ABSTRACT: This article analyzes the effects of Israel’s democratic backsliding on the Palestinian population in the Occupied Palestinian Territories. While research on democratic backsliding focuses on the erosion of liberal democratic features and how this influences democracies’ citizenry, Israel’s composite regime offers a unique setting: an established (albeit weakened) liberal democracy ‘within the Green Line’ alongside an established occupation devoid of democratic features ‘beyond the Green Line.’ Exploring this, I analyze how Israel’s belligerent occupation has at times been restrained by the ‘democratic side’ of the country, resulting in Palestinians indirectly benefiting from Israel’s democracy while not having democratic rights themselves. The article thus demonstrates how Palestinians may be among the first populations to suffer from democratic backsliding while themselves being devoid of democratic rights.

KEYWORDS: democratic backsliding, Israel, judicial overhaul, Occupied Palestinian Territories, Palestine

In a government-sponsored protest on 27 March 2023, coalition members of Israel’s hardline right-wing government spoke to the crowd. Addressing some 200,000 protestors, ruling-party parliamentarian Tali Gotliv riled the people up by asking: “If I want to strip the rights of terrorists’ families, who is stopping me?! If I want to enact ‘neighbor procedure,’ who is stopping me?!” In response to each question, the crowd roared, “The HCJ!”—referring to the High Court of Justice. Gotliv was mentioning examples where Israel’s military or government had a policy vis-à-vis Palestinians that the HCJ had either restrained or outlawed. Unto itself, the inflammatory rhetoric is not surprising. The 37th Israeli government,
sworn in three months earlier, had been pushing a major judicial reform, enacting a series of changes that would severely limit the judicial branch from exercising restraint on executive power. Yet the particular context is interesting. Rather than depicting situations in which the court did not serve the country’s citizens, Gotliv received monumental crowd approval for referencing ‘the evil’ wherein Palestinians—their own denied democratic rights—had been protected by Israel’s High Court.

This article explores the influence of Israel’s democratic backsliding on the Occupied Palestinian Territories (OPT). While an extensive amount of research has focused on how the erosion of democratic checks and balances influences a country’s citizenry, Israel’s composite regime offers a unique setting. On the one hand, within the areas the country has annexed and granted the population citizenship, an established democracy has developed where citizens receive equality before the law and the government operates within the bounds of a (sometimes weakened) liberal democracy. On the other hand, since the 1967 War, the country has simultaneously left large areas under occupation, denying the local population citizenship and establishing martial law devoid of any civil or democratic rights. This highly unusual circumstance raises interesting questions: while the further erosion of the country’s remaining liberal democratic features will have an obvious and direct impact on the citizens living within democratic areas, what will this process mean for the Occupied Palestinian Territories? How will the country’s internal democratic backsliding influence Palestinians in the West Bank and the Gaza Strip, and how will this affect the Israeli-Palestinian conflict?

Considering the lack of democratic governance in the Occupied Territories, it could be assumed that this process will have little to no impact on these territories. Contrary to the areas ‘within the Green Line’ where governing powers are restrained by a series of democratically enshrined checks and balances that are coming under attack, the military government in the Occupied Territories operates without such limitation. Despite this notion, this article demonstrates that, over the years, the Palestinian population within the Territories—while devoid of democratic rights themselves—have found ways to utilize Israel’s internal democratic channels, placing some restraints on the seemingly unrestrained military government. Specifically, despite having virtually no civil rights within the military administration, the HCJ’s interpretation of the military government as an arm of the executive opened a backchannel for Palestinians, bypassing the military and using the HCJ to restrain their seemingly unrestrained executive. While the court has over the years avoided ruling on the legitimacy of the occupation or the military regime itself, it has had a noteworthy impact restraining the military, offering perhaps the only
civil-rights-adjacent protection Palestinians have enjoyed. The removal of the HCJ’s authority, whether by limiting its ability to pass judgment or enabling Israeli authorities to override its ruling, will have a significant impact on the Palestinians, leading them to be among the first populations to suffer from democratic backsliding while not having democratic rights themselves.

