The Israeli situation offers an interesting case study for inquiring whether courts are ‘friend or foe’. This is not to say that the Israeli experience, in this regard or more generally, is unique. Indeed, in the US context, for example, similar concerns to those noted above were voiced over forty years ago. And yet, the challenges that arrive at the doorsteps of Israeli courts, ranging from corruption through religious protection, free speech and, of course, a wide range of issues emanating from the prolonged Israeli–Palestinian conflict, place it at the very centre of political debate on a regular basis. It is not only a court seeking to preserve constitutional foundations such as due process and human rights in the context of a prolonged conflict. In addition, from a legal perspective, it has done so against the background of a ‘state of emergency’ in place since Israel was established in 1948; and burdened further by the decision to hear petitions against the military commander of the Occupied Palestinian Territories (OPT) brought by residents of the OPT.

Internationally, the Israeli courts, and the Supreme Court in particular, are held in high regard, sometimes viewed as the last defence for Israeli democracy. Domestically, however, the picture is a mixed one, with both sides either routinely ‘disappointed’ in the court, or resigned to see it as an antagonistic force whose powers should be limited.

To an extent, the intense public debate concerning judicial independence in Israel suffers from similar misunderstandings and conceptual confusions that plague similar debates elsewhere. Therefore, this chapter will, at times, refer to the theoretical issues that are apparent. Chief among them is the confusion between limiting judicial power and encroaching on judicial independence, which is the focus of section I. This discussion leads into the efforts to distinguish between legitimate and illegitimate limits placed on the courts by the political branches, which are analysed in section II. Section III will then show why this conflation between power and judicial independence, and between legitimate and illegitimate political

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initiatives, are particularly dangerous for advocates of those who wish to preserve judicial independence, and for a democratic ethos more generally. Section IV then brings the various strands together by attempting to answer the question: ‘are the Israeli courts friend or foe?’ and how the answer to this question should impact the construction of judicial independence in the Israeli context.

I. Between Power and Judicial Independence

In May 2018, the President of the Israeli Supreme Court, Esther Hayut, delivered a remarkable speech, declaring that ‘Israel’s judicial branch is under an unprecedented attack that threatens to damage its independence irreparably’. The background to this claim was a ministerial initiative to curtail the courts’ power to strike down laws that have an adverse, and disproportionate, impact on human rights. Speaking after President Hayut, the justice minister at the time, Ayelet Shaked, declared that it is within parliament’s power and duty to map the mutual relationship between the branches of government.

The urgency apparent in President’s Hayut approach is understandable. Over twenty years ago, a prominent Israeli constitutional scholar observed that: ‘The increased public interest in the courts in general and the involvement of the courts in cases with intense political implications have made public comment on judges and judicial decisions more frequent and more violent.’ When reflecting on the current atmosphere, in which a member of parliament called to send a bulldozer to raze the Supreme Court (following a decision to demolish a number of dwellings which had been built illegally in the Jewish settlement of Beit El), the heated deliberations on the role of the court from the turn of the century seem timid and quaint in comparison.

In the highly contentious context of Israeli politics it is worth clarifying that the argument that proceeds below is not intended to offer support to the politics of those who made and make it

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4 ibid.


their mission to target the courts in a highly politicised fashion. Quite the opposite, in fact. However, is it wrong to maintain, as the former minister of justice did, that it is parliament’s duty to map the relationship between the branches of government? After all, the nature of this relationship is the ultimate political question, in the true sense of the word. These are the questions that troubled Aristotle, Montesquieu and Madison. Why should they not be the subject of open debate within the most political of branches? The answer is that the theoretical debate has very practical implications insofar as parliament is concerned. Thus, one may ask: how can parliament decide the extent of its own power, vis-a-vis other branches, in a manner that is intellectually honest? This is a fair objection, but it is not the one advanced by judges and their supporters. That is, the objection is not that parliament has no role in debating the powers and limits of judicial authority, because it is in an inherent conflict of interest. That is: here parliamentarians are debating the extent to which their decisions will be ‘checked and balanced’ by the judicial branch. Whether cynically or not, institutions would understandably opt to have the outcome of their deliberations – in the form of statutes – withstand scrutiny; and they would clearly prefer to have the ‘final say’ in the matter. However, there is no obvious way to avoid this parliamentary inherent conflict of interests. Like any public authority, judicial power stems, in the main, from parliamentary legislation.

Indeed, every judiciary in the world owes at least some of its power to parliament. Parliamentary acts tend to establish the courts, regulate their jurisdiction, set the procedure through which court budgets are allocated, and determine the terms and conditions of the employment of the judges. So the argument is, to be precise, that a change to the status quo, which changes the balance of power in a manner that is detrimental to the courts, is inherently threatening to judicial independence. But it will be argued below that this approach is not only misguided. In being misguided, it also serves opponents of the courts with ammunition.

