LAW

At the heart of the ripeness doctrine, as enshrined in Israeli constitutional law, is the precept that when a constitutional question arises, and in the absence of a concrete set of facts, the judicial decision on the substantive question must be deferred to a later date. The doctrine took its first steps in the context of four legal cases which essentially developed, shaped, and supported the purposes underlying the doctrine, namely: first, regulation of the stream of referrals and other matters submitted to the Court; second, saving judicial time and increasing efficiency; third, dealing with the possibility that, over time, the need to decide the fundamental issue at hand would be obviated; and fourth, enhancing public confidence in the judiciary by confining judicial intervention to cases involving a concrete dispute. I shall consider each of these four cases, in the order in which they were decided.

A. The Disengagement Case

At the beginning of 2006, the High Court of Justice dismissed *in limine* a petition against the constitutionality of two provisions enshrined in the Disengagement Plan Implementation Law.[15] These two provisions essentially impose a criminal penalty (six months imprisonment) and economic sanctions (denial of compensation) on Israeli residents of the evacuated communities in the Gaza Strip and northern Samaria if they reside or return for the purpose of residing in the evacuated area after the evacuation date set by the Prime Minister and the Minister of Defense. The ground for the dismissal of the petition was the threshold criterion concerning the existence of an effective alternative remedy provided by the Disengagement Implementation Law. According to the Court, first, it was possible to examine the constitutionality of the criminal sanction in the context of the criminal process as such, in the event that one was pursued; second, it was possible to raise claims against the economic sanction before the eligibility committees as well as before the special committees, if and when such a sanction was applied.[16] However, in her separate judgment, Justice Miriam Naor added – notably, in an individual opinion – an additional ground for dismissing the petition outright: one rooted in the ripeness doctrine, which was borrowed entirely from American law.[17] According to Justice Naor, the crux of the ripeness doctrine is that, in the absence of a concrete, clear and complete set of facts, which are necessary for the purpose of forming a principled judicial decision, the Court will not consider the petition itself. This, as a tool to regulate the stream of referrals and other matters submitted to the Court, is a tool capable of deferring judicial decisions but not necessarily preventing them.[18] In her view, the

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[15] HCJ 7190/05 Lobel, at paras. 3–8 (opinion of Naor, J.); *see also* Disengagement Plan Implementation Law, 5775 – 2005 (Isr.).

[16] *See* HCJ 7190/05 Lobel, at paras. 11–14 (opinion of Barak, J.) (Decisions of the eligibility committees may be appealed as of right to the Magistrate's Court in Jerusalem, and subsequently appealed as of right to the District Court of Jerusalem. These committees' decisions may be appealed as of right to the Administrative Affairs Court in Jerusalem, and subsequently, also as of right, to the Supreme Court.).

[17] *Id.* at para. 3 (opinion of Naor, J.); s*ee also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 334–335 (Foundation, 3rd ed. 2000).

[18] HCJ 7190/05 Lobel, at paras. 5, 7.

ripeness doctrine is not intended to replace other threshold criteria, such as the existence of adequate alternative remedies or failure to exhaust proceedings, but to supplement them. Thus, petitioning for an alternative remedy or exhaustion of proceedings may, in fact, themselves produce the ripeness required for an informed judicial decision on the constitutional question.[19]

B. The Nakba Case

About six years after the *Disengagement case*, Justice Miriam Naor (with whom Justice Dorit Beinisch and Justice Eliezer Rivlin concurred) dismissed a petition against the constitutionality of a provision in the Budget Foundations Law, authorizing the Minister of Finance to reduce the budget of a budgeted or financially supported body where, among other things, it is found that the body has issued a publication that in essence denies the existence of the State of Israel as a Jewish and democratic state or marks the day of the establishment of the State as a day of mourning.[20] According to the Court, notwithstanding the important and fundamental legal issues facing the Court,[21] it was conceivable that the alleged infringement of a protected right might not take place at all given the complex mechanism within which the Minister of Finance was required to act.[22] According to Justice Miriam Naor, it was also possible that, over time, a fundamental decision on the important issues raised by the petition would become otiose, either because the Minister of Finance would decide not to exercise the authority vested in him, or because he might decide to use that authority in a manner that did not harm the petitioners.[23] In terms of the qualifications to the application of the ripeness doctrine, Justice Miriam Naor added that if it was proven that waiting until the petition ripened would

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[19] *Id.* at paras. 7–8.

[20] HCJ 3429/11 Alumni Ass'n; *see also* Budget Foundations Law (Amendment No. 40), 5771–2011 (Isr.).

[21] HCJ 3429/11 Alumni Ass'n, at para. 28 (opinion of Naor, J.).

[22] *Id.*

[23] *Id.* at para. 33. I should note that it is not at all clear to me how the Minister of Finance can exercise his powers in such a manner that marking the day of the establishment of the state as a day of mourning will not compel him to exercise his said power, or at least exercise it in such a way as not to harm the institutions which are the subject of the power.

cause immediate severe harm to the petitioner, then in such a case the Court would not abstain from rendering a judicial decision.[24]

C. The Securities Case

About a month after the *Nakba case*, Justice Eliezer Rivlin (with whom Justice Neal Handel and Justice Uzi Vogelman concurred) also had cause to consider the ripeness doctrine. This occurred in the course of a hearing of petitions against the constitutionality of a provision of the Securities Law, which was inserted by virtue of the Increased Efficiency of Enforcement Procedures in the Securities Authority (Legislative Amendments) Law, 5771-2011, which prohibits, in certain circumstances, issuing insurance and the existence of indemnification arrangements against administrative enforcement proceedings.[25] Underlying the petition in this case was the argument that this provision infringed the right to freedom of occupation as well as the right to equality because the imposition of severe financial sanctions, in the absence of the employee's ability to protect himself against such sanctions by purchasing insurance, created a chilling effect on the ability to function in management positions in companies exposed to sanctions of this type including, in particular, those which did not enjoy significant economic robustness.[26] Relying on the ripeness doctrine, the Court dismissed the petition *in limine* on the ground that the full implementation of the arrangements under appeal had not yet commenced, and that in any event it was not possible to ascertain the extent of the harm which might be caused by the said arrangements where implemented.[27] According to Justice Eliezer Rivlin, public confidence in the judiciary increases when judicial intervention is carried out in order to prevent the actual violation of fundamental

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[24] *Id.* at paras. 30–31 (for example, had the Knesset adopted the original version of the Day of Independence bill, which contained a criminal sanction of three years imprisonment, then in view of the harsh criminal sanction it is conceivable that the Court would have decided the petition on the merits even before the law was applied in a concrete case); *see also United Pub. Workers* v. *Mitchell*, 330 U.S. 75 (1947).

[25] HCJ 3803/11 Israel Capital Mkt.; *see also* Securities Law, 5728-1968 (Isr.).

[26] HCJ 3803/11 Israel Capital Mkt., at para. 5 (opinion of Rivlin, J.).

[27] *Id.* at paras. 11–12.

rights.[28] In his view, protection of public trust in the judiciary is essential precisely because the judiciary is the weakest authority relative to the other authorities in the state.[29] Thus, according to him, the Court must preserve its resources, particularly that of public trust, for the most essential cases in order to "have them available to it on judgment day – to fulfil the role of protecting fundamental rights."[30] Justice Eliezer Rivlin based this approach on the principle of the separation of powers, which requires, in his view, confining the Court's intervention to cases where the disputes are tangible. In other words, *locus standi* is confined solely to those who claim to have incurred real harm and immediate and personal suffering.[31] Finally, it is noteworthy that Justice Uzi Vogelman, in an individual opinion – and in light of material differences between American law and Israeli law, including in relation to the doctrines of *locus standi* and justiciability – chose to post his own caution, and leave open the question of the compatibility of the American ripeness doctrine with Israeli law.[32]

D. The Tenders Case

Two years after the decision in the *Securities case*, Justice Salim Jubran, in a minority opinion, dismissed *in limine* an appeal against an administrative petition concerning the constitutionality of a directive in the mandatory tender regulations, which deals with the extension of the grounds permitting, under certain circumstances, the forfeiture of a tender guarantee.[33] According to Justice Salim Jubran, even when there was a concrete set of facts – such as in the matter at hand – there were cases – such as in the matter at hand – where it was

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[28] *Id.* at paras. 18–19.

[29] *Id.*

[30] *Id.* at para. 19.

[31] *Id.* at paras. 13, 17.

[32] *Id.* (opinion of Vogelman, J.).

[33] AAA 7201/11 Rahmani, at para. 4 (opinion of Jubran, J.) (helping to note that Justice Uri Shoham and Justice Yitzhak Amit chose not to refer, at all, to the position taken by Justice Salim Jubran regarding the application and manner of implementation of the ripeness doctrine).

necessary to demonstrate the existence of a cumulative practice of infringement of a protected right.[34]

III. THE RIPENESS DOCTRINE, ISRAEL STYLE

While these four cases were primarily concerned with the development of the purposes underlying the ripeness doctrine, in three later important legal cases heard by extended panels (nine justices), the Court focused on shaping the scope of the doctrine, thereby coining the phrase "the ripeness doctrine, Israel style." At the core of the "ripeness doctrine, Israeli-style" is a combined test, according to which: in the first stage, the Court examines whether a concrete set of facts is needed in order to decide the constitutional question on the merits whie, in the second stage, subject to obtaining a positive answer in the first stage, the Court will examine the existence of other grounds which nevertheless compel it to render a judicial decision on the constitutional question. An in-depth examination of these three cases reveals that, accompanying the broad consensus among the justices regarding the actual adoption of the ripeness doctrine, is considerable controversy over its scope. Three prominent trends can be pointed out in this disagreement among the justices: one, emphasizing the need for caution regarding the adoption of the American doctrine as it stands; the second, the importance of returning to fundamental principles in relation to the Court's duty to decide disputes brought before it for adjudication; and third, extending the exceptions to the applicability of the ripeness doctrine, through an emphasis on the presence of covert discrimination, the existence of broad governmental discretion which lacks clear criteria, the concern that the fundamental issue at hand will not be referred again to the Court, the existence of a serious infringement of a constitutional right, and the absence of an alternative process for more effectively determining the claims. I shall

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[34] *Id.* (helping to argue that the first signs of Justice Salim Jubran's approach can be found – albeit not explicitly stated – in the judgment rendered by Justice Eliezer Rivlin in Israel Capital Mkt.; in dismissing the petition *in limine*, Justice Eliezer Rivlin held that the petition did not rely on cases which had actually occurred, ones that illustrated the assertions made therein).

refer to each of the three cases, in the order in which they were decided.