The following section begins with a very brief outline of democratic backsliding. It then turns to a historical overview of Israel’s administration in the Occupied Palestinian Territories, specifically focusing on the legal arrangements that have developed over the years. This leads to the main analysis, focusing on three ways the HCJ has been influential in protecting Palestinians from an unrestrained military regime. The conclusion discusses these arguments, situating them within the larger perspective of how Israeli democratic backsliding would influence the Israeli-Palestinian arena.

Historical Context: Israeli Democratic Backsliding and the Occupied Palestinian Territories

The ‘judicial reform’ proposed by Israel’s 37th government follows a classic trajectory of democratic backsliding. While many revolutionary pressures may lead to a country’s democracy vanishing, the dominant threat to democratic proceedings in past decades has stemmed from democratic backsliding. Differing from external threats that overthrow a democracy, democratic backsliding refers to “the incremental erosion of democratic institutions, rules and norms that results from the actions of duly elected governments, typically driven by an autocratic leader” (Haggard and Kaufman 2021: 1). As discussed elsewhere in this special issue, this erosion can take many forms, often including the systematic centralization of powers within the executive while simultaneously weakening any and all checks and balances on executive power.

How might such a process impact Palestinians in the West Bank and Gaza Strip? In the 1967 War, Israel nearly quadrupled its size, taking over the Golan Heights from Syria, East Jerusalem and the West Bank from Jordan, and the Gaza Strip and Sinai Peninsula from Egypt. Over the years Israel returned the Sinai Peninsula to Egypt (1982) and extended its jurisdiction to the Golan Heights and East Jerusalem, making them—to varying degrees—officially part of the country (Tal 2018). The West Bank and Gaza Strip, in turn, were kept under military occupation, with Palestinian inhabitants placed under martial law with no civil liberties and sever limitations on their rights. It would therefore seem that contrary to
the (albeit fairly weak) checks and balances of Israel’s democracy ‘within the Green Line,’ democratic backsliding should not impact Palestinians living under Israeli occupation. Israel’s control mechanisms in the West Bank and Gaza Strip, however, complicate matters.

Unlike most occupations in the world, or even other Israeli occupations such as in Southern Lebanon (1982–2000), Israel sought to establish its rule of the Territories not solely through brute military force but instead through establishing a legal framework and infrastructure. Thus, an elaborate legal system was developed. Beginning the complex process of establishing a legal military administration for the occupied population, on 7 June 1967—three days into the war—the commander of IDF (Israeli Defense Forces) forces in the West Bank published “Proclamation Two: Proclamation Regarding Governance and Legal Arrangements,” assuming administrative governance of the territory. Declaring that existing legal frameworks will remain in effect unless they contradict published IDF laws and regulations, the local Palestinian population under the occupation would thus be governed by a combination of leftover British Mandatory law, Jordanian law (in the West Bank), Egyptian law (in the Gaza Strip), as well as newly enacted IDF laws and regulations (Gordon 2008). Judicial proceedings for the local population would be carried out through military courts, laying the foundation for trying Palestinians in court rather than relying on soldiers in the field to enact judgment and punishment. While the legal proceeding in military courts bears little resemblance to democratic ‘due process,’ Israel’s attempt to build such a legal infrastructure for the military occupation would prove critical in the years to come.