One final preliminary observation: the matter of judicial independence covers a wide range of issues, but those can mostly be categorised as ‘institutional’ judicial independence or ‘personal’ judicial independence. Many scholars have described, analysed and criticised threats to the latter, which relates to matters such as tenure, job and pay security, and other forms of

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8 M Agmon-Gonnen, ‘Judicial Independence: The Threat from Within’ (2005) 38 Israel Law Review 120, 122; Shetreet (n 3) 992; Kornhauser (n 7).
protection for judges who do not toe the line. For present purposes, suffice to say that judicial tenure is inherently related to judicial independence because a judge should not find an argument to be more ‘persuasive’ simply because she fears that she will lose her position if she decides otherwise. For this reason, and, correspondingly, this value is arguably endangered by the fact that judges that face elections tend to impose longer sentences on criminals convicted of serious felonies closer to an election. The latter phenomenon, ironically justified through reference to democracy and accountability, seems antithetical to judicial independence. If it is to be considered of any value, judicial independence should allow judges to reach decisions that are unpopular in eye of the public or other branches of government, including reaching decisions that find against parliament or the government of the day, without fear or favour. With that observation in mind, we now turn to the focus of this chapter, which is the institutional facet of judicial independence.

Before delving into the matter of judicial independence, some background to the Israeli constitutional context is necessary. As is well known, Israel is one a few countries without a codified constitution. Instead, over the years, the Israeli parliament – the Knesset – enacted a series of sixteen ‘Basic Laws’, the first of which, Basic Law: The Knesset, was promulgated in 1958; and the most recent one, Basic Law: Israel, the Nation State of the Jewish People, passed in July 2018. The lack of a constitution means that, problematically, a simple majority in parliament can pass, amend or abolish a ‘constitutional’ law, which holds a higher place in the legal order.

Arguably, the most important moment in Israeli constitutional history is located in the early 1990s, for two complementary reasons, one doctrinal, the other realist. From a doctrinal perspective, the Knesset passed the first – and to date, the only – two Basic Laws devoted to human rights: Basic Law: Human Dignity and Liberty; and Basic Law: Freedom of Occupation. Although these laws do not mention a wide range of rights (eg freedom of speech, religion, equality or any social, economic or cultural right), they refer to the Israeli Declaration of Independence from 1948. That Declaration was viewed, until then, as solely … declaratory

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9 Shetreet (n 5); Agmon-Gonen (n 8); Kaufman (n 1); A Winkler and J Zabel, ‘The Independence of Judges’ (1995) 46 Mercer Law Review 795.


11 C Geyh, ‘Customary Independence’ in Burbank and Friedman (n 7) 160; cf Shetreet (n 5) 997–98.
and having no legal, let alone constitutional, status. The Supreme Court placed high value on the reference to the Declaration and, in particular, its preamble, which states, inter alia, that the State of Israel

will uphold the full social and political equality of all its citizens, without distinction of race, creed, or sex; will guarantee full freedom of conscience, worship, education, and culture; will safeguard the sanctity and inviolability of the shrines and Holy Places of all religions; and will dedicate itself to the principles of the Charter of the United Nations.

The realist perspective, or explanation, places much emphasis on the identity of the Israeli President of the Supreme Court during the time, Aharon Barak. Formerly a legal academic and Israel’s Attorney General, Barak became, in 1978, the youngest ever judicial appointment to the Supreme Court, and its President in 1995. Until his retirement, in 2006, he was the most recognisable and authoritative voice, judicially and extra-judicially,\(^\text{12}\) promoting the judicial agenda and legacy according to which ‘everything is justiciable’. This position combined with the doctrinal structure that, putatively at least (and notwithstanding a number of prominent judicial and scholarly\(^\text{13}\) opinions to the contrary) found that the 1992 Basic Laws constituted a ‘constitutional revolution’, moving Israel from a British constitutional paradigm of absolute parliamentary sovereignty to an American-style system under which the powers of the legislature are checked by the judiciary to see if they have a disproportionately harmful effect on human rights.\(^\text{14}\) Together, the wide breadth of powers, covering vast realms of society and the economy, and the ability of the courts to review statutory instruments that were, previously, beyond judicial authority, raised the profile and stature of the court to one that is at least on equal footing to that of the other two branches. Finally, with respect to an important subset of the matter at hand, Barak ruled, in accepting a petition to publish the name of the head of the Mossad, that:


Judges can and should review the reasonableness of discretion in security matters as much as they can and should review administrative discretion in any other field. Hence, there are no special limits on the scope of judicial review in security matters.\footnote{HCJ 680/88 Shnitzer v Military Censor (1988) 639–40. For a critique of Barak’s legacy, see N Sultany, ‘The Legacy of Aharon Barak: A Critical Review’ (2007) 48 Harvard International Law Journal Online 83.}

But to what extent did that extension and enhancement of judicial powers change the manner in which courts should be perceived as independent? It appears that, notwithstanding dramatic pronouncements concerning a ‘constitutional revolution’ executed by the judiciary in the 1990s,\footnote{Aharon Barak stated that ‘In 1992, a constitutional revolution took place in Israel’: ‘Human Rights in Israel’ 39 Israel Law Review (2006) 12, 18; also R Hirschl, ‘The “Constitutional Revolution” and the Emergence of a New Economic Order in Israel’ (1997) 2 Israel Studies 136.} Israel was following an existing path. Thus, a brief comparative observation could be useful at this stage.