A. The Admissions Committees Case

This case concerned a law permitting a communal village to make the allocation of land to persons applying to reside in the village contingent upon the prior approval of an admissions committee, comprised, *inter alia*, of representatives of that village. Among the listed statutory grounds on which an admissions committee may reject a candidate's application to join and reside in a communal village, is, *inter alia*, the candidate's incompatibility with life in the community or with the socio-cultural fabric of the community and village.[35] At the same time, the law provides a qualification, namely, that the admissions committee may not reject candidates upon grounds of race, religion, gender, nationality, disability, personal status, age, parenting, sexual orientation, country of origin, outlook or political-party affiliation.[36]

Justice Asher Grunis (with whom Justices Miriam Naor, Elyakim Rubinstein, Esther Hayut, and Hanan Melcer concurred) dismissed the petitions, stating that at this stage, when the law had not yet been implemented, the petitions should be dismissed for lack of a sufficient factual basis upon which to decide the questions at hand.[37] In particular, he reached this conclusion because according to the law, decisions of the admissions committees could be appealed to appeals committees, and subsequently to the Administrative Affairs Court.[38] There, in the Administrative Affairs Court, it would be possible to raise all the relevant constitutional arguments in order to allow a decision to be reached. In addition, Justice Asher Grunis emphasized that while he regarded the ripeness doctrine as a threshold criterion which joined the list of traditional threshold criteria, it was not necessarily a criterion which was distinguishable in

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34 HCJ 2311/11 Sabah (opinion of Grunis, J.); *see also* Neta Ziv, Leave *Alone the Admission Committees: (Soon) Twenty Years for Kaadan*, 35 MEVZAKI HEAROUT PSIKA 1 (2014).

34 *Id.*

37 HCJ 2311/11 Sabah, at para. 10.

38 *Id.* at para. 23.

principle from the threshold criteria for a premature petition, but rather a specific instance of such a criterion.[39]

On the merits, and alert to the need for caution voiced by Justice Uzi Vogelman in the *Securities case*,[40] Justice Asher Grunis also emphasized that it was necessary to obtain assistance from the experience accumulated in the United States in order to develop the ripeness doctrine;[41] however, it was vital to develop the "ripeness doctrine, Israel style,"[42] which at its core was a two-step test:

> In the first stage, the Court must decide whether the central question at issue in the petition is a legal one, the answer to which does not require a detailed set of facts, or whether implementation of the law is required in order to answer it. In the second stage, the Court is required to consider whether there are grounds to hear the petition despite the absence of a sufficient factual basis.[43]

The first stage did not entail a dichotomous decision as to the existence or absence of a concrete set of facts. According to Justice Asher Grunis, it was necessary to examine the scope of the factual basis required to decide the constitutional questions which were posed in each and every case. In his opinion, this was the appropriate way to act in cases where the determination of the legal questions required a certain set of facts to be present which would assist in examining whether there had been a violation of a protected right, and additionally, the nature and intensity of the alleged violation. This was the case, for example, when one was faced with a statutory provision permitting "relatively wide leeway for interpretation on the part of the executive branch when implementing the law."[44] The

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[39] *Id.* at para. 11. (in this way, Justice Asher Grunis sought to respond to Yitzhak Zamir's criticism regarding the incorporation of the American ripeness doctrine into Israeli law); *see also* ZAMIR, *supra* note 8, at 1892–98.

[40] *See* HCJ 3803/11 Israel Capital Mkt.

[41] HCJ 2311/11 Sabah, at para. 21 (opinion of Grunis, J.).

[42] *Id.*

[43] *Id.* at para. 17.

[44] *Id.* at para. 15.

latter state of affairs offered a classic case for the application of the ripeness doctrine; this was because, prior to the implementation of the law by the executive branch, or prior to its implementation to a sufficient extent,[45] the ramifications of that act could not be ascertained. Nonetheless, according to Justice Asher Grunis' approach, when the majority of the question facing the Court was fundamentally legal, the "future factual development [would] not contribute to the legal decision", and hence there was scope to consider and decide the merits of the constitutional questions in the absence of, and perhaps notwithstanding the absence of, a concrete set of facts.[46] To illustrate this position, Justice Asher Grunis referred to legislation which was essentially racist in nature, such as racial segregation in schools, which was unconstitutional and where no question arose as to its implementation.[47] Another example cited by Justice Asher Grunis concerned the privatization of prisons, where in his view the transfer of powers from the state to private entities operating for profit created an inherent violation of constitutional rights.[48]

In the second stage of the "ripeness doctrine, Israel style", Justice Asher Grunis considered the "chilling effect" – that is, when leaving the law unchanged could cause people to refrain from engaging in lawful conduct for fear of having the law enforced against them – as a case that justified a hearing and determination of legal questions in the absence, and perhaps despite the absence of, a concrete set of facts.[49] According to Justice Asher Grunis, a chilling effect could take various forms and occur in various circumstances, such as: first, where waiting for the implementation of the law would expose the petitioner to a risk, such as a sanction, or compel him to

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[45] *Id.* at para. 12. (showing, to some extent, these remarks adopt the position taken by Justice Salim Jubran, as set out in a minority opinion in the case of Rahmani DA Earthworks Ltd., according to which it is not sufficient to point to a concrete set of facts; there must also be a cumulative practice of harm to the protected right).

[46] HCJ 2311/11 Sabah, at para. 12.

[47] *Id.*; *see also Brown* v. *Board of Education*, 347 U.S. 483 (1954).

[48] HCJ 2311/11 Sabah, at para. 12; *see also* HCJ 2605/05 Acad. Ctr. for Law and Bus. v. Minister of Fin., 63(2) PD 545 (2009).

[49] HCJ 2311/11 Sabah, at para. 16 (opinion of Grunis, J.).

breach the law; second, it could take the form of concern that the petitioner or the public would suffer damage; third, it might be concern about the creation of irreversible facts on the ground as a result of the deferment of a judicial determination on the legal questions; fourth, because of the nature of the issue in dispute, from a practical point of view, there potentially might not come a point in time at which the petition would be considered ripe, and therefore a hearing of that issue could never be held too soon or too late; and fifth, where there was a real public interest is determining the petition, such as where a serious violation of the rule of law had been committed.[50] Countering this, Justice Asher Grunis emphasized that this second stage of the "ripeness doctrine, Israel style" examined the "balance of convenience"[51] and that, as a corollary, consideration also had to be given to situations where "legal inquiry [could] impair the continuity of administrative action or the ability of the executive branch to change or amend any policy which it has adopted".[52]

This is the place to note that Justice Elyakim Rubinstein and Justice Naor's concurrence with the judgment rendered by Justice Asher Grunis did not reflect their full acquiescence to the "ripeness doctrine, Israel style". First, while Justice Elyakim Rubinstein adopted Justice Asher Grunis' stance regarding the grounds for dismissal of the petitions, he did not express a position of principle as to the "ripeness doctrine, Israel style". Moreover, he suggested exercising caution when using the concept of the chilling effect, albeit without seeking to minimize the value of that idea.[53] Despite all this, Justice Elyakim Rubinstein stated that the issue of the applicability of the ripeness doctrine was a matter of common sense and emphasized that this doctrine was not generically different from the threshold criteria regarding a premature petition.[54] Second, Justice Miriam Naor opined that it was better at this stage to develop the ripeness doctrine

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50 *Id.* at para. 16.
51 *Id.*
52 *Id.*
53 *Id.* at para. 15 (opinion of Rubinstein, J.).
54 *Id.* at para. 14.

"one step at a time" and that once a "sufficient number of cases were collected, the Court would be able to formulate an overall picture."[55]

In contrast to Justice Asher Grunis, Justice Salim Jubran ruled in a minority opinion (with which Justices Edna Arbel, Yoram Danziger, and Neal Handel concurred), that notwithstanding the absence of a concrete set of facts, including a cumulative practice, the petition was ripe for a constitutional hearing.[56] This was the case, in his view, due to the existence of covert discrimination, which could be learned from the background to the enactment of the amendment to the Cooperative Societies Ordinance;[57] the wide discretion, and absence of clear criteria, granted to the admissions committees;[58] and the concern that the fundamental issue would not be referred again to the Court in light of the offending party's practice of retracting the infringement once judicial proceeding were commenced.[59] Underlying the result reached by Justice Selim Jubran was his approach to the existence of two considerations that had to guide the Court in relation to the applicability of the ripeness doctrine: first, the severity of the injury that might be inflicted on an individual if the petition was not heard;[60] and second, the absence of an alternative procedure for effectively examining the claims.[61]

As for Justice Neal Handel, it should be emphasized that his affiliation with the minority camp, in terms of the outcome of the judgment, may be misleading.[62] For, in relation to the ripeness

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55 *Id.* at para. 1 (opinion of Naor, J.).

56 *Id.* at paras. 9, 65, 84 (opinion of Jubran, J).

57 *Id.* at para. 9.

58 *Id.* at para. 32.

59 *Id.* at para. 10.

60 *Id.* at para. (opinion of Jubran, J.).

61 *Id.* at para. 7. In this section, Justice Salim Jubran adopted the view of Justice Miriam Naor in the Graduates of the Arab Orthodox High School in Haifa, *supra* note 3, at para. 31 (opinion of Naor, J.).

62 Justice Neil Handel upheld the petitions, albeit partially, stating that the petitions were ripe insofar as they pertained to the question of the composition of the admissions committees. In his view, this composition gave a built-in advantage to the communal villages as opposed to applicants seeking to join these villages – in other words, an advantage that created a real danger of unconscious bias and hence a disproportionate infringement of the right to equality. *Id.* at para. 16 (opinion of

doctrine in general and the "ripeness doctrine, Israel style" in particular, his views seemed to resemble those of Justice Asher Grunis more closely than those of Justice Salim Jubran. Justice Neal Handel adopted the "ripeness doctrine, Israel style" as proposed by Justice Asher Grunis,[63] yet proposed his own partial ripeness doctrine under which in those cases where there were constitutional questions, some of which were ripe and some of which were not, a decision had to be rendered on those questions which were ripe.[64] Underlying Justice Neal Handel's position, was the perception that the outcome of the application of the "ripeness doctrine, Israel style" did not have to be "all or nothing."[65] According to Justice Neal Handel, the partial ripeness doctrine was not intended to replace the "ripeness doctrine, Israel style" at all; instead, the partial ripeness doctrine formed part of the second stage of the "ripeness doctrine, Israel style:"

> When within the framework of the first stage, it is concluded that the greater part, including the core, of the petition is not ripe for determination due to the absence of the concrete infrastructure required in the circumstances of the matter, though a certain portion of the petition is ripe for decision now – it will still be necessary to examine whether grounds exist to split the various parts of the petition.[66]

Handel, J.). In this connection, it should be noted that Justice Miriam Naor explicitly considered Justice Neal Handel's position, and stated that in relation to the composition of the admissions committees, Justice Neal Handel's concerns did not establish a need for immediate judicial intervention because the decisions of the admissions committees could be appealed to the appeals committees, which was comprised of public representatives only – in other words, an objective monitoring and control mechanism was available. *Id.* at para. 3 (opinion of Naor, J.).

63 *Id.* at para. 3 (opinion of Handel, J.).

64 *Id.* Underlying Justice Neil Handel's approach were three justifications: first, it could not be assumed that the complex tests put forward by Justice Grunis would always lead to a unified result; second, the partial ripeness doctrine had already been recognized for a long time by American law; and third, the partial ripeness doctrine stemmed from the objectives of the general ripeness doctrine, namely efficiency, public confidence in the judiciary, and the enhancement of the judicial determination. *Id.* at paras. 4-6.

65 *Id.* at para. 2.

66 *Id.* at para. 7.