A second way Israel attempted to build a legal foundation for its actions related to the establishment of settlements. Immediately after the war ended the government began intensive discussions regarding if—and primarily how—to establish Jewish settlements in the OPT. Once again, rather than simply relying on the belligerence of an occupier’s force, a two-track process was developed, aiming to legitimize the settlements despite their clear violation of international laws of occupation—both The Hague Regulations (1907) and the Fourth Geneva Convention (1949). First, as developed later, settlements were shrouded in militarized aura, allowing the country to argue that it was not violating international law by settling civilian population in an occupied territory. Rather, it was operating within its rights to govern based on security requirements (Kretzmer and Ronen 2021: 195–199). Second, the country repeatedly argued that while it voluntarily applies the humanitarian provisions of the Geneva Convention, neither Jordan nor Egypt had legitimate claims to the Territories—and thus Israel cannot be seen as an occupying power since there is no country it occupied the territory from (Bar-Yaakov 2002).
Alongside this, Israel sought to legally justify the disparity between populations within the Territories, wherein Israeli Jews living in these areas enjoy full liberal democratic rights while Palestinians in the Territories are governed by a harsh military occupation devoid of such rights. To this end, on 2 July 1967, Israel’s Defense Minister issued Emergency Regulations Regarding Jurisdiction of Offences Committed in the Territory Held by the IDF. These lay the foundation for the two-tiered legal system within the OPT, as they set the basis for extending Israeli law extraterritorially to Israeli citizens within the Territories (Benvenisti 2019). Over the years, additions were made as the Emergency Regulations were extended, expanding their scope to include any person in the Territories who is eligible to attain Israeli citizenship due to the Law of Return. All Jews in the Territories, whether Israeli citizens or not, are therefore excluded from the military orders and laws governing Palestinians and are instead governed by Israeli law. Once again, rather than simply enforcing policies as a belligerent occupier, the country sought to legitimate its actions by demonstrating how—despite the outcome being a clear violation of international law—the occupier is operating legally.

These governing arrangements of Palestinians changed and evolved over the years, often due to judicial developments or political arrangements. While examples of the former are discussed below, some of the larger latter examples include the Camp David Accords, the Oslo Process, and the Disengagement from Gaza. Among their many facets, the Camp David Accords, signed between Israel and Egypt in 1978, stipulated that Palestinians in the West Bank and Gaza Strip would be granted full autonomy as part of a process toward implementing UN Security Council resolution 242. As a way of demonstrating that Israel was taking symbolic steps toward this, in 1981, the Civil Administration was established in the West Bank and the Gaza Strip, replacing the military government (Shafir 2017: 42). The Oslo Accords, a series of agreements signed between the Palestine Liberation Organization and Israel between 1993–2000, led to the development of the Palestinian Authority—a self-ruling apparatus granted varying levels of authority over different parts of the West Bank and the Gaza Strip. While Israel still maintained overarching control over the vast majority of territory, the Oslo Accords led to substantial rearrangements of the governing proceedings regarding Palestinians. Finally, in 2005, Israel would evacuate its settlements and military presence from the Gaza Strip, leading once again to a redeployment and rearrangement of governance in the area. These ongoing developments notwithstanding, the baseline for Palestinians under Israeli occupation has remained fairly consistent, with many of the changes relating to where and how laws are enacted.
Israel developed these mechanisms to argue that its military occupation of the Palestinian Territories is, at worst, an enlightened military control of a disputed territory (Barak 2018). Yet, while the local Palestinian population is devoid of any civil or democratic rights, Israel’s desire to shroud the belligerent occupation in non-belligerent legitimacy has led to some unique and surprising features of the occupation, resulting in the fact that while Palestinians have no democratic rights they still stand to lose a lot from Israel’s democratic backsliding.