Canada and the United Kingdom provide the most relevant examples of courts that found their powers extended following an act of parliament. The 1982 Canadian Charter of Rights and Freedom granted the court the power of judicial review;\footnote{ER Alexander ‘The Supreme Court of Canada and the Canadian Charter of Rights and Freedoms’ (1990) 40 University of Toronto Law Journal 1; Law Society of Upper Canada v Skapinker (1984) 9 DLR (4th) 161.} whereas in the UK, the 1998 Human Rights Act gave the courts power to declare a law incompatible with the European Convention on Human Rights. In other countries, the courts were even more adventurous, and yet, the similarities to the Israeli Supreme Court’s innovation are clear.

In 1971, the French Constitutional Council declared that the Preamble to the 1958 Constitution is a legally enforceable provision.\footnote{P Lindseth, ‘Law, History and Memory: “Republican Moments” and the Legitimacy of Constitutional Review in France’ (1997) Columbia Journal of European Law 3.} This was followed by a decision to allow any sixty members of either house of the French parliament to refer a law for review by the Council. And this power was quickly put into effect: opposition parties have referred nearly one-third of all legislation to the Council, and since 1981, this has resulted in the annulment of at least parts of the laws.\footnote{A Stone Sweet, Governing with judges: Constitutional Politics in Europe (Oxford, Oxford University Press, 2000).}

Similarly, the Indian Supreme Court declared that the Preamble to the Indian Constitution created a basic structure upon which the court may rely to strike down not only legislation, but also unconstitutional constitutional amendments.\footnote{Kesavananda Bharati v State of Kerala (1973).} In Hungary, the Constitutional Court developed a legal doctrine that expanded its powers and legitimacy.
significantly, enabling it to strike down one out of three laws that came under its review, and even to instruct the Hungarian parliament when it is at fault for acting ‘unconstitutionally by omission’. These extensive powers have led one of the most prominent scholars of post-Soviet legal regimes, Kim Lane Scheppel, to refer to the Hungarian regime of the time as a ‘courtocracy’.21

In all of these examples, the powers of the courts have increased in relation to the government and the legislature. And yet, I would argue, this did not increase their independence. To offer just one comparison, the Israeli courts currently have far more powers than their British counterparts, even following the enactment of the Human Rights Act 1998. So much so, that the most ‘extreme’ version of the current proposals debated to constrain the reach of the Israeli courts is to adopt the British model, and allow the courts only to declare the unconstitutionality of a law. This proposal is perceived, by its opponents, as a death knell to … judicial independence. But does that mean that British courts do not enjoy judicial independence? That obviously is not the case. The conclusion must be, therefore, that if Israeli courts were to lose their existing powers to strike down laws, they would not lose judicial independence, but rather lose some judicial power. A clear distinction must be maintained, in academic and public discourse, between judicial power and judicial independence.

Winkler and Zagel thus rightly identify that whilst this issue of parliament’s power to limit the courts’ jurisdiction is often discussed as integral to judicial independence,22 its relevance to the matter at hand is ‘considerably less’ pronounced than it is perceived to be.23 ‘Independence to the judge’, they note, ‘turns on the amount of discretion she has in deciding a particular issue before her and not on whether she can hear the issue in the first place.’24 Judges are not allowed to hear cases that are brought before them after the applicable statute of limitations, or cases that belong in another forum, or another jurisdiction; and they will not respond positively to requests to make declaratory rulings or on matters that have become hypothetical. These limits have no bearing on judicial independence.

21 KL Scheppel, ‘Declarations of Independence: Judicial Reactions to Political Pressure’ in Burbank and Friedman (n 7) 227.
23 Winkler and Zagel (n 9) 819.
24 ibid.
II. Legitimate and Illegitimate Political Incursions

However, notwithstanding the analytical distinction, we should not be so naïve as to suggest that the source of this conflation, between judicial independence and judicial power, is simply a matter of confusion. Where the powers of the judiciary are concerned, parliamentarians and government representatives become excited and tend to hyperbole not as an abstract, theoretical matter; nor with regards to particular areas of private law (eg the power to impose punitive remedies in tort). Such a dialogue exists between branches of government, but is usually confined to specialists, and does not attract much public attention. This issue becomes far more contentious when the power in question involves a tug of war between two (or more) branches of government, and is perceived as a zero-sum game. Such debates bring to the fore concepts such as ‘separation of powers’, ‘checks and balances’ and the ‘rule of law’. In this particular case, parliament and government feel unduly constrained by the dictates of the judiciary, and seek to limit its powers; whereas the judiciary senses that it is being constrained in its role, and duty, to ensure that the executive and legislative branches adhere to the rule of law. Interestingly, the United Kingdom and Israel recently offered two strikingly similar case studies in that regard, in which each respective Supreme Court found that parliamentary practices were executed in a manner that was unlawful. In the United Kingdom, this occurred when the Supreme Court found that the prime minister’s decision to prorogue parliament (or, technically, to advise the Queen to do so), against the background of the Brexit debate, was ‘unlawful, void and of no effect’. In Israel in March 2020, following the general election, the (at the time interim) Speaker of the House refused to allow a vote to put in place a new, permanent Speaker. The similarity between the cases was not lost on the Israeli Supreme Court which found justification for intervening in the Speaker’s decision, inter alia, by reference to the British case.