In his view, at this stage, and within the framework of the examination of the application of the partial ripeness doctrine, it was imperative to determine: first, that the proposed splitting of the legal questions was exceptional (and, as a corollary, a special reason was required that would justify it; second, that there were considerations and tests – in addition to those proposed by Justice Asher Grunis within the context of the "ripeness doctrine, Israel style"[67] – that justified recognition of partial ripeness in a particular case. In this regard, the following had to be considered:[68] first, to what extent it was clear that the specific question under consideration did not require concrete implementation in order for a constitutional decision to be made in respect of it;[69] secondly, the extent to which the petition was compatible with the hearing being split, in a manner that was neither artificial nor would cause the entire legal edifice to collapse;[70] third, whether the question was substantive – both qualitatively and quantitatively – even if it was not the central or dominant question in the petition;[71]and fourth, whether a hearing now of the issue which was ripe for determination would produce a benefit that justified the splitting of the petition or obviate future damage.[72]

B. The Electoral Threshold Case[73]

This case was concerned with the constitutionality of raising the Knesset electoral threshold from 2% to 3.25%. As in the *Admissions Committees case*, Justice Selim Jubran, in a minority

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67 *Id.*

68 The relationship between the above considerations and tests may be reciprocal, "in such manner that the clear existence of one consideration may 'atone' for the weaker existence of another consideration." *Id.* at para. 8.

69 This consideration is similar to that presented by Justice Asher Grunis, and in respect to which he cited the example of the privatization of prisons. *Id.* at para. 12 (opinion of Grunis, J.).

70 *Id.* at para. 8 (opinion of Handel, J).

71 *Id.*

72 *Id.* We are referring to the American "balance of convenience" test to which Justice Asher Grunis referred in his judgment. *Id.* at para. 18 (opinion of Grunis, J.).

73 HCJ 3166/14 Gutman; *see also* The Knesset Elections Law (Amendment No. 62), 5774-2014 (Isr.).

judgment, faced off against Justice Asher Grunis, albeit this time on his own.

While Justices Asher Grunis and Salim Jubran both held that the petitions raised significant questions that touched upon the fundamental characteristics of the democratic regime in the State of Israel and the electoral system applied there,[74] they were divided primarily on the question as to whether the time was ripe to discuss and decide the constitutional issues raised by the petition. Faithful to the two-step test making up the "ripeness doctrine, Israel style," developed by him in the *Admissions Committees case*,[75] Justice Asher Grunis concluded that the petitions had to be dismissed as being premature. In contrast, Justice Salim Jubran believed that, both according to the "ripeness doctrine, Israel style" and according to the criteria he himself had established in the *Admissions Committees case* in relation to the severity of the harm which might be caused to the individual in the event that the petition was not heard, as well as in relation to the existence or absence of an alternative procedure for more effectively determining the claims, it would be wrong to dismiss the petitions on the grounds of the ripeness doctrine.[76]

It is interesting to note that even though the two judges supported the application of the American ripeness doctrine in Israel, Justice Salim Jubran never explicitly adopted the "ripeness doctrine, Israel style" – either in the *Admissions Committees case* or in the *Electoral Threshold case*. In contrast to Justice Salim Jubran, Justice Asher Grunis expressly adopted Justice Salim Jubran's approach regarding the existence of cases where it was not sufficient to demonstrate the existence of a concrete factual basis in order to establish that a particular petition was ripe for determination but that it was also necessary to show a cumulative practice of infringement of a protected right.[77]

Another point worth emphasizing is that both judges favoured the view that the decision as to whether an issue was ripe

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74 *Id.* at paras. 15, 17 (opinion of Grunis, J.).
75 HCJ 2311/11 Sabah, at para. 17 (opinion of Grunis, J.).
76 HCJ 3166/14 Gutman, at paras. 5-7 (opinion of Jubran, J.).
77 HCJ 2311/11 Sabah, at para. 12 (opinion of Grunis, J.).

for hearing and determination had to be made within the context of the first stage of the constitutional review process customarily conducted in the Israeli legal system: namely, the stage at which the Court considered whether a constitutional right or principle had been infringed.[78] This was another development of the ripeness doctrine, which *prima facie* provoked a legal debate between the two judges, this time concerning the standard of proof required to prove an infringement of a constitutional right. Justice Asher Grunis held that the petitioners bore the burden of proving a material violation or a material infringement of a protected right or a material and patent deviation from a constitutional principle.[79] In contrast, Justice Salim Jubran held that when the expected harm to an individual's constitutional right was of great magnitude and there was no alternative procedure for hearing the claims, it was sufficient to demonstrate real potential for violation of the right in order to enable a hearing of the petition even before the constitutional violation had actually occurred.[80] I write '*prima facie'* because Justice Asher Grunis presented Justice Salim Jubran's view as one which favoured in principle and in general the test of real potential for violation of a right,[81] whereas Justice Salim Jubran's stated position was in fact limited only to those cases in which the magnitude of the anticipated harm to a constitutional fundamental right of the individual was great and there was no alternative procedure for determining the claim.[82]

In this debate between Justices Grunis and Salim Jubran, it is appropriate to shine a spotlight on another matter upon which they disagreed, this time concerning the implications of the application of the ripeness doctrine for the case under discussion. While the two judges concurred in the view that the outcome of dismissing the petitions could lead to a *fait accompli*, which might justify a decision on the merits of the petitions, even in the absence of a concrete factual

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78 HCJ 3166/14 Gutman, at para. 41 (opinion of Grunis, J.); *id.* at para. 8 (opinion of Jubran, J.).

79 *Id.* at para. 41 (opinion of Grunis, J.).

80 *Id.* at para. 17 (opinion of Jubran, J.).

81 *Id.* at para. 65 (opinion of Grunis, J.).

82 *Id.* at para. 17 (opinion of Jubran, J.).

basis,[83] Justice Asher Grunis stated that this was a temporary *fait accompli*, while Justice Salim Jubran took the view it was a permanent *fait accompli*, or at minimum a temporary but prolonged and continuous *fait accompli*.[84] In other words, Justice Asher Grunis formed a view based on the forthcoming election campaign in relation to the date of the hearing on the petitions in the case at hand, and as such determined that it was a temporary *fait accompli*;[85] whereas Justice Selim Jubran focused on the term of the Knesset (four years), and as such determined that it was a permanent *fait accompli*, or at least a temporary but prolonged and continuous *fait accompli*.[86] This distinction between temporary harm and permanent harm – or, at least, temporary but prolonged and continuous harm – is another development of the ripeness doctrine.

Another interesting albeit not explicit development is revealed in Justice Asher Grunis' judgment. Even though Justice Asher Grunis had dismissed the petitions by virtue of the ripeness doctrine, he still methodically considered each of the petitioners' arguments, discussed them and decided whether each of the issues raised by these claims was premature or not.[87] This process is clearly reminiscent of the partial ripeness doctrine presented by Justice Neal Handel in the *Admissions Committees case*.

With regard to the other judges on the bench ruling on these petitions, it should be noted that although all, except Justice Salim Jubran, concurred with the result reached by Justice Asher Grunis regarding the dismissal of the petitions, not all were in agreement regarding the path to this outcome. While Justices Hanan Melcer, Neal Handel, Yoram Danziger, and Elyakim Rubinstein concurred with Justice Asher Grunis' arguments concerning the ripeness doctrine, subject to a number of comments of their own, Justices Uzi

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[83] *Id.* at para. 60 (opinion of Grunis, J.); *id.* at para. 21 (opinion of Jubran, J.).

[84] *Id.*

[85] *Id.* at para 60 (opinion of Grunis, J.).

[86] *Id.* at para 21 (opinion of Jubran, J.).

[87] *Id.* at paras. 48-49 (opinion of Grunis, J.).

Vogelman and Miriam Naor[88] agreed with Justice Salim Jubran that the petitions were ripe for hearing and adjudication. However, unlike Justice Salim Jubran, they held that the amendment to the Knesset Election Law was proportionate, and as a corollary, constitutional.

Justice Yoram Danziger for his part sought to develop the exception to the ripeness doctrine dealing with the existence of a chilling effect.[89] In his view, the chilling effect was potent precisely in those cases where it might create a vicious circle in which it itself prevented the establishment of the factual infrastructure.[90] In his view, a prime example of this was legislation that infringed the right to freedom of expression.[91]

Reiterating the view, he had expressed in the *Admissions Committees case*, Justice Elyakim Rubinstein again referred to the common sense test, from which, among other things, he had derived the ripeness doctrine.[92]

For his part, to further the caution he had previously voiced in relation to the manner of implementation and scope of application of the American ripeness doctrine in Israeli law,[93] Justice Uzi Vogelman again warned that the ripeness doctrine should not be used as long as no definitive data was available regarding the constitutional questions, as it was not always possible to achieve complete

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88 Like Justices Uzi Vogelman, Miriam Naor, and Salim Jubran, Justice Esther Hayut considered that the constitutional questions in the petitions were ripe for determination. This was because raising the electoral threshold, irrespective of the existence of a factual basis, infringed the principle of equality under Section 4 of Basic Law: the Knesset. In addition, in her opinion, in order for such an infringement to be constitutional, it was not sufficient for the amendment to the Knesset Election Law to pass the hurdle of the formal standard, it also had to comply with the judicial limitation clause. Like Justices Vogelman and Naor, Justice Esther Hayut considered that the amendment met all the conditions of the judicial limitation clause. *See Gutman*, *supra* note 4, at para. 3 (opinion of Hayut, J.).

89 *Id.* (opinion of Danziger, J.).

90 *Id.*

91 *Id.*

92 *Id.* at para. 7 (opinion of Rubinstein, J.).

93 See the opinions rendered by Justice Vogelman in HCJ 3803/11 Israel Capital Mkt. Trs.'Ass'n and HCJ 2311/11 Sabah.

certainty.[94] In asserting this, Justice Uzi Vogelman referred to first principles: namely, that the Court's function was to decide the petitions brought before it and the ripeness doctrine was an exception to this rule. These two determinations presented an important and critical development of the cautionary note previously voiced by Justice Uzi Vogelman in relation to the manner and scope of application of the ripeness doctrine. In any event, in substantive terms, Justice Uzi Vogelman was of the opinion that the petitions were ripe for deliberation and decision, mainly because the case at hand was not one in which it was preferable to wait and examine how the executive branch would implement the provisions of the law or how the lower instance courts would give effect to the various provisions.[95] On the contrary, if anything, the existence of a chilling effect was proven in the *Electoral Threshold case,* and this was because the political actors had already adapted themselves to the new normative situation.[96] Nonetheless, Justice Uzi Vogelman considered that, on the merits, the amendment to the Knesset Election Law met the constitutional tests, whether these were formal in nature or substantive in character.

Finally, the judgment of Justice Miriam Naor is particularly interesting. On the one hand, in her view, the mere heightening of the electoral threshold established a violation of the constitutional principle that "every vote has equal weight," protected under Section 4 of Basic Law: the Knesset, and consequently there was no need for a concrete factual basis in order to decide the petitions on the merits; in other words, the ripeness doctrine did not apply.[97] On the other hand, even though she took the view that the violation was proportionate and met the tests of the judicial limitation clause,[98] she still chose to concur with the concluding segment in Justice Asher Grunis' judgment whereby dismissal of the petitions would not close the doors to further examination of the amendment to the Knesset Election Law, once the results of the elections to the Twentieth

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94 *See* HCJ 3166/14 Gutman, at para. 2 (opinion of Vogelman, J.).

