

Why Israel's top court is greenlighting a civil rights crackdown

Saturday 23 December 2023, by [LURIE-PARDES Eyal](#) (Date first published: 12 December 2023).

After a year of fierce battles over the judicial coup, Israel's Supreme Court seems totally subservient to the state's policies since Oct. 7. What's changed?

In times of war, constitutional courts frequently fail to defend civil liberties. There is no shortage of examples of this from around the world, often stemming from an impulse to avoid conflict with the national security establishment in order to avoid losing public support. In the wake of the [Hamas-led attacks](#) on October 7 and Israel's [ongoing bombardment](#) of the Gaza Strip, the Israeli Supreme Court has been no exception.

Since last year's Israeli election, the Supreme Court has been the subject of a fierce battle between an [emboldened far-right government](#) that seeks to strip it of its powers, and a [mass protest movement](#) that has sought to defend it and uphold its role as a protector of human and civil rights. Over the past two months, however, the Court has appeared totally subservient to the government, the war cabinet, and the police, repeatedly refusing to block severe violations of citizens' rights. In fact, several rulings from recent weeks exhibit how the national trauma of October 7 has influenced justices' judicial decision making.

Many cases before the Court are centered on a "balancing formula": whether a government action, even if in some way justified for a "compelling reason," disproportionately violates the protected constitutional right at stake. But beyond merely describing the national security reasoning presented by the government, the Court's recent rulings have included biblically inspired depictions of the atrocities of October 7 to justify, in some part, giving more weight to national security considerations over protecting civil rights.

For example, court rulings have [repeatedly quoted](#) a paragraph by Justice Noam Sohlberg stating: "In these terrible days, the State of Israel is waging a severe campaign against those seeking to destroy it from the Hamas organization that controls the Gaza Strip, which sent its murderers, along with 'erev rav,' a bloodthirsty mob, on the morning of October 7 ... to destroy, kill, and annihilate young boys and old men, toddlers and women."

This creates an almost impossible standard for petitioners to meet. As a result, the Court has given a constitutional greenlight to oppressive new measures such as [not providing information on Palestinian detainees](#) to civil rights groups, even when such measures [contradict the Court's precedent](#). Most strikingly, the Court has allowed the government to effectively ban pro-Palestinian speech, [denying a petition](#) submitted by several Arab-Palestinian organizations against a decision by the Israeli police to forbid demonstrations in Umm Al-Fahm and Sakhnin against the war.

Palestinians protest in front of Ofer Prison in solidarity with the hunger-striking administrative detainee Ahmad Zahran, west of Ramallah, occupied West Bank, December 19, 2019. (Ahmad Al-

Bazz/Activestills)

The Court's [precedents](#) on the permissibility of demonstrations are generally protective of freedom of expression and allow the police to prohibit them only if there is "a high probability of actual severe and serious damage to public safety or public order." But in this case, the Court accepted the police's argument that prior protests in times of national unrest have disrupted public order and that the police are preoccupied with other work and so lack the capacity to allow a protest to go forward.

There are, however, numerous reasons to doubt the sincerity of the police's statements. While a protest calling for a ceasefire was approved only after the Association for Civil Rights in Israel [petitioned the Supreme Court](#), protests on other matters led by Jewish Israelis since the start of the war have generally been [granted police approval](#). In other words, the only protests the police claim to not have the capacity for are those that oppose the war.

Moreover, the police's argument that a protest in the center of a Palestinian city against the war in Gaza would disrupt the public order doesn't hold water. The police often use justifications of this sort if a demonstration is likely to provoke a hostile response from the local community to a degree that would jeopardize the police's ability to maintain the peace. Nonetheless, even when such an antagonistic response is expected — as in the case of the Jerusalem Pride Parade, for example — the courts have ruled that the police [are obligated](#) to allow the demonstration to take place.

The case of Palestinian demonstrations for a ceasefire inside Palestinian cities is even more clear-cut: because a ceasefire has [overwhelming support](#) among Palestinian citizens, it is unlikely that a protest in a Palestinian town would receive significant pushback from the local community.

Palestinian citizens of Israel and left-wing Israeli activists at a protest against Israeli attacks on the Gaza Strip, in Haifa, May 11, 2023. (Shir Torem/Flash90)

But perhaps the easiest way to understand the police's repression of anti-war protests is by listening to their own statements. Police Commissioner Kobi Shabtai has expressed open [hostility](#) towards pro-Palestinian protesters, [saying](#): "Anyone who wants to identify with Gaza is welcome — I'll put them on buses that will send them there."

A flawed safeguard

Israel's Supreme Court is an [essential institutional check](#) in the Israeli political system. Because of the government's de facto control over the Knesset, the Supreme Court is the only body empowered to block anti-democratic measures. Many of Israel's existing civil rights protections have been granted and protected by the Court, including rulings that protect Palestinian citizens and Palestinians in the occupied territories — such as [mandating affirmative action](#) and [striking down certain torture practices](#) used by the Shin Bet.