These were highly contentious cases, which will probably be studied by future generations of students as touchstones in the debate over separation of powers. But they tell us very little about ‘judicial independence’. The phrase is not mentioned in either decision, nor by decisions of the British lower courts, two of which reached a different decision. Those courts rejected the challenge, categorising the prime minister’s decision as ‘inherently political in nature’ and

25 R (Miller) v the Prime Minister [2019] UKSC 41.
26 HCJ 2144/20 The Movement for Quality in Government et al v the Speaker of the Knesset et al (23 March 2020).
determining that there were ‘no legal standards’ against which to assess its legitimacy. In other words, this was a clear example of different positions regarding normative theories of adjudication and separation of powers. However, one can envisage, as has happened in the past, that if a few politicians decided to speak out against the decision, and to ‘promise’ to revisit the powers of the (unelected) court to act in a manner that is ‘undemocratic’, members of the judiciary and their advocates would cry out against the danger to judicial independence. That, again, would be a mistake.

So, if judicial independence is distinct from power, separation of powers and the rule of law, what is it about? One answer suggests that judicial independence is concerned with the type of influence that can sway judicial decisions. In particular, it seeks to distinguish between ‘appropriate’ and ‘inappropriate’ influences. A judge may be influenced, or persuaded, by arguments made by one of the parties in open court; but she may not be influenced by a party who makes her case when meeting in a bar, after hours, or by a lawyer who offers a bribe if she wins the case. She should decide a case, then, according to the law and free from inappropriate pressure.

Kim Lane Scheppele suggests a slightly different distinction, one that focuses on the difference between external (political) intervention at the level of the rule, and external (political) intervention at the level of the case. Particularly in cases in which the political branches have a clear interest, she asks: what is the difference between a political ‘intervention’ in the form of ministerial regulation that would instruct judges to decide cases in a particular way (eg that remedies in tort cases should be capped at a given amount; or that some forms of evidence may be admissible); and the type exemplified by the Soviet ‘telephone justice’ cases (or, for that matter, in Miracle on 34th Street), where political officials called judges to instruct them how to decide the case? Political intervention is, we understand, legitimate if it appears at the level of a rule, even if it pre-empts a particular family of cases. Indeed, at that level, per Scheppele,

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27 Miller v the Prime Minister [2019] EWHC 2381 (QB); Cherry v the Advocate General [2019] CSIH 49.
28 Kornhauser (n 7)
30 In the classic Christmas film from 1947, a judge presiding over a case in which he must determine if the defendant is truly Santa Claus is instructed by his political sponsor to determine that such is the case if he wishes to retain his judgeship, and indeed decides accordingly.
31 Scheppele (n 21).
a judge is *expected* to follow the political edict, which is embodied in the form of a regulation, for example. In contrast, political intervention is suspect, and endangers judicial independence, when it appears at the level of a case.

This position, she suggests, should be questioned. Political intervention of any sort (ie both at the level of the case and at the level of the rule) is suspect. As Scheppele explains:

> If judges have to take a positivist attitude toward law and simply follow the rules laid down by the political branches, then they are not really independent of politics but … completely subservient to it. … If there is no struggle between the political branches and the judicial branch over the meaning of the law and the way that it is to be applied in concrete cases, then there is not only no meaningful separation of powers but also no meaningful distinction between law and politics.

In other words, Scheppele takes the realist intuition to its logical extreme, by suggesting that not only does politics impact law in familiar ways, but that *conceptually* there is no distinction between a political rationale and a legal one. This conclusion, paradoxically, is the result of the positivist paradigm according to which judges should, and do, follow rules laid down by the legislature and by government ministers. The peculiar aspect (for this author, but perhaps not for Scheppele) is that ‘[o]nly when judges are empowered to resist direct commands through invoking the power to make law themselves can they be truly independent within a broader legal order’.  

As such, Scheppele’s position is clearly an outlier, but it is intellectually stimulating, offering as it does what may be viewed as a ‘political’ approach to judicial independence, as opposed to a ‘jurisprudential’ approach. Whilst the latter takes into account basic jurisprudential principles, such as the courts’ duty to follow the law as articulated by the political branches, the political approach suggests that ‘true’ independence is made manifest precisely when the courts *ignore* those directives and ‘make law themselves’. Extreme as this position may seem, it clarifies that our expectations for ‘what qualifies as judicial independence?’ is on a spectrum, and that criteria for answering this question need to be established before we can answer if judicial independence is in danger.