95 *Id.* at para. 3 (opinion of Vogelman, J.).

96 *Id.*

97 *Id.* at paras. 1-3 (opinion of Naor, J.).

98 *Id.* at paras. 3-4. In Justice Miriam Naor's view, in these types of cases, the zone of proportionality available to the Knesset was particularly wide.

Knesset were known. In her words, "these are matters in respect of which trial and error are necessary."[99] This last proposition was one with which Justice Uzi Vogelman and Justice Esther Hayut also concurred.[100]

C. The Boycott Case[101]

This case dealt with the constitutionality of the Prevention of Damage to the State of Israel through Boycott Law. This law imposes liability in tort and various administrative sanctions against anyone who knowingly publishes a public call for a boycott of the State of Israel, within the meaning of the law. In the above case, three sections of the law were subjected to constitutional scrutiny: Section 2, which deals with the imposition of civil tort liability, including Section 2(c) providing for the imposition of damages which are independent of the actual damage caused (hereinafter: punitive damages); and Sections 3 and 4, which deal with the imposition of administrative sanctions. Section 3 also confers authority on the Minister of Finance, with the consent of the Minister of Justice and with the approval of the Constitution, Law and Justice Committee of the Knesset, to promulgate regulations for the implementation of these sanctions.[102] The term "boycott of the State of Israel" is defined in Section 1 of this Law as "*deliberately avoiding economic, cultural or academic ties with another person or body solely because of their affinity with the State of Israel, one of its institutions or an area under its control, in such a way that may cause economic, cultural, or academic damage.*"[103]

Reading the plethora of opinions presented in the judgment, and insofar as concerns the question of the application of the ripeness doctrine, Ariel Bendor rightly wrote that:

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99 *Id.* at para. 7.

100 *Id.* at para. 6 (opinion of Vogelman, J.); *id.* at para. 4 (opinion of Hayut, J.).

101 HCJ 5239/11 Avneri v. Knesset; *see also* The Prevention of Damage to the State of Israel through Boycott Law, 5771 – 2011.

102 *Id.*

103 The Prevention of Damage to the State of Israel through Boycott Law, *supra* note 101, § 1.

It is difficult to understand the opinions of some of the judges [. . .] This difficulty stems from the fact that some of the judges agreed with the views of other judges in this regard, but described the position with which they concurred in a different manner from that presented by other judges who advocated it.[104]

Ariel Bendor precisely described the ambiguity surrounding the ripeness doctrine as expressed in the various opinions rendered by the judges:

Three justices (President (Ret.) Grunis and Justices Melcer and Amit) opined that in the future, based on concrete facts, constitutional arguments could be raised against all four sections; two justices (President Naor and Vice President Rubinstein) opined that it would be impossible to raise constitutional arguments against any of the sections (as opposed to arguments concerning the manner of implementation of the law or the content of regulations or rules promulgated thereunder), and apparently three other justices (Justices Handel, Danziger and Vogelman), based on various substantive analyses, left no opening for future constitutional reviews, beyond the determinations in the *Avneri* judgment regarding the validity of sections of the Boycott Law, while one justice (Justice Jubran) took the view that in the future constitutional claims could be raised against Sections 3 and 4." (Emphasis in the original).[105]

Ariel Bendor argued that ultimately, the only consensus reached by all the judges revolved around the unconstitutionality, including the invalidity, of Section 2(c) of the Boycott Prevention Law relating to punitive damages, as well as the dismissal of the petitions insofar as they concerned Sections 3 and 4 of the law regarding administrative sanctions. On the other hand, opinions were divided relating to Sections 2(a) and 2(b) of the law.[106] The fragmentation of the ripeness doctrine, as described here, indicates, even if only *prima facie* the adoption of Justice Neal Handel's approach regarding the partial ripeness doctrine, as expressed in the *Admissions Committees case.*

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104 Bendor, *supra* note 7.

105 *Id.* at 49.

106 *Id.*

After studying the various opinions in this case, it seems to me that there are four points which should be emphasized. First, in contrast to Justice Yoram Danziger, Justice Elyakim Rubinstein held that it was insufficient to demonstrate a chilling effect in order to bring about the application of the ripeness doctrine, for the relevant question was one of the intensity of the chilling effect.[107] Second, in his judgment, Justice Yoram Danziger adopted the approach taken by Justice Salim Jubran in the *Tenders case*, as reiterated by Justice Asher Grunis in the *Admissions Committees case*, to the effect that there are cases where it is not sufficient to demonstrate a concrete factual basis, but it is also necessary to point to a cumulative practice of infringement of a protected right.[108] Third, Justice Yitzhak Amit adopted Justice Miriam Naor's approach, as expressed in the *Nakba case*, regarding the possibility that, at the end of the day, the Minister of Finance will not exercise his authority. Fourth, Justice Yoram Danziger adopted and emphasized the goal of public confidence, which Justice Eliezer Rivlin pointed to in the *Securities case*.[109]

IV. THE RIPENESS DOCTRINE, ISRAEL STYLE: QUESTIONS ABOUT ITS USE IN COMPARATIVE LAW

Appealing to comparative law in order to import legal doctrines is a proper and worthy process. This is especially true when dealing with constitutional law, which concerns constitutional issues that are common to a wide range of states. Accordingly, an appeal to comparative law may provide a judge deliberating a case with a wealth of legal ideas, which ultimately assist him in deciding the concrete issues before him.[110] However, there is a gap, and properly so, between the judge's free academic ability to contemplate and ponder legal theories and doctrines existing in comparative law and his institutional and normative ability to adopt such doctrines intact, within the framework of the local law in which he operates. Institutionally, comparative law is not binding law in a foreign legal system, so at most it may serve as a source of inspiration only for the

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107 HCJ 5239/11 Avneri, at para. 14 (opinion of Rubinstein, J.).

108 *Id.* at para. 49 (opinion of Danziger, J.).

109 *Id.*

110 AHARON BARAK, THE JUDGE IN A DEMOCRACY 290-291 (2004).

judge who aspires to enrich his legal knowledge of shared legal issues. Normatively, various legal systems are usually characterized by substantive normative differences which require careful scrutiny prior to the adoption of any legal doctrine. Moreover, the adoption of a legal doctrine also requires adjustments to domestic law. In my view, unlike the vertical relationship between international law and domestic law, the relationship between comparative laws is horizontal. In other words, one comparative law may serve as the *amicus curiae* for another comparative law. Furthermore, an examination of comparative law in relation to domestic law is not much different from an examination of philosophical legal theories in abstract terms. By this, I am seeking to say that not every theory, however efficacious it may be, can justifiably be applied in every legal system.

A. There Is Nothing New Under The Sun

When examining the manner in which the American ripeness doctrine has been adopted and incorporated into Israeli law, the warning signs to which I referred above, did not go unnoticed by the Supreme Court justices. Notably, Justice Uzi Vogelman stressed the need to reflect on the concept of introducing the American doctrine intact into Israeli constitutional law, in light of the differences between the respective characteristics of Israeli constitutional law and American constitutional law. Like Justice Uzi Vogelman, Justice Esther Hayut, in the *Admissions Committees* case,[111] pointed out two main points of distinction between the American legal system and the Israeli legal system. First, the American ripeness doctrine is based on a provision enshrined in the United States Constitution under which the Court must avoid adjudicating abstract disputes devoid of any real issues in contention, whereas the "ripeness doctrine, Israel style" stems from the self-restraint which the Court may choose to impose upon itself when exercising its powers under Sections 15(c) and 15(d) of Basic Law: the Judiciary. Second, the implementation of threshold criteria in Israeli law is more flexible.[112] Nonetheless, the Supreme

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111 HCJ 5744/16 Ben Meir v. The Knesset, Nevo Legal Database (2018).

112 *Id.*

Court has never engaged in a thorough examination of the two legal systems.

At the same time, a considerable discrepancy is evident between the rhetoric of Justices Uzi Vogelman and Esther Hayut on the one hand and the actual implementation of the doctrine on the other. I would emphasize that the terminology coined by Justice Asher Grunis in the *Sabah* case: "the ripeness doctrine, Israel style" does not confer a genuinely Israeli character on the doctrine, with its dual components, and in any event does not reflect a substantive legal examination of the differences between the two legal systems and their implications for the ripeness doctrine's application in Israeli law, as described by Justice Esther Hayut. Indeed, "the ripeness doctrine, Israel style" is strikingly similar to the American formula, as accurately presented by Elena Chachko in an article that was published immediately after the *Nakba* case and the *Tenders* case, and, as mentioned, prior to the *Sabah* case. In examining the extent to which the ripeness doctrine conforms to constitutional law in Israel, Elena Chachko traces the origins of the ripeness doctrine in American law. In her view, the American ripeness doctrine – which the Supreme Court in Israel sought to adopt, at least at the outset[113] – includes "substantive tests designed to assess the law on its merits, which sometimes allow a decision 'on the face of the law,'even before it is implemented."[114] According to Elena Chachko, the United States' test for the applicability of the ripeness doctrine is two-fold: first, ripe petitions are those where the questions at issue are primarily legal and not factual; second, an examination is conducted of the implications and various interests attaching to the legal norm under review before it is implemented, and the implications of deferring judicial review until after it is implemented.[115] According to Elena Chachko:

> Even if the result of applying the ripeness doctrine is the conclusion that it is premature to hear the petition, this does not exclude a hearing on the preliminary question as to whether there is room for

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113 In other words, prior to the *Admissions Committees* case, the *Electoral Threshold* case, and the *Boycott* case.

114 Chachko, *supra* note 11, at 439, 440-41.

115 *Id.* at 441.

> judicial review 'on the face of the law' because it infringes a constitutional right. The question whether a law infringes a constitutional right and the question of ripeness are therefore two separate questions, although they affect one another, and it is appropriate for the Court to respond to both before deciding whether to defer a determination on the constitutionality of the law.[116]

We can see, therefore, that the "ripeness doctrine, Israel style," initially in the *Sabah* case (that is, following the publication of Elena Chachko's article), is not materially different to the American doctrine.

An in-depth examination of Justice Asher Grunis' judgment in the *Sabah* case provides further support for this assertion. In his ruling, Justice Asher Grunis emphasized his agreement with Justice Uzi Vogelman's comment in the *Israel Capital Market Trustees Association* case,[117] stating that the American ripeness doctrine should not be imported into Israeli law, lock, stock and barrel. However, in his view, the experience accumulated in the United States could be used to help develop this doctrine in Israeli law.[118] Accordingly, Justice Asher Grunis sought to develop the "ripeness doctrine, Israel style."[119] Yet, a perusal of the entirety of the judgment rendered by Justice Asher Grunis, indicates that no "ripeness doctrine, Israel style" was in fact developed, and that in essence his doctrine is the same as that applied in the United States. Indeed, in response to the question of when a petition would be deemed ripe for hearing, Justice Asher Grunis referred to the American ripeness doctrine, including the dual test as developed by the United States Supreme Court,[120] and as described above in Elena Chachko's article. This dual test, as espoused by the United States Supreme Court is at the crux of the "ripeness doctrine, Israel style."[121] There is no basis, therefore, for

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116 *Id.* at 448.