The features of Israel’s constitutional arrangements make the process of democratic backsliding straightforward. A unicameral and unitary parliamentary democracy, where minority governments are extremely rare and that has a constructive no-confidence vote and no written constitution, there are extremely ineffective legislative checks on the executive, leaving the judicial branch the only institutionalized restraint on executive power (Chazan 2005; Haklai and Norwich 2016). This is executed primarily through judicial review. Judicial review is carried out by the Supreme Court sitting as the High Court of Justice (HCJ), which has the authority to “hear matters in which it deems it necessary to grant remedy for the sake of justice” and is explicitly empowered to issue orders “to state authorities, local authorities, their officials and other bodies and persons fulfilling public functions, to act or to refrain from acting in lawfully performing their duties” (Basic Law: The Judiciary, articles 15(c) and 15(d.2); Hofnung and Wattad 2018). It is for this reason that, while the 37th government’s democratic backsliding consists of an array of laws, the most central of these is the frontal assault on the only official check and balance on government power—the judicial system. Dubbed a ‘Judicial Reform’ by the government (or ‘Judicial Coup’ by its critiques), proposed laws include removing the court’s ability to restrain government action based on ‘reasonableness’ of the action; changing the configuration of the committee that appoints and promotes judges such that the government will have an either direct or indirect absolute majority; and the possible legislating of an ‘override clause’—allowing the coalition to override a ruling by the Supreme Court through an act of parliament. The passage of any of these proposals will substantially cripple the only institutional restraint on the executive within the Israeli system, and the passage of all of them will effectively allow the government to rule without any checks and balances, paving the way for laws that will send the country further down the backsliding path with no ability to forestall their enactment.

While the devastating blow such moves would have on Israel’s democratic regime ‘within the Green Line’ is clear, their effect on the non-democratic regime ‘beyond the Green Line’ is the focus of the next section.
Backsliding without Democracy

Despite Palestinians in the Occupied Territories having no democratic rights themselves, Israel’s desire to create a legitimate legal system for the occupation has resulted in the fact that democratic institutions ‘within the Green Line’ can end up curbing the military government’s arbitrariness ‘beyond the Green Line.’ An Israeli democratic retrenchment, whether allowing the government to override HCJ rulings, relegating legal councillors ensuring government ministers follow the law to political appointees or ‘advisory’ roles, or canceling the court’s ability to rule on the ‘reasonableness’ of government decisions, would therefore result in a meaningful backsliding for Palestinians as well.

Since the beginning of the occupation the HCJ recognized that the state was adopting a legal justification for its rule over the Territories, and it therefore accepted cases where Palestinians challenged their executive authority—the IDF, in court. This situation, domestic courts reviewing acts of military authorities in occupied territories, is unprecedented internationally (Kretzmer and Ronen 2021: 2). The court’s official jurisdiction evolved primarily from lack of challenge.

In the first published cases brought before the court, the state opted not to challenge the court’s jurisdiction in the OPT, perhaps owing to its desire to substantiate that the occupation operates within the bounds of rule of law (Hajjar 2005: 57). Following several such cases, in 1973, the court made its jurisdiction over IDF functions in the OPT explicit:

Is this court authorized to place under its review actions that are done by state authorities, and specifically military forces, in the military governed area? . . . the defendants did not challenge this jurisdiction, and without such a claim we shall assume this time as well . . . that the jurisdiction exists on a personal level against functionaries in the military government who belong to the executive branch of the state, as ‘persons fulfilling public functions according to the law,’ and who are subject to the review of this court.9

Thus, while the HCJ adamantly avoided ruling on the legality of the occupation or the military government itself, it would stand firm that the occupation’s administration should be viewed as any other function of the executive, and thus functionaries—soldiers and other enforcers of executive policies—are bound by the laws governing the territory, subject to judicial review. The implications of this jurisdiction led to several important developments over the years, which—should the executive gain authority to overrule or undermine the judicial system—could all be reversed. While not exhaustive, three of the most important facets that would be affected are the arbitrariness of laws enforced on Palestinians,
court rulings regarding settlements and Palestinian lands, and the broader regard the IDF has been required to have for human rights as one of its governing considerations.

**Codifying Laws versus Arbitrariness**

The military regime’s need to defend its actions before a court of law has meant that the arbitrariness of policies and their enforcement, a common feature of occupations in general and martial law in particular, had to be restrained. Thus, rather than granting soldiers the freedom to carry out any and all acts at their own discretion to enforce law and order, extensive series of laws were drawn up outlining rules and regulating life under martial law, dictating the procedures and limitations of law enforcement. To be sure, these rules bear no resemblance to liberal democratic norms. For example, the most comprehensive codex of laws pertaining to Palestinians in the Territories (Order Regarding Security Procedures [combined] [Judea and Samaria] 2009) includes regulations such as one year’s imprisonment for insulting a soldier or infringing on a soldier’s dignity (article 215d); life imprisonment for membership in a group in which someone else violated gun manufacturing or possession laws (article 231); authorization for regional commanders to hold prisoners in administrative custody without trial if the commander deems it a security necessity (article 273); and authorization for military commanders to impose curfews on a territory if deemed necessary for security purposes (article 317).