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32 For such a position, see eg C Franklin ‘Behavioral Factors Affecting Judicial Independence’ in Burbank and Friedman (n 7) 148, 149.

33 Scheppele (n 21) 279.

34 ibid.
III. Judicial Independence in Israel

I suggested that it is important to distinguish between the range of powers held by a court and the degree of independence we attribute to it. I turn now to clarify that danger of this conflation in the Israeli context.

We can start this part of the inquiry by returning to President Hayut’s rebuke of the recent initiatives. Responding to the claim that the court is too powerful, she indicated that since 1992, the US Supreme Court had voided fifty federal laws, while the Israeli court reached the same decision only on eighteen occasions, making it one of the least ‘activist’ courts in the world. To paraphrase the president’s argument, perhaps unfairly, she is saying: we’re playing nice, so why be so hostile? Even more unfairly, one may even find a normative element in her argument: if the court promises to continue to ‘respect’ the decisions made by other branches of government, will you preserve our ‘judicial independence’? This is a dangerous path to follow. It is also somewhat paradoxical: for if the court has voided only eighteen laws in twenty-seven years, five of which involved two issues which reached the court on different occasions, why is it so important to maintain that power and, moreover, to leverage the threat to judicial independence in the process?

The reason that this is a dangerous path to follow is because judicial independence is important, and is particularly important in a country such as Israel, where the issues at stake could hardly be more dramatic. In Israel, a number of justifiably celebrated decisions by the Supreme Court established the rule of law, and fundamental ideas of administrative law, such as due process and ultra vires, in a very difficult context. Among them, we can note the following: in 1950, a mere two years after the war of independence, the Supreme Court overruled a decision by the prime minister, the powerful David Ben Gurion, to dismiss a (Jewish) teacher who was considered a right-wing terrorist by the establishment. Three years later, the court struck down the minister of interior’s decision to shut down a communist paper which was published both in Hebrew and Arabic.

Following the war of 1967, the control over Palestinian land and population engaged the Supreme Court in issues with which it was not previously familiar. In 1979, the court ruled for

35 HCJ 144/50 Schweib v Minister of Defense 2 PD 5 (1950).
36 HCJ 73/53 Kol Ha’am v Minister of Interior 7 PD 871 (1953).
the first (and last, prior to the Beit-El decision, noted in the opening) time that the order to confiscate private land for the purpose of building the Elon Moreh settlement was ultra vires and void, as it lacked a security rationale. In the present context, the reaction of the Israeli prime minister at the time, Menachem Begin, to the decision, is noteworthy: ‘There are judges in Jerusalem.’ As Begin was the leader of the conservative, Likud, party, and a vocal advocate of the historical and religious ties between the Jewish people and the land, this pronouncement was perceived as a clear endorsement of the importance of the rule of law.

In 1999, the Supreme Court found that, without explicit legal authorisation, the General Security Service (comparable to MI5 or the FBI) is not empowered to use force against suspects when conducting inquiries. The decision was understandably lauded by the international community (the decision was immediately translated and distributed) and rebuked by the security forces.

In 2004 and 2005, the Supreme Court heard a number of cases concerning the ‘Separation Barrier’, and ordered the government to dismantle 40 km of the barrier north of Jerusalem, and about 100 km of the barrier that enclosed the settlement of Alfei Menashe, along with five Palestinian villages. The latter case led the Israeli government to withdraw its objection to yet another petition, on a further segment of barrier. The court reached these decisions after carefully scrutinising the evidence placed before it and, predominantly, questioning whether there was any security reason for the route of the barrier, which led to a disproportionately harmful effect on the lives of Palestinians in its vicinity. And yet, this careful approach notwithstanding, the court’s decisions were followed by an outcry by right-wing members of parliament to ‘circumvent the Supreme Court’ by passing legislation which would deny the

37 Text to n 6.
39 Reichman (n 2) 77.
41 HCJ 7957/04 Hamoked – Centre for the Defence of the Individual v The Prime Minister of Israel (2004)
court the power to question security justifications.\textsuperscript{43} This legislation, it should be noted, was never passed, and its proposal could be viewed, in retrospect, as mere sabre rattling.