117 *See* HCJ 3803/11 Israel Capital Mkt. Trs.'Ass'n v. State of Israel.

118 HCJ 2311/11 Sabah, at para. 21 (opinion of Grunis, J.).

119 *Id.* at para. 3 (Hayut, J., concurring).

120 *Id.* at para. 21; *see also* The Abbott*, supra* note 1.

121 *Cf.* HCJ 2311/11 Sabah, at paras. 15-16.

asserting that the "ripeness doctrine, Israel style" is an Israeli doctrine; rather, it does no more than incorporate the American ripeness doctrine lock, stock and barrel into Israeli law.[122]

B. The Ripeness Doctrine: Contradicting Unique Trends in Israeli Constitutional Law

The above discussion makes evident the need to understand the essential differences between the American legal system and the Israeli legal system prior to the incorporation of the ripeness doctrine into Israeli law. As noted, Justice Esther Hayut pointed out two main differences in this context, which can be addressed as follows.

With regard to the first issue, one may identify a new test of adjudication, according to which the question of a statute's constitutionality is bound up with the question of its implementation. This test deviates from the practice of Israeli law in relation to the judicial review of statutes, which, for the most part, is applied abstractly and without necessarily being tied to concrete circumstances.[123]

With regard to the second issue, from the 1990s onwards, there has been a clear trend towards increased flexibility regarding its application, including the scope of application of traditional threshold criteria – such as *locus standi*, good faith and more – in Israeli constitutional law.[124] This trend continues to this day, and therefore it

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[122] It should be noted that, in paras. 19-20, Grunis' opinion does not contain a discussion regarding differences between the American and Israeli legal systems concerning the ripeness doctrine, including the extent of its application in Israeli constitutional law. The discussion set out by Justice Asher Grunis in these two paragraphs relates to his attempt to clarify the general distinction between the process of judicial review in Israel and that applied in the United States. Put differently, he sought to emphasize that the adoption of the American ripeness doctrine into the local system did not constitute the indirect adoption of other issues pertaining to the judicial review process in the United States, such as the distinction between abstract judicial review and applied judicial review.

[123] Chachko, *supra* note 11, at 433-36.

[124] *See*, *e.g.*, AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL: BASIC PRINCIPLES 177-180 (6th ed. 2005); HCJ 910/86 Ressler v. Minister of Def. 42(2) PD 441 (1988); HCJ 2148/94 Gelbert v. Hon. President of the Sup. Ct. and Chairman of the Inquiry

is unclear why a new threshold criteria must be developed, particularly in view of the current judicial trend to reduce the application of the threshold criteria, and as a corollary expand the right of access to the High Court of Justice. Underlying the factors that have led to the reduced use of the traditional threshold criteria – such as, judiciability, *locus standi*, tardiness, and more – are worthy considerations, first and foremost among which is the principle of the rule of law. Accordingly, and as long as the Court does not intend to deviate from this principle, it would seem that the incorporation of the ripeness doctrine into Israeli law is artificial and stands in sharp contradiction not only to the prevailing trend of using traditional threshold criteria for the past two decades, but particularly to the principle of the rule of law on which this trend is founded. I shall address the latter matter regarding the rule of law with greater vigour in the last section of this article.

In this state of affairs, before the Israeli Supreme Court has considered the crucial institutional and normative differences between the American and Israeli legal systems insofar as concerns the constitutional legal issues pertaining to the ripeness doctrine, it seems that the very act of importing it, never mind adopting and applying it, is itself problematic. Further, and more substantively, as previously demonstrated, in my opinion, the American ripeness doctrine is alien to Israeli constitutional law; it inexplicably deviates from the constitutional practice applied in Israel to judicial review, and it stands in sharp contradiction to the tendency to dampen the application of the threshold criteria in Israeli constitutional law.

C. The Ripeness Doctrine, Israel style – Lost in a Sea of Goals

An examination of the case law in the context of which the ripeness doctrine has developed in Israeli law reveals that this

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Committee to Investigate the Massacre in Hebron 48(3) PD 573 (1994); HCJ 651/03 Ass'n for C.R. in Israel v. Chairman of the Central Election Committee for the Sixteenth Knesset 57(2) PD 62 (2003); HCJFH 4110/92 Hess v. Minister of Def. 48(2) PD 811; HCJ 852/86 Aloni v. Minister of Just. 41(2) PD 1 (1987); HCJ 1/81 Sheeran v. Broadcasting Authority 35(3) PD 365 (1999); HCJ 1635/90 Zarzevski v. The Prime Minister 45(1) PD 749 (1991); HCJ 428/86 Barzilai v. The Gov't of Israel 40(3) PD 505 (1986).

development has not only circled around questions concerning the manner and extent of the doctrine's application, but also to its purposes. This last issue in turn has had a considerable impact on the scope of these developments and the way in which the doctrine has been implemented. Patently, the case law concerned does not contain an in-depth debate between the judges regarding these underlying purposes, either in relation to the actual recognition of them or in relation to their scope and the implications of adopting them.

In the *Disengagement* case, Justice Miriam Naor, in an individual opinion, characterized the purpose of the ripeness doctrine as providing a tool for regulating the stream of referrals to the Court. Later, in the *Nakba case*, Justice Miriam Naor – with whom, this time, Justices Dorit Beinisch and Eliezer Rivlin concurred – expanded the spectrum of goals motivating the ripeness doctrine, and described the doctrine as necessary to save judicial time and increase efficiency, out of the hope that the statutory provision under review would become a dead letter; whether due to the Finance Minister's choice to refrain from exercising his statutory authority or because of the application of the clauses in a way that would not harm the petitioners, or for any other reason. Following this, in the *Securities* case, Justice Eliezer Rivlin, presiding, sought to broaden the spectrum of purposes necessitating the adoption of the ripeness doctrine even further, this time in reliance primarily on the principle of the separation of powers. In his view, it was necessary to confine judicial intervention to cases where the dispute was concrete, as public confidence in the Courts was enhanced when judicial intervention was aimed at preventing an actual violation of fundamental rights.

In my opinion, a thorough examination of each of the above purposes highlights constitutional and practical difficulties with regard to their adoption in connection with the ripeness doctrine. Nonetheless, I wish to clarify already that I do not contend that these purposes are improper, rather, my argument is that these are problematic goals to the declared need to import the American ripeness doctrine into Israeli constitutional law.

1. Saving Judicial Time And Increasing Efficiency – Indeed? A Tool For Regulating The Stream Of Referrals To The Court – How?

In none of the latter three legal cases in which the ripeness doctrine was considered and the petitions dismissed primarily because of this doctrine was any judicial time whatsoever saved or any financial resources preserved. Each of these cases involved a number of hearings and the ensuing judgments covered hundreds of pages.[125] Furthermore, even when some of the judges relied on the ripeness doctrine, they still, for some reason, chose to state their position on the merits of the petition itself, in preparation for the next petition which might be brought before them once the issues matured in the future.

Therefore, judicial time was not saved, nor efficiency increased. On the contrary, considerable precious judicial time was invested in the deliberations and decisions on the merits of the petitions, which, at least based on the rationale underlying their dismissal, was not really necessary. This was because the Court was faced with a threshold criterion pursuant to which the decision on the petitions could have been deferred, without recourse to the legal polemic that was laid out over the hundreds of pages in question. Moreover, the detailed constitutional discussion conducted within the context of these rulings essentially invited the parties to revert back to the Court in the event that the statutes, which were the subject of the petitions, were not interpreted or implemented according to the standards proposed by the Court itself.

If the doctrine is indeed concerned with regulating the stream of referrals to the Supreme Court, it would seem that Yitzhak Zamir was right in arguing that adopting the ripeness doctrine in Israeli law has not in fact created any added value or benefit. After all, there are already other threshold criteria that support the purposes underlying the ripeness doctrine as a threshold criterion *per se*; for example, the

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[125] Nonetheless, one cannot deny the possible argument that while the judgments which established the ripeness doctrine in Israel contain lengthy discussions – therefore making it doubtful that judicial time was saved or judicial resources preserved for vital cases – the principle itself, once formulated, will lead to these results in the future, in terms of creating a chilling effect.

threshold criteria regarding premature petitions, abstract petitions, theoretical petitions, and more. Additionally, according to Yitzhak Zamir, damage – or, at least, considerable difficulty – follows from the doctrine's adoption in Israel. Thus, for example, it makes the legal process more complex and impairs the certainty and clarity of the law, especially in discussing questions relating, to the relationship between the ripeness doctrine and the other threshold criteria.[126]

2. The Respect Clause And The Hope That The Law Will Become A Dead Letter

From a legal point of view, the Court's refusal to engage in a substantive constitutional hearing, as a result of its aspiration, or perhaps hope, that over time the need to decide the fundamental issue would be obviated – whether due to the decision of the Minister Finance not to exercise his authority under the law, or by reason of the statutes' implementation in such a manner as not to harm the petitioners, or for some other reason – is very problematic, and even contradicts the 'respect clause' in Basic Law: Human Dignity and Liberty. First, this position reflects the view that no distinction should be made between judicial review of a statute's constitutionality, on the one hand, and constitutional review of the manner of its application, on the other.[127] Second, it sends the ostensible message that, unlike the executive branch, the legislature is not subject to the constitutional criteria of the limitation clause.[128] In this last context, it is worth recalling the basic tenet posited by Justice Uzi Vogelman, whereby it is the Court's function to decide petitions coming before it, *inter alia*, by virtue of the 'respect clause' in Section 11 of Basic Law: Human Dignity and Liberty, which states that "each

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126 ZAMIR, *supra* note 8, at 1896-97. It should be noted that Itzkak Zamir did not completely negate the very existence of the ripeness doctrine; his criticism was focused on its existence in Israeli law. In the *Admissions Committees* case, Justice Asher Grunis stated, without elaborating further, that the ripeness doctrine is a private instance of a threshold criteria regarding premature petitions. What does it mean: "a private instance of another threshold criteria?" What are the similarities or differences between the general threshold criteria regarding premature petitions and the concrete instance of the ripeness doctrine?

127 Bendor, *supra* note 7, at 49.

128 *Id.* at 52-53.

and every government authority is bound to respect the rights under this Basic Law."

In terms of judicial review of the legislature, it is noteworthy that in the *Mizrahi Bank* case,[129] the Court emphasized the substantive status of the 'respect clause,' outlined the scope of its application to the legislature, and listed the criteria for its applicability in accordance with the limitation clause. In the *Mizrahi Bank* case, the Court itself relied on the 'respect clause' to explain: first, the *legislature's duty* to respect protected rights; and second, the *judiciary's duty* to respect protected rights by preventing other governmental authorities, including the legislature, from violating these rights otherwise in accordance with the limitation clause.