However, while there is no doubt that Palestinians subject to martial law are denied any civil rights or liberties, the need to codify everything in public defensible laws does—unto itself—lead to some restraint on an otherwise unrestrained regime (Hajjar 2005: 27–28). First, the regulations contain restraints on arbitrariness, such as limiting the number of hours a person can be detained without being arrested (article 26b) or peoples’ right to appeal military court decisions and arrests (articles 47, 157–162). Second, and more importantly, codifying laws paves the way for legal challenges when the regime violates the law. Thus, not only have individual Palestinians appealed to the HCJ when the military regime acted illegally even by its own undemocratic rules (a subject expanded upon below), but NGOs such as the Association for Civil Rights in Israel (ACRI) and the Palestinian al-Haq have over the years taken upon themselves to document and challenge those situations where military commanders exceeded their authority more grossly (Hajjar 2005: 61–63).¹⁰

One of the most important and concrete examples of how codifying law exposed the regime to challenges that incrementally improved Palestinians’ situation is the longwinded process of regulating physical
interrogations—or more bluntly—torture. During the first twenty years of the occupation, there were numerous allegations of torture that Palestinians were going through in Israeli General Security Service (GSS) interrogations, which were repeatedly denied by the state.\textsuperscript{11} Then in 1987, following two public incidents, the government was compelled by Israeli public pressure to establish the Landau Commission, which was tasked with evaluating GSS interrogation policies. Once again demonstrating how Israeli democratic procedures overrode the military government’s non-democratic policies, the Landau Commission confirmed that the GSS had been using violent interrogation measures since at least 1971 (Landau Commission 1987, article 2.24). Moreover, the committee recognized that since GSS interrogators were obligated to keep their interrogation methods secret, when summoned to court to disprove allegations that confessions were given under duress they chose “the simple and easy option: they favored the absolute secrecy principle over the obligation to tell the truth in court, and on the witness stand they denied using any physical pressure on people being interrogated. More bluntly, they simply lied” (Landau Commission 1987, article 2.27). The need to appear before court and justify secret interrogation procedures led the Landau Commission to recommend abandoning secrecy, and instead to codify the rules governing physical interrogations. In other words, in order to resolve interrogators’ ‘need’ to perjure themselves, the Commission recommended that the government adopt an official policy wherein “moderate physical pressure” may be applied during interrogations—a recommendation accepted by the government.

This process of making non-democratic interrogation procedures public on the democratic side of the Green Line began a trajectory. By 1990, the Public Committee Against Torture in Israel (PCATI) was established, and—taking advantage of the now public procedures—began, along with other NGOs and activists, to challenge these procedures enacted against Palestinians in the HCJ. In 1996, the HCJ ruled that “painful handcuffing” is a prohibited form of interrogation,\textsuperscript{12} and in 1999 PCATI won a major victory—as the HCJ prohibited the GSS’s routine use of physical and psychological pressures (Shoughry-Badame 2011). Following this, the Attorney General issued official guidelines, prohibiting different forms of interrogation while clarifying that in some extreme circumstances harsher measures are acceptable (Kretzmer and Ronen 2021: 362–365). To be sure, the victory in the HCJ was not perfect. Loopholes remained, and ‘extreme circumstances’ became more routine. Nonetheless, the case of violent interrogation—physical or psychological torture—demonstrates how a less liberal democratic Israel ‘within the Green Line’ would have harmed the Palestinians. Had Israel’s democratic backsliding occurred prior to this
process, the government might have simply rejected the Landau Commission or deemed its conclusions classified. Moreover, should the executive gain the authority to override HCJ rulings, the court’s prohibitions could be overruled by the government, enshrining in legitimized law what the court ruled illegitimate. Thus the Palestinian population, while themselves not having the right to democratic due process of interrogations or having their public opinion count, received in a roundabout way some protection from internal Israeli democratic proceedings.