This list of cases (to which others may be added) may suggest that Israeli courts have been the rear-guard in preserving the rule of law and democratic principles in an extreme situation, in which those principles are tested routinely. Some scholars, however, are more sceptical. Ronen Shamir and Aeyal Gross, for example, suggest that such landmark cases allow courts in general,\textsuperscript{44} and the Israeli courts in particular, to navigate the treacherous waters of public approval, siding with the government in the vast majority of cases (to retain the necessary political capital vis-a-vis other branches of government and the mainstream media) whilst finding against the government on a number of isolated cases, to retain credibility with the liberal elites and the international community.\textsuperscript{45}

In fact, during the period under review (1967–86), Shamir found that of the 557 petitions submitted by Palestinians to the Supreme Court, only five (of which one concerned Elon Moreh) were successful.\textsuperscript{46} Moreover, he notes that each of these cases had a particular set of characterisations which barred it from being perceived as a general precedent. To return, by way of example, to the Elon Moreh case, he notes that whilst in past (and future) cases the settlers and the military establishment highlighted the security necessity for the settlement, in this case the settlers insisted that no such security considerations existed. Rather, they proclaimed that the settlement was ‘a Godly commandment to inherit the land promised by our ancestors … not inspired by security considerations’.\textsuperscript{47} In his discussion, Shamir reviews the

\textsuperscript{43} G Alon, ‘Decision Draws Fire from the Right, Praise from the Left’ \textit{Ha’aretz}, 1 July 2004, \url{www.haaretz.com/1.4746667} (accessed 14 April 2020).

\textsuperscript{44} S Scheingold, \textit{The Politics of Rights} (New Haven, CT, Yale University Press, 1974).


\textsuperscript{46} The others are \textit{El-Asad v Minister of Interior} (1979) [requiring the Minister of Interior to issue a permit to an East Jerusalem publisher to publish a newspaper]; \textit{Kawasme v Minister of Defense} (1980) [revoking a decision to deport three Palestinian leaders without due process]; \textit{Samara v Military Commander of Judea and Samaria} (1979) [allowing a Palestinian to return from Germany to join his family in the OPT]; \textit{Jerusalem District Electric Company v Minister of Energy} (1981) [striking down the military takeover of a Palestinian electricity company in East Jerusalem].

\textsuperscript{47} Cited in Shamir (n 45) 788 (emphasis added).
An overwhelming consensus from the media, from academic scholars and human rights groups, praising the court for these decisions.\(^{48}\) However, he notes:

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\text{None of the decisions had any significant effect on later policies, save the growing sophistication of the authorities in their implementation of legal procedures. Yet the significance of the cases was exaggerated, allowing them to appear as symbols of justice.}^{49}\]

Gross maintains, with reference to the occupation, that the success in a few cases creates ‘the myth of a “benign occupation” that protects human rights even though they are mostly denied’.\(^{50}\)

As Gross’s argument indicates, Shamir’s analysis has been proven prescient, time and again, since it was written. Thus, in 1993, the Supreme Court approved, per curiam, the midnight deportation, without due process (including the right to a fair hearing) of 415 putative Hamas ‘members’ to Lebanon.\(^{51}\) As Reichman notes:

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\text{[T]he political and military pressure appears to have been too strong for the Court: the judges found that the right to a hearing can also be granted after the deportation to Lebanon. Needless to say, the legal community met this decision with disbelief.}^{52}\]

In the *Targeted Killings* case,\(^{53}\) the court assessed the practice which, at the time, led to the killing of 338 Palestinians, of whom 128 were innocent bystanders, including 29 children. The court denied the government’s preliminary argument of justiciability. However, as a matter of substance, it created a category of ‘unlawful combatants’ who ‘are not entitled either to the privileges of combatants or to the immunities of civilians’.\(^{54}\)

Similarly, in cases concerning the demolition of houses of Palestinian families where one member, who lived in the house, committed a suicide attack, the court granted the family a right to challenge the decision, but then routinely accepted the military’s position, and allowed

\^[48] ibid 795–96.
\^[49] ibid 797.
\^[50] Gross (n 45) 9.
\^[51] HCJ 5973/92 *Association for Civil Rights in Israel v Minister of Defense* 47 PD 267 [1993].
\^[52] Reichman (n 2) 82.
\^[53] HCJ 769/02 *Public Committee against Torture in Israel v Government of Israel*
the collective punishment. David Kretzmer, for example, found that the High Court of Justice (HCJ) intervened in only three of 150 house-demolishing orders until the 1990s. Data collected by scholars and human rights organisations suggest that over 2,000 houses have been demolished or sealed through these measures. Guy Harpaz finds that, when challenged, the Supreme Court has adopted ‘a deferential attitude towards the security authorities, manifested in and facilitated by a very low burden of proof. [House demolition] judgments are in most instances unanimous, jurisprudentially brief, abstract, formalistic and unrefined, displaying almost uniform support of the practice’. In doing so, he asserts, the court has ‘virtually granted [the authorities] a carte blanche’, whilst simultaneously ignoring well-established administrative and constitutional standards.