As to the legislature's duty to respect protected rights, I believe that the adoption of the ripeness doctrine is at odds with the 'respect clause,' both in relation to the exercise or non-exercise of judicial review of the legislature, and in relation to the nature of the Court's authority to exercise judicial review. In my opinion, the manner in which the legislature is bound to respect protected rights is by enacting laws in accordance with the criteria outlined in the limitation clause. In my view, the legislature violates a protected right by the process of enacting laws that restrict protected rights, for example, through criminal, civil, or administrative law. In such cases, the question is, as noted, whether or not this legislation meets the conditions of the limitation clause. Further, the 'respect clause' does not make the legislature's duty to respect protected rights conditional upon the intensity of the injury, or the existence of a tangible injury, or the existence of a cumulative practice of injury, nor in any event does it make it contingent upon the manner in which the responsible Minister chooses to implement the law. With all due respect, it seems to me that in relation to the ripeness doctrine, the discussion held by the Court, as described above, is very problematic. For example, in the *Nakba* case, it appears that while the petition was directed at the legislature and the constitutionality of the statutes enacted by it, the Court actually chose to divert the spotlight on to the arena of the

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[129] *See* CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Vill., Nevo Legal Database (1995).

executive branch and examine the constitutionality of the exercise of its powers as these had been conferred through Knesset legislation. In that case, Justice Miriam Naor did not explain, at any point, how the ripeness doctrine was compatible, for example, with the 'respect clause.'[130] The question faced by the Court in that case was one of the constitutionality of the Minister of Finance's authority to cancel the budgets, *inter alia*, of institutions that marked the day of the establishment of the State of Israel as a day of mourning. This may be a constitutional question of the first importance concerning the freedom of expression of budgeted institutions, but has no relevance to the question of the actual or manner of exercise of the Minister of Finance's authority.

As to the duty of the judiciary to respect protected rights by preventing other government authorities, including the legislature, from violating these rights otherwise than in accordance with the limitation clause, it is evident that the respect clause is also of vital importance to the judiciary itself. The power of the Supreme Court to exercise judicial review over the legislature is not really a discretionary power. In fact, the "respect clause" imposes a *duty* on the Court to respect the protected rights. When the Court refrains from exercising judicial review over any of the government authorities, it infringes protected rights, even if it is not refusing to exercise judicial review but merely delaying it. Ultimately:

> This Court is not concerned with the 'battle for control' but with imposing the supremacy of the rule of law and the subordination of all state authorities to the law.[131]

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[130] § 11, Basic Law: Human Dignity and Liberty, SH 5752 (1992) (Isr.); *see also* Judith Karp, *Basic Law: Human Dignity and Liberty – A Biography of Power Struggles*, 1(2) MISHPAT UMIMSHAL 323, 373 (1993) (even then, Karp pointed out that the expression "government authority" should be interpreted as also including the legislative authority).

[131] HCJ 5364/94 Velner v. Chairman of the Israeli Labor Party 49(1) PD 758, 809 (1995).

3. The Principle Of The Separation Of Powers And Enhanced Public Confidence In The Judiciary

In any event, I am not certain upon what foundation the Court has based its assumption that if it were to confine its review of the legislative authority – as opposed to the executive branch – to cases where the dispute is concrete, that this would lead to increased public confidence in the judiciary. This assumption is purely speculative. Indeed, where the judiciary enjoys the public's trust, this is certainly welcome. However, the jurisdiction of the Court should be exercised in accordance with a clear and precise compass that guides it in the discharge of its duty under the "respect clause" and in accordance with its authority under Section 15(c) of Basic Law: The Judiciary. The Court's jurisdiction cannot be exercised in accordance with an arbitrary standard which at best may be likened to a kite blown by political winds in the public sphere. In my opinion, the Supreme Court was right in the past when it came out against the idea of feedback in respect of judicial performance, and it would do well to leave the issue of public confidence, in the sense presented by the Court, outside the bounds of legitimate judicial policy considerations. Be that as it may, it can easily be seen that the judiciary enjoys a higher degree of public confidence than the other government authorities, even in the post-*Mizrahi Bank* case era, including the constitutional revolution before it. To all this, one must add that, at the end of the day, all sectors of the population in Israel – right, left, and centre; Jews and Arabs; secular and religious and more – find refuge in the Supreme Court, and are able to obtain legal relief against the legislative and executive authorities whenever they believe that they have been harmed by the activities of these authorities. Moreover, there is no evidence whatsoever that the public's confidence in the Court has increased due to the rejection of the above petitions by virtue of the ripeness doctrine. In fact, I am not at all certain that the public is even aware of the legal issues which underlay the petitions discussed here, or the ensuing determinations or ramifications of the petitions' dismissal.

By this I do not mean to say that no importance should be attached to the principle of the separation of powers, nor that we should ignore the interest in augmenting public trust in the judiciary;

however, a more fundamental understanding of this principle and interest requires a different conclusion to be drawn than that reached by the Supreme Court on the ripeness doctrine.

Indeed, at its core, the legitimacy of the Supreme Court's authority to examine the constitutionality of statutes is drawn from the fulfilment of the constitutional principle of the separation of powers, but this is true in the substantive sense; that is, in the sense of checks and balances, and not necessarily in the sense of reducing friction in the interrelations between the judiciary and the legislature.[132]

As for the public trust in the judiciary, certainly the most important commodity in the judge's arsenal is the public's trust. Without public trust, the judge cannot judge. He, the judge, holds neither a sword nor a wallet. All he has is the public's confidence in him. This is an asset which the judge must guard with all his might.[133] However, public trust in this context means that the public's belief that the judge is rendering justice on the face of the law, and not the public's conviction that the judge is refraining from clashing with the legislature. In the words of Aharon Barak, the need to ensure public trust in the judiciary does not mean the need to ensure popularity.[134] Either way, protecting minority rights is by definition unpopular because it serves the minority, occasionally at the expense of the majority. However, in a democratic regime, the Court must ensure that minority rights are not violated, especially when the legislature is unable to provide that guarantee in a system based on majority rule in the most formal sense.

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132 *See* RUBINSTEIN& MEDINA, *supra* note 115, at 127-28.

133 AHARON BARAK, JUDICIAL DISCRETION 292-93 (Papyrus 1987); HCJ 73/85 Kach Faction v. The Knesset Speaker 39(3) PD 141, 158 (1985); HCJ 306/81 Platto-Sharon v. Knesset Committee 35(4) PD 118, 158 (1981); HCJ 5364/94 Velner, at 788.

134 BARAK, *supra* note 124, at 292.

V. THE RIPENESS DOCTRINE, ISRAEL STYLE: AMBIGUITY, INCONSISTENCY, AND LEGAL UNCERTAINTY

Even if I was willing to accept the principle of the ripeness doctrine, which I am not, the tests offered in the case law, and especially the mode of their application, remain problematic, vague, and a source of legal uncertainty. The following examples illustrate this claim.

A. A Concrete Factual Basis Versus A Cumulative Practice Of Infringement Of A Right

In one place, the Court held that in the absence of a concrete set of facts the petition would not be ripe for constitutional examination;[135] however, Justice Salim Jubran added in the *Tenders* case that even when there was such a set of facts, a proven practice of infringement of the relevant right would also be required.[136] This was a position with which Justice Asher Grunis later concurred in the *Admissions Committees* case.[137] In other words, according to this approach, even when there is a proven violation of a constitutional right, one which has occurred in a clear factual context, still, in the absence of a proven practice of such violations, the Court will refrain from deciding the fundamental constitutional question. It is not at all clear on what theoretical juridical basis the Court has taken this position. Moreover, this legal position could prejudice a petitioner, ignore his complaint, and, even worse, use him as a tool and as a means of achieving an extraneous objective – namely, the purposes underlying the ripeness doctrine.[138]

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135 See for instance, HCJ 7190/05 Lobel.

136 AAA 7201/11 Rahmani.

137 HCJ 2311/11 Sabah, at para. 12 (opinion of Grunis, J.).

138 This state of affairs raises numerous important questions regarding the proportionality of the ripeness doctrine; however, these questions exceed the scope of this article.

B. The Existence Of An Alternative Process? Depends On Which Case!

In the *Electoral Threshold* case, Justice Salim Jubran ruled that the existence of an alternative process for conducting a more effective examination of the claims could have implications for the issue of the applicability of the ripeness doctrine.[139] However, this consideration had not guided him in the earlier *Tenders* case*,* where, apparently no alternative procedure was actually available. The *Tenders* case was heard as an appeal against an administrative petition; that is to say, that was the alternative procedure *per se*. Still, Justice Selim Jubran chose to take a minority viewpoint, adopting the ripeness doctrine wholeheartedly and, moreover, expanding the scope of its application.[140] Similarly, the consideration regarding the existence of an alternative process was disregarded by Justice Salim Jubran in the *Admissions Committees* case. There, if Justice Salim Jubran had been compelled to consider the issue of the existence of an alternative process, he most probably would have concurred with the majority opinion and dismissed the petitions against the Admissions Committees Law. This is because, according to the statutory provisions in the *Admissions Committees* case, an alternative process had been put in place to hear claims, including the possibility of attacking the decisions of the admissions committees and the appeal committees above them, before the Administrative Affairs Court, and from there to the Supreme Court – whether by right or by leave of the Court – in accordance with the substantive legal issues involved. Moreover, according to the provisions of Section 6 of the Administrative Affairs Courts Law, 5760-2000:

> Where an Administrative Affairs Court finds, upon the application of a party, the Attorney General, or at its own initiative, that an administrative petition before it raises a matter of particular importance, sensitivity or urgency, it may, after receiving the parties' response, order the transfer of the hearing on

139 HCJ 3166/14 Gutman.

140 AAA 7201/11 Rahmani.

> the petition to the Supreme Court sitting as the High Court of Justice.

It follows that Justice Salim Jubran's concern that the fundamental matter in dispute would not come before him again was completely unfounded. Moreover, one may legitimately wonder whether this last concern is one that the Supreme Court may properly assert as a justifiable legal reason for judicial intervention when alternative judicial proceedings can be pursued before other courts, which are also empowered to hear the fundamental arguments that form the subject-matter of the legal proceedings.[141]

Either way, the interesting point is that the Court's discussion of the existence of an alternative process was not at all comprehensive. The *Disengagement* case, for example, points to the existence of an alternative procedure for arguing against the constitutionality of the penal provision under that law. However, Justice Miriam Naor did not examine the outcome and ramifications of a direct assault as opposed to an indirect assault on the statutory provision. Further, under the legal position currently prevailing in Israel, trial courts have the power to exercise constitutional review of statutory provisions during the course of hearing the concrete case before them, in reality the trial courts in Israel are not eager to engage in a constitutional discussion of the constitutionality of any particular statutory provision. This is true generally, and even more so with regard to penal provisions.