**Court Rulings regarding Settlements**

One of the most controversial points in the Israeli-Palestinian conflict is Israeli settlements. What began at the end of 1967 as a state-run project to establish key military strongholds, with debate about their temporariness, would within a few years be subsumed by grassroots movements reframing the settlement project as ‘religious Zionism’ (Pedhazur 2014). Combining intensive political action, violent and nonviolent mobilization, and social entrepreneurship, the settler movement gradually embedded itself in up-and-coming positions of power. By the time Likud came to power in 1977, the mother organization—Gush Emunim—had its settlement implementation plans adopted by several government ministries, leading to a flourishing of official and unofficial cooperation with the government over the years (Hirsch-Hoefler 2020). Palestinians, in turn, had no choice but to see their land requisitioned and major government investment cultivating areas for Jews, with virtually no options of resisting these moves. Their only legal avenue was appealing to the Israeli High Court of Justice.

The first case in which the HCJ was asked to rule on the legality of settlements was the Rafah Approach. After the evacuation of 6,000–20,000 Bedouins from the area between Sinai and Gaza due to ‘security risks,’ the territory was designated for a Jewish settlement, and this was challenged in court by the Israeli Mapam party (Kretzmer and Ronen 2021: 193–197). Rejecting the petition in 1973, three important legacies emerged from the ruling. First, as quoted above, the court formally recognized that it had jurisdiction over such matters. Second, alongside this jurisdiction, Justice Landau added a crucial statement: “one thing is clear: the scope of the court’s intervention in military authorities’ actions that relate to security matters must be extremely narrow.”

Thus, while the court would examine whether military authorities deviated from regulations, it would not pass judgment on security considerations themselves. As shown below, this would lay the foundation for the state to argue that all matters regarding settlements were a security matter, attempting to bypass the court’s judgment. Third, the court accepted an interpretation of Jewish
settlements’ function that would further the state’s later claims, merging civilian Jewish settlement and the military’s security needs:

As for the removal of the plaintiffs [from their lands] there is no doubt that that is within the authority of the defendants, as long as they were guided by security considerations. It is clear that the designation of those lands, all or in part, for Jewish settlement, does not remove the security nature of the action. Security considerations . . . were not disproven nor seen to be camouflage for other considerations, when it was learnt from General Tal himself that the territory (or part of it) is designated for Jewish settlement, which is itself, in this case, a security measure.\textsuperscript{14}

The implications were that the court will be extremely cautious and retrained when ruling on security matters, and that Jewish settlements could themselves be classified a security requirement. This approach was reinforced in the next major case regarding settlements, the Beit El case. Reiterating the securitization of settlements as a main justification in rejecting the appeal against Palestinian land requisition, all justices echoed the notion expressed by Justice Ben-Porat:

Israel, as small country with a territory within the Green Line that is long and narrow, is surrounded, regrettably, by countries that do not hide their hostility toward it . . . Against this background, the argument that the element of [buying] time when stopping surprise aggressions is foremost and critical, makes common sense. One of these solutions—and this is the matter before us—is creating civilian Jewish presence in special strategic areas . . . As reality has proven that warfare may happen by surprise, it is reasonable that the need for Jewish presence at this location is essential.\textsuperscript{15}

Thus, while these cases clearly demonstrate the reality wherein Palestinians’ rights do not bear real weight in comparison to IDF security considerations, the court nonetheless implicitly restrained the settlement project in its rulings. Security considerations may be a blanket excuse for settlement, however if these considerations could be disproven, the settlement in question would lose legitimacy.

This restraint came to the fore in the next petition: the Elon Moreh case. Relating to the previous Beit El judgment, the justices