The final category of cases which suggests a reluctance of the courts to intervene is that which concerns the administrative detention of individuals; that is, the deprivation of liberty for an indeterminate period without a criminal charge or trial. According to the human rights organisation B’Tselem, Israel has held up to 1,800 Palestinians at a given time, and since 2002, ‘not a single month has gone by without Israel holding at least 1,000 Palestinians in administrative detention’. Administrative detention in the West Bank is authorised under a military order, which empowers the military commander in the area to detain an individual for up to six months if they have ‘reasonable grounds to believe that a certain person must be held in detention for reasons to do with regional security or public security’. At the end of the six

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56 In Israel, the Supreme Court sits as a High Court of Justice when reviewing petitions against public authorities.
60 ibid 42.
months, a subsequent order can be (and frequently is) issued, leading to dozens of detainees being held for over a year, without trial. An empirical study of Supreme Court decisions concerning the OPT has revealed that, at 35 per cent, administrative detention cases constitute the largest portion of the five categories (the others are: house demolitions, separation barrier, closures and curfews, and military actions). At the same time, the court is most reluctant to intervene in such cases, finding for the petitioner less than 5 per cent of the time.

In summary, the decisions discussed in this section advance the inquiry into whether Israeli courts may be considered ‘friends or foes’ by further demarcating judicial powers and judicial independence. Whether granting or denying the petition, Israeli courts refrained from engaging in controversial political territory, such as the legality of a prolonged occupation; and did not take the opportunity to enhance human rights discourse in this context. Instead, they relied on principles of procedural due process, evidentiary requirements and standards of reasonableness and proportionality. Needless to say, these decisions, of which there are several thousand, impact the rights and livelihood of millions, whilst rarely engaging with the controversial question of the court’s powers to strike down legislation. The judicial powers were traditional, as were the judicial principles relied upon. Judicial independence is under threat, then, not because of the application of nuclear powers, such as striking down laws. The threat becomes apparent when government agencies are given “room to manoeuvre” to act in ways which otherwise should have been curtailed under a straightforward application of the substantive law, and when judges refrain from using the full amplitude of their existing powers.

IV. Friend or Foe – A nuanced view

There seems to be a consensus that judicial independence is important for the courts for instrumental reasons. In particular, judges demand judicial independence so they can maintain their role as ‘friends’ to democratic principles and the rule of law. This position is particularly popular amongst judges themselves. Thus, California Superior Court Judge Terry Friedman

64 ibid 680.
maintained that attacks on judicial independence ‘imperil … our fundamental rights and freedoms as Americans, especially free speech and equal opportunity, which historically the courts have protected, sometimes even when contrary to majority will’. And in a recent visit to Israel, Justice Rosalie Abella Silberman, of the Canadian Supreme Court, addressed this very issue, saying that:

Independent judges who are not politically compliant are not anti-democratic, they are doing their job; those critics, on the other hand, who think patriotism means doing only what politicians want, are the biggest threat to Israel’s values, because they misconceive democracy as majoritarian rule.

The causal link between judicial independence and democratic principles is more often declared than explained. Clearly, when supporting such a link, the narrow understanding of democracy as majority rule is rejected, since courts often work as counter-majoritarian institutions. Instead, courts may be uniquely important and successful in protecting ‘potential or unorganised interests or values which are unlikely to be represented elsewhere in government’. Alternatively, they may be supporting democracy in the narrower, process-based sense, by reinforcing democratic government where its representatives have failed to uphold their own ground rules.

If judicial independence is a means to an end – to ensure the protection of democracy, the rule of law, and right and liberties – how should we rate courts in general, and the Israeli courts in particular, in this regard? First, it is not at all clear that the intuitive link between strong courts and protection of rights withstands scrutiny. Thus, Peretti concludes that there is a common claim ‘that independent judges can ensure the certain protection of our rights and liberties, particularly those of powerless minorities, even when doing so arouses the opposition of

67 T Peretti, ‘Does Judicial Independence Exist? The Lessons of Social Science Research’ in Burbank and Friedman (n 7) 103, 120.


majorities or powerful politicians. The empirical evidence … does not support these expectations’. 71

The discussion up to this point seems to suggest two conclusions: that the narrative, in general, but prominently in Israel, which conflates judicial powers and judicial independence misses the mark. In addition, that the court is a ‘friend’ of advocates of liberalism, human rights and tolerance on a number of landmark cases, but in the vast majority of cases, quietly prefers to side with the government, preserving its own institutional legitimacy.

In this section I would like to muddle the waters somewhat, on both counts.

First, we noted above the differentiation between the personal and institutional versions of judicial independence. 72 It is now worth adding that that the two categories are not wholly distinct. Thus, due to their fidelity to the judiciary as an institution, judges may well view any harm to it as sufficiently worrisome as to constrain themselves in their decision-making. This, in its own right, could raise their concern that judicial independence is under threat. 73 Similarly, judges may be concerned with the perception of their legitimacy, also referred to in terms of public trust. Idealistically, judges repeatedly note that their ability to preserve the rule of law is reliant on their perception as impartial arbiters who are not concerned with their own powers. Thus, President Barak has stated that ‘The need for public trust is not the need for popularity. … The meaning is the awareness that the judge is not a party to the legal fight, and that he is not fighting for his own power, but for the power of the law.’ 74 If judges perceive that a political ‘fight’ with the executive or legislature would lead them to lose political capital, they may choose their battles more carefully. Davidov and Reichman note that the ‘price’ that may be exacted from the judiciary may be far more mundane, and yet far more exacting, than that of limiting judicial powers. Thus, agencies may be reluctant to implement a judicial decision, citing delays and lack of resources; they may join forces with other agencies to frustrate judicial

71 Peretti (n 67) 120.
72 Text to n 8.
73 T Peretti, ‘Does Judicial Independence Exist? The Lessons of Social Science Research’ in Burbank and Friedman (n 7) 103, 110.
74 HCJ 732/84 MK Yair Tzaban v Minister of Religions 40 PD 141, 147–48.
policies in other areas; and government may be inclined to redraft the law, thus entrenching and clarifying its (unwelcome) position.\textsuperscript{75}

On the other hand, categorising court decisions as ‘pro-petitioner’ or ‘pro-state’ may not be wholly reflected in the court’s decision. Hofnung and Weinshall, for example, find that in a substantial number of cases, ‘in the course of deliberations and under the HCJ’s questioning, the security establishment changes its initial stand and moves toward a position that accepts some or most of the petitioner’s demands’.\textsuperscript{76} They refer to this strategy as one that is ‘latent, and is discernible only to those participants actively engaged in the legal process’\textsuperscript{77} because, in many of these cases, the petition is formally rejected, simply because the state has withdrawn its objections. In such situations, they conclude, ‘the HCJ’s political power and influence is manifested without having to actually activate its powers, and thus helps preserve it’.\textsuperscript{78} A similar conclusion is reached by Dotan, who suggests that ‘while, in general, Palestinian petitions to the Court during this period enjoyed a low rate of success, Palestinians were far more successful in achieving their goals in out-of-court settlements and other informal arrangements with legal authorities within the government’.\textsuperscript{79}

\textbf{V. Conclusion}

I conclude this chapter with a recent example that highlights the political tensions concerning judicial powers, judicial independence and the importance of a clear analysis. The example covers three separate Supreme Court decisions to strike down laws that allowed the administrative detention of asylum seekers (‘infiltrators’, in Israeli government parlance) for three years, in the original version, and up to one year, in the watered-down version.\textsuperscript{80}

\begin{footnotesize}
\textsuperscript{75} Davidov and Reichman (n 65) 926.
\textsuperscript{76} Hofnung and Weinshall (n 55) 677.
\textsuperscript{77} ibid 678.
\textsuperscript{78} ibid.
\textsuperscript{80} That is, the Supreme Court struck down the harsher version (HCJ 7146/12 \textit{Adam v The Knesset} (2013)), the Israeli Parliament amended it, and the Supreme Court struck it down again (HCJ 7385/13 \textit{Gavrisilasi v The Knesset} (2014)), and again (HCJ 8665/14 \textit{Desta v The Knesset} (2015)).
\end{footnotesize}
As is the case elsewhere, there are few constituencies in Israel with less political backing than asylum seekers and refugees. Therefore, targeting the court for protecting their interests carries, relatively, few political risks. Thus, it may be unsurprising that, following these decisions, a coalition of nationalist forces materialised, aiming to limit the court’s ability to safeguard the rights of asylum seekers. Realising that such a targeted approach may be politically feasible but legally difficult, this coalition broadened its ambition by introducing, as recently as November 2018, an amendment to the Basic Law: Human Dignity and Freedom, limiting the courts’ ability to hold a law as unconstitutional, through a variety of ‘override clause’ versions. In addition, they managed to make the appointment process of judges to the Supreme Court a highly political affair, by reducing the power of judges in the committee and by forcing through the appointment of first one judge and then a second who live in a settlement in the OPT.

These factions advocating reform care very little about theories of separation of powers or judicial independence. They are not bothered, and are probably not aware, of the cases that concern property rights, social security or taxation in which the court has struck down primary legislation. They want to send the court a political message: to preserve your existing, traditional, administrative and constitutional powers, you must align with our political agenda.

A country that is steeped in an ongoing national and ethnic conflict since its existence, and for over fifty years in prolonged occupation, has an uphill battle to maintain respect for the rule of law and for human rights, particularly for Palestinian citizens and non-citizens, but also for others. Those constituencies depend on judicial independence to stand guard against calls that seek to portray them as ‘power grabbing’, ‘authoritarian’ and, indeed, enemies of the people.

If the Supreme Court is dragged into the political theatre, forced to fight for its own limited power to strike down laws by leveraging the argument of judicial independence, it will lose the battle for its powers; but more importantly, it will lose the war for its own independence.

The powers of the court are numerous. Its administrative reach, which includes an overview of home office regulations, security measures, health and education guidance, and a variety of government dictates, are far more important and effective in Israel’s daily struggle to maintain what is left of a core of democratic and constitutional values than the power to strike down laws.81

81 Winkler and Zagel (n 9) 802