C. Ripeness? It Depends On Whom You Ask And In What Case!

In the first phase of the two-stage examination in the *Sabah* case, Justice Asher Grunis was required to consider the *Prison Privatization* case as an example of a situation in which the Court could determine that the major portion of the question raised by the petition was fundamentally legal and therefore future factual developments would not contribute to the judicial decision. At the

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[141] I wish to emphasize that the position I have stated above should not be taken to mean that I do not agree with the legal outcome reached by Justice Salim Jubran in the *Admissions Committees* case; however, it is not the question of the existence of the alternative remedy which guides me in this analysis.

same time, Justice Asher Grunis did not explain how the *Prison Privatization* case differed, if at all, from the *Admissions Committees* case or the *Electoral Threshold* case.[142] This is particularly so in light of Justice Asher Grunis' remarks in the *Admissions Committees* case that the relevant statute regarding the privatization of prisons had not yet been implemented and that the risks pointed to by the petitioners were merely in the nature of a possibility, as well as that the statute contained various defense mechanisms for the protection of prisoners' rights and the supervision of these prisons.[143] It should be emphasized that, in his remarks, this case was cited as an example of a situation in which any future implementation of the statute could still raise the constitutional question that needed to be discussed; and therefore, the question of implementation was irrelevant.[144] He did this in order to obviate the need to address the position taken by Justice Edmund Levy, who held in the *Prison Privatization* case that since the statute had not yet been implemented, the time was not yet ripe to decide its constitutionality, and in the picturesque language of Justice Edmund Levy:

> As judicial review cannot rely on a loose assessment, my position is that it should be left until the proper time, and that is not the point in time at which we are today. We are therefore dealing with an egg that has not yet hatched. Whether it be a good day upon which it comes into the world or not, whether it be edible or not, we do not yet know.[145]

Further, in the second phase of the two-stage examination in the *Admissions Committees* case, Justice Asher Grunis outlined the reasons for the chilling effect of the statute, fear that the deferral of judicial review would lead to irreversible facts on the ground, or the existence of a significant public interest in hearing the petition even before the implementation of the statute. This is the place to ask: was the Boycott Law incapable of leading to a chilling effect? Once the

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142 HCJ 2311/11 Sabah.

143 *See* HCJ 2605/05 The Academic Center for Law and Business v. The Minister of Finance, 63(2) PD 545.

144 *Id.*

145 *Id.* at para. 11 (opinion of Levy, J.).

petitions against raising the electoral threshold were dismissed, did this not create irreversible facts on the ground? And, was there no clear significant public interest in examining the constitutionality of the Nakba Law and the Admissions Committees Law?!

Additionally, while in the *Disengagement* case the ripeness doctrine was applied in "all its glory" despite the existence of a criminal sanction (six months imprisonment),[146] in the *Nakba* case, Justice Miriam Naor noted that had the Independence Day bill been passed, which also included a criminal sanction (three years imprisonment), it was likely that the Court would not have given consideration to the ripeness doctrine.[147] It is not clear, therefore, whether it is the very existence of the criminal sanction which determines the question of the applicability or inapplicability of the ripeness doctrine, or the severity of the sanction. And, if it is the latter, it is not clear that a six-month sentence is not a harsh punishment! Generally speaking, it is likely that in both cases the person subject to the criminal sanctions is of normative character, for whom a prison sentence is potentially devastating, whether it be imprisonment behind lock and key or merely a sentence carried out through community service. Either way, in my opinion, the criminal conviction, and accompanying stigma, is so severe that they require a substantive constitutional hearing irrespective of the issue of the actual punishment meted out.

Moreover, in the *Electoral Threshold* case, not only did Justice Asher Grunis seek to decide the issue in contention using the two-stage test of the "ripeness doctrine, Israel style," which he had presented in the *Admissions Committees* case, but after holding that the petitions did not meet the first stage of the doctrine, he for some reason did not consider (or even partially consider) the second stage of the test. In the second stage, Justice Asher Grunis was supposed to examine a number of possible justifications for deciding the petitions on the merits, despite the absence of a factual basis. Among these justifications, Justice Asher Grunis himself had already mentioned in the *Admissions Committees* case the fear that the deferral

146 HCJ 7190/05 Lobel.
147 HCJ 3429/11 Alumni Ass'n.

of the judicial review would lead to the creation of irreversible facts on the ground. Except that this hurdle was, apparently, swiftly met, through his assertion that it was a temporary *fait accompli*! Temporary? How?!

Another example may be seen in the positions taken by Justices Uzi Vogelman, Miriam Naor, and Esther Hayut in the *Electoral Threshold* case, where they held that raising the electoral threshold *per se* established a violation of the principle of electoral proportionality, as protected in Section 4 of Basic Law: the Knesset. This, as mentioned, was prior to considering the question of the limitation clause. However, none of them wondered in relation to the *Admissions Committees* case, whether the very empowerment of the admissions committees to reject applicants by their incompatibility with the fabric of life in any particular communal village, was capable of establishing a violation of the constitutional right to equality – be it proportionate or disproportionate.

D. Between The Psychoanalysis Of The Legislature And The Analysis Of The Law

A further demonstration of judicial uncertainty may be found in the *Admissions Committees* case, in which Justice Elyakim Rubinstein expressly disapproved the practice of referring to statements made by those who had initiated or advocated the legislative amendment concerning the charge of hidden bias, finding support in Justice Aharon Barak's remark that, at the end of the day, we are concerned with "an analysis of the law and not the psychoanalysis of the legislature."[148] Yet, suddenly, in the *Electoral Threshold* case, Justice Elyakim Rubinstein did in fact turn to legislative psychoanalysis when he referred to all of the Knesset's records to hold that it was clear that some of those who had initiated the amendment genuinely believed that the faulty state governance could be improved by means

[148] HCJ 246/81 Agudat Derech Eretz v. Broadcasting Authority 35(4) PD 1, 17 (1981). This remark was also cited by Justice Asher Grunis. *See* HCJ 3166/14 Gutman, at para. 26 (opinion of Grunis, J.).

of enacting the amendment and concomitant increase of the electoral threshold.[149]

E. *ON RIPENESS AND COMMON SENSE*

In both the *Admissions Committees* case and the *Electoral Threshold* case, Justice Elyakim Rubinstein presented the common sense test for deciding whether to adopt the ripeness doctrine, including the extent and manner of such adoption. Nonetheless, it is unclear what Justice Elyakim Rubinstein meant when he referred to the common-sense test, nor did he explain how it should be applied in practice. In other words, what were the criteria for applying this test? Was it an objective or a subjective test? How could he explain the fact that some judges were not of the opinion that the petitions were still premature for constitutional determination? Could each and every judge exercise a different type of common sense to that of his colleagues?

These five examples illustrate the assertion that the adoption of the ripeness doctrine, and its implementation in the case law, has created uncertainty, a lack of uniformity and, certainly, undermined public confidence. Further, the purposes of the doctrine have not been realized in practice, and there are alternative legal instruments for achieving these purposes.

E. Instead of a Conclusion: Judicial Diplomacy

Legal scholars are unanimous in their view that the reason underlying the adoption of the ripeness doctrine in Israeli constitutional law is the judiciary's desire to avoid friction with the legislature.[150] This is particularly true of petitions dealing with divisive social, ideological, and policy issues.[151] This position is consistent with Justice Rivlin's remarks that judicial review of the legislature should be confined solely to cases where there is a genuine dispute – a move that would inevitably lead to an increase in public confidence in the judiciary.

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149 HCJ 3166/14 Gutman, at para. B (opinion of Rubinstein, J.).

150 Barak-Erez, *supra* note 8.

151 ZAMIR, *supra* note 8, at 1896.

It seems, therefore, that when the ripeness doctrine was adopted, the Court took a number of huge steps backwards, retreating into the era preceding the *Mizrahi Bank* case, when judicial review was confined to the executive branch. Is this really true? The answer is: not necessarily. In his book, *The Judge in a Democracy*, Aharon Barak wrote: "Activism or self-restraint are relevant concepts only when there is judicial discretion."[152] And in terms of judicial discretion, it should be noted that the power to shape it – particularly in the absence of explicit (or basic) legislation – is confined exclusively to the Court itself. In my opinion, Dr. Adam Shinar rightly argues that despite the adoption of the ripeness doctrine, the Supreme Court has not yet abandoned norlimited the trend towards expanding the traditional threshold criteria, particularly those relating to *locus standi* and justiciability. In Dr. Adam Shinar's view, largely in response to Yitzhak Zamir, the reason why the Court has actually chosen to apply the ripeness doctrine rather than the traditional threshold criteria, such as *locus standi*, is the advantage found in using the ripeness doctrine, which allows the Court to dismiss petitions on an individual basis in light of the factual circumstances of the case before it, without such dismissal fettering the Court in the future.[153]

Taking a similar approach to Adam Shinar, Ariel Bendor has, in his writings, identified a number of advantages to be gained from incorporating the ripeness doctrine into Israeli law. In his view, through the use of the ripeness doctrine, the Court can expand the scope of judicial review by developing a discourse that relates not only to a statute's constitutionality but also to the constitutionality of its implementation and, concomitantly, expand the constitutional restrictions on laws.[154] Ariel Bendor illustrates this last issue by citing the *Electoral Threshold* case and the *Boycott* case.[155]

In another article, Ariel Bendor and Tal Sela argue that the expansion of judicial discretion is not only reflected in the adoption of the ripeness principle, but also in the choice of whether or not to implement it. In other words, there may be instances where the Court

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152 BARAK, *supra* note 102, at 390.

153 Shinar, *supra* note 8.

154 Bendor, *supra* note 7, at 51.

155 *Id.*

will be ready to hear a petition on the merits even if it is still premature.[156]

For myself, I would like to portray the incorporation of the ripeness doctrine into Israeli constitutional law as a form of judicial diplomacy in the sense of tactical judicial review, which creates, through the executive branch, an indirect constitutional dialogue with the legislature.[157] This judicial diplomacy is possible precisely because of the parliamentary characteristics of Israeli democracy, according to which the members of the executive branch are, for the most part, also legislative members. In other words, in light of the fact that, in terms of personalities, most legislative members are also members of the executive branch, it is sufficient to transmit critical messages to members of the executive branch and thereby avoid undesirable friction with the legislature. Either way, at the end of the day, the final decision as to whether to intervene when examining the constitutionality of a statutory provision – and if so, in what way – remains in the hands of the Court itself; if it so wishes, the petition will be considered ripe; if it decides otherwise, it will be deemed premature; and, if it so wishes, the Court will hear and decide the petition even if it is premature, in accordance with the varied exceptions the Court has developed for itself.

This judicial diplomacy is the direct result of the continuing threats emanating from the political authorities which oppose the Court's decisions and untiringly seek to weaken it.[158] This state of affairs is extremely dangerous, both because it blurs the boundaries between the legislative and the executive branches, including in judicial review, and because the Court may lose its equilibrium due to its attempts to survive the political threats that seek to erode its

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156 *See also* Ariel Bendor & Tal Sela, *Judicial Discretion: The Third Era*, 46 MISHPATIM 605, 630-32 (2018). Ariel Bendor and Tal Sela argue that "the expansion of judicial discretion is not reflected solely in the adoption of the ripeness ruling but also in the choice whether to implement it." *Id.* In other words, there may be cases where the Court will hear the petition on the merits even if it is premature.

138 *See also* Navot, *supra* note 9, at 123-25; Ronen Poliak, *Relative Ripeness: Implement or Abstract Constitutional Judicial Review*, 37 MISHPAT 45, 62-63 (2014).

158 Shinar, *supra* note 8.

powers. This is especially true when we are concerned with the protection of the substantive democratic-constitutional-characteristics of the State of Israel.

F. Epilogue

Particularly in the past decade, a public-legal discourse was conducted in the State of Israel regarding the interrelations between the central government authorities; the judiciary on the one hand and the legislative and executive branches on the other hand. This discourse is being conducted against the backdrop of the tension that is influenced by claims of judicial activism, assertions of legislative activism, and misgivings about activism in privatization. This tension is rooted in a competition between the separation of powers in its formal sense, *i.e.* complete separation of government authority, and in the substantive sense, *i.e.* creation of relations based on mutual oversight and checks and balances between these authorities. In addition, this tension flourishes in the light of two polar-opposite perceptions concerning the principle of the rule of law: at one end, demanding adherence to the rule of primary legislation, however unjust and unfair it may be; and, at the other end, demanding the subjugation of the positive law to the basic values and principles that guarantee a degree of fairness and justice for everyone, and particularly for those who are unable to obtain such justice from the legislative authority itself.