Historically, however, these victories are largely outweighed by the Court's failures to protect Palestinians' civil rights, especially those living in the West Bank. For instance, the Court has allowed the [establishment of settlements](#), in violation of international law; the [forcible transfer](#) of Palestinians in Masafer Yatta, south of Hebron; and expansive use of [administrative detention](#), which allows Israeli forces to [indefinitely detain Palestinians](#) without trial, formal charges, or allegations that a felony was ever committed.

The Court has also failed to protect Palestinian citizens of Israel: although it [ruled](#) that Palestinian citizens have the same rights as Jewish citizens, it has frequently allowed the government to

discriminate against them in [allocating national resources](#), while [banning family reunification](#) and [enabling segregation in schools and housing](#).

In short, while the Court has granted some important protections to Palestinians, it has also failed in colossal ways. As the prominent Israeli civil rights lawyer Michael Sfard [put it](#) in a talk at Columbia Law School, “The Israeli High Court is an occupier’s court, and it does not provide justice, but from time to time, it does provide a remedy.”

Anti-judicial overhaul activists protest outside the Supreme Court in Jerusalem, September 11, 2023. (Noam Revkin Fenton/FLASH90)

While those on the left have been critical of the Supreme Court’s role in legitimizing oppressive measures, the right-wing mainstream has been [even more vocal](#) in its criticism. The far-right Israeli government spent most of this year prior to the war trying to pass legislation to [overhaul the judiciary](#), aiming to strip the Court of some of its authority to strike down legislation or administrative actions.

Right-wing policymakers view the Supreme Court as a [hyper-interventionist institution](#) that prevents the conservative majority from implementing its agenda on issues such as expanding settlements in the West Bank; exempting ultra-Orthodox Jews from mandatory military service; and limiting the rights of Palestinians, women, and LGBTQ+ people.

As part of the judicial overhaul, Prime Minister Benjamin Netanyahu and Justice Minister Yariv Levin wish to change the composition of the Judicial Selection Committee to enable the creation of a conservative majority among Supreme Court justices. Until such a change is made, [Levin has said](#), he will refuse to appoint a permanent Chief Justice and to fill the two vacancies on the Court. This is the first time in its history that the Supreme Court is operating without a permanent Chief Justice.

Fast-forward back to now, and the justices are surely aware that striking down government acts and legislation during the war could be used by right-wing politicians to further justify the judicial overhaul. The Supreme Court is thus left in a vulnerable position at the precise moment that it is hearing important petitions on politically complex issues. If the Court rules to uphold civil liberties over national security concerns, its opinions are likely to be politically unpopular.

For example, the Court will hear a case against the near-total [shutdown of the Qalandia checkpoint](#) since October 7, which has created a de facto blockade on Kafr Aqab, a Palestinian neighborhood in East Jerusalem that was excluded from the city and its services after the construction of the separation barrier. A decision mandating the loosening of limitations on Palestinians’ freedom of movement — a constitutionally-protected right — against the positions of national security officials would almost certainly be highly unpopular, fueling right-wing talking points about the need for the judicial overhaul. To prevent such a scenario, the Court is likely to be more inclined than ever to rule in favor of the government.

By keeping the threat of the judicial overhaul alive, the government is restricting the Supreme Court’s latitude in protecting people’s rights. At a time of war, when judicial intervention is more necessary than ever to prevent the government’s campaign against civil rights, the Israeli Supreme Court seems incapable of piercing through the veil of national trauma. Unfortunately, in retrospect, the Court will likely be seen as yet another constitutional court that failed to defend fundamental rights in times of war.

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P.S.

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Our team has been devastated by the horrific events of this latest war – the atrocities committed by Hamas in Israel and the massive retaliatory Israeli attacks on Gaza. Our hearts are with all the people and communities facing violence.

We are in an extraordinarily dangerous era in Israel-Palestine. The bloodshed unleashed by these events has reached extreme levels of brutality and threatens to engulf the entire region. Hamas' murderous assault in southern Israel has devastated and shocked the country to its core. Israel's retaliatory bombing of Gaza is wreaking destruction on the already besieged strip and killing a ballooning number of civilians. Emboldened settlers in the West Bank, backed by the army, are seizing the opportunity to escalate their attacks on Palestinians.

This escalation has a very clear context, one that +972 has spent the past 13 years covering: Israeli society's growing racism and militarism, the entrenched occupation, and an increasingly normalized siege on Gaza.

We are well positioned to cover this perilous moment – but we need your help to do it. This terrible period will challenge the humanity of all of those working for a better future in this land. Palestinians and Israelis are already organizing and strategizing to put up the fight of their lives.

Can we count on your [support](#)? +972 Magazine is the leading media voice of this movement, a desperately needed platform where Palestinian and Israeli journalists and activists can report on and analyze what is happening, guided by humanism, equality, and justice. Join us.

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