This tension has existed since the founding of the State of Israel, but has intensified – and become more prominent – following the enactment of Basic Law: Human Dignity and Liberty and, particularly, following the publication of the judgment in the *Mizrachi Bank* case, when the Basic Laws were granted supra-statutory constitutional status.

This tension does not trouble me. On the contrary, its existence is actually a confirmation of the health of Israeli society. However, the scope, extent, and manner of managing this tension are the issues which provide justifiable cause for anxiety, and all of these together predict the worst for the country's future. In any healthy society that seeks to eradicate elements of tyranny and governmental corruption, it is imperative that there be tension between those

responsible for the legal system and the politicians. This tension is the result of the inherent difference in the nature of the interests of each of the governmental authorities. Nonetheless, even when this type of tension is experienced, it should be constructive rather than destructive, reasonable rather than arbitrary, and proportionate rather than extreme. A positive discourse can only take place where society adopts a steady, solid, repertory of values and fundamental principles that guide all governmental authorities in a similar manner, irrespective of the narrow considerations and interests of each of these authorities.

In recent years, however, we have witnessed legislative activism, evidence apparently of the parliamentarians. Moreover, even the executive branch suffers from activism in privatization, for example, by way of indifferently privatizing essential services which become the object of narrow business considerations. These last two phenomena are manifestations of a worrying governmental perception prioritizing the removal of fetters from the exercise of governmental authority, precisely because the members of these governmental authorities are representatives of the people (so it is claimed) that they are free to legislate whatever they see fit or manage state matters as they deem proper.

This perception is fundamentally mistaken. It is no more than a narrow formal understanding of the concept of democracy. The political authorities have apparently forgotten the words of Montesquieu, whereby:

> Political liberty is to be found only in moderate governments . . . but constant experience shews us that every man invested with power is apt to abuse it . . . To prevent this abuse, it is necessary, from the very nature of things, power should be a check to power."[159]

The rule of law in its substantive sense is therefore concerned with the desire for governmental acts to fulfil certain basic requirements.

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[159] CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 197 (T. Evans 1777).

These are requirements designed to guarantee the internal morality of the law, which is vital to ensure that the public feels a commitment to the law and complies with its provisions out of a recognition of its binding validity. Adherence to these principles is intended to enable the law to fulfill its purpose as a social institution, the goal of which is to enable collaborative human existence, increase the public's sense of security and protect individual freedoms. Respect for the rule of law is a prerequisite for ensuring the legitimacy of law enforcement among members of the public subordinate to the law.[160] In this context, I am not referring to the term "law" in its narrow sense (*Gesetz*, in German; *loi*, in French; *ley*, in Spanish; and *law*, in English), but in the broad sense, which can even be equated with "justice:" law which is mandatory, not because it has been enacted in a proper formal process by a lawfully elected legislature, but precisely because it is just and correct (*Recht*, in German; *droit*, in French; *derecho*, in Spanish; and *law*, in English).[161]

It follows, therefore, that the rule of law, in its formal sense, is the rule of law enacted in a lawful form by a lawfully elected legislature that can fulfill its role as a legislature. In contrast, the rule of substantive law is the rule of just and proper law. At the heart of these concepts is the distinction between formal democracy and substantive democracy. While formal democracy is solely interested in the majority opinion and seeks to enforce its decisions, be they good or bad, substantive democracy respects the majority's opinion while concurrently protecting the minorities within it (the weaker groups), particularly where the majority seeks to misuse its rights in its capacity as the majority, in order to oppress those weaker groups. Elsewhere, I wrote:

> The Athenian state had a constitution and a supreme court. Neither Socrates nor Plato critized democracy as such. Socrates was inciting the aristocratic young men of Athens to revolt against the democracy of Athens, namely, against the rule of the majority. This

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160 RUBINSTEIN & MEDINA, *supra* note 115, at 284-85.

161 *See* MOHAMMED S. WATTAD, THE MEANING OF CRIMINAL LAW: THREE TENETS ON AMERICAN & COMPARATIVE CONSTITUTIONAL ASPECTS OF SUBSTANTIVE CRIMINAL LAW 124-125 (VDM Verlag 2007).

> is what captured Plato's mind in offering *The Republic*, the challenge of providing a true definition of justice, a philosophy of just and good society; for him, democracy is the rule of Law, namely, the rule of Good and Justice . . . While formal democracy is the rule of the majority, constitutional democracy considers the voice of the majority as another factor in determining what is fair and just, thus preventing any likelihood of abuse of minority rights (those whose interests are not protected by the majority). Formal democracy acts in accordance with the rule of the legislature, no matter how right, decent, just, and fair the legislature might be; what the legislature says the law is becomes binding law. Constitutional democracy scrutinizes the legislature's actions for their compatibility with the fundamental principles of fairness, reason, justice, and good. Finally, formal democracy represents the rule of law, but constitutional democracy is driven by the rule of [L]aw. As Plato once argued against formal democracy, those who belong to the majority are concerned only with their own immediate pleasure and gratification, and therefore a democracy that relies on the rule of the majority cannot produce good human beings.[162]

The rule of law is one of the fundamental principles of the legal system making up its core substantive elements, shaping the content and interpretation of the legal norm and sometimes even determining its validity. These fundamental principles are superior to primary legislation.[163] This approach also expresses the perception that the Constitution itself is not always supreme, and it is subject to these fundamental principles.[164] In this regard Justice Aharon Barak's words are apt:

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[162] *Id.* at 196-98.

[163] *See* HCJ 1/65 Yardur v. Chairman of the Central Elections Committee for the Sixth Knesset 19(3) PD 365, 389 (1965).

[164] *See* SHMUEL SAADIA & LIAV ORGAD, REFERENDUM 123 (2000).

> As a matter of jurisprudential principle, it is possible that the Court in a democratic society could declare the voidance of a law which is contrary to the basic principles of the system; even if these basic principles are not enshrined in a rigid constitution or an entrenched Basic Law, there is nothing axiomatic about the approach that a law is not voided because of its content. The voidance of a law by the Court because of its severe violation of basic principles does not violate the principle of legislative sovereignty, since sovereignty is always limited.[165]

The Supreme Court has jurisdiction to hear and decide on the legality of laws. This is pursuant to its constitutional and supra-legal power enshrined in Section 15(c) of Basic Law: the Judiciary, and, in particular, following the judicial rulings in the *Mizrahi Bank* case,[166] as well to its earlier rulings.[167] The process of examining the legality of laws is essentially interpretative in nature, where the task of interpretation is one of the main judiciary powers.[168]

The Supreme Court's power to interpret statutes, Basic Laws, regulations and other legal norms is undisputed. When the Supreme Court interprets a statute in light of a Basic Law, and a conflict is revealed between the Basic Law and the statute in question, that contradiction in essence is the interpretation of the laws in question.[169]

The ruling in the *Mizrahi Bank* case further strengthened the Supreme Court's status in relation to its power to examine, not only

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165 HCJ 142/89 La'Or Movement – One Heart and One Spirit v. Central Elections Committee for the Sixth Knesset 44(3) PD 529, 555 (1990).

166 *See* CA 6821/93 United Mizrahi Bank Ltd. v. Migdal Cooperative Vill. (1995).

167 *Cf.* RUBINSTEIN & MEDINA, *supra* note 115, at 182; HCJ 246/81 Agudat Derech Eretz, at para. 17; HCJ 141/82 Rubinstein v. Speaker of the Knesset et al., 33(3) PD 141 (1983); HCJ 142/89 La'Or Movement, at para. 529; HCJ 726/94 Clal Ins. Company et al. v. Minister of Finance et al., 48(5) PD 441 (1994).

168 *See* RUBINSTEIN & MEDINA, *supra* note 115, at 151-63; EITAN INBAR, CONSTITUTIONAL LAW AS REFLECTED IN JUDICIAL RULINGS 84 (2001).

169 INBAR, *supra* note 149, at 89.

the statutes' legality, but also their constitutionality. The crux of this latter power is the fulfillment of the Court's role in maintaining the rule of law.[170] This is because the primary function of the Supreme Court is to instil democratic values in society and enforce the rule of law, particularly on the government authorities, where it is the legitimacy of the Constitution and the Basic Laws which legitimizes judicial review.

Moreover, in essence, the legitimacy of the Supreme Court's power to review the constitutionality of statutes is derived from the constitutional principle of the separation of powers, in its substantive sense; that is to say, in the sense of checks and balances.[171] This is true *a fortiori* in light of the fact that the Basic Laws, in particular after the judicial decision in the *Mizrahi Bank* case, have attained supra-constitutional normative status. In that case, clear rules were laid down that relate not only to the normative status of the Basic Laws, but also to the normative mechanism involved in their operation, including changes to and the infringement of rights protected under them, as well as the examination of the nature of Basic Laws which are formally entrenched and others which are substantively entrenched.

Holding this position, I have no wish to ignore the rationale underlying the approach taken by Justice Eliezer Rivlin towards public trust: a rationale that emphasizes the status of the judiciary as devoid of a wallet and a sword. Indeed, one could argue that the judiciary might appropriately possess its own wallet and sword, but in their absence, it would not be right to overturn that public trust. However, public trust in the judiciary means:

> Trust in judicial professionalism, judicial fairness and judicial neutrality which is the public's confidence in the moral character of the judge. It is public trust that judges are not parties to the legal struggle, and that it is not for their power that they struggle, but for the protection of the Constitution and its values . . .

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[170] RUBINSTEIN & MEDINA, *supra* note 115, at 265-311.

[171] *See id.* at 127-128; *see also, e.g.,* HCJ 73/85 Kach Faction, at 158; HCJ 306/81 Platto-Sharon, at 158; HCJ 5364/94 Velner, at para. 788.

> Public trust means giving expression to history rather than hysteria.[172]

VI. SO IT IS, AND NOTHING MORE!

In conclusion, given the ripeness doctrine, I wonder whether the judgment rendered in the *Mizrahi Bank* case would have seen the light of day had the case not come before the Court today. I fear not. "Fear," I write, because I regard the constitutional revolution brought about by the *Mizrahi Bank* case as a blessing "fear," I write, because I consider the ripeness doctrine to pose a danger. Am I right? Only time will tell. So, this fruit is left to ripen, and with time it will become evident whether it is edible or not, which I hope it will not. In the meantime, it is appropriate to note that a court which, concurrent with its function of safeguarding justice, has to concern itself with rebuffing political assaults and protecting its very existence from attempts to weaken it – and the ripeness doctrine reflects such an attempt – and may lose its equilibrium. At this time, the Supreme Court has not yet lost its equilibrium, but there is no guarantee that this risk will not materialize. At the end of the day, we are all vulnerable human beings, flesh and blood, either we remain "ordinary" people or we become worthy of being judges.

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[172] Barak, *supra* note 102, at 50-51; *see also* CrimFH 5567/00 Deri v. State of Israel 54(3) PD 614, 601 (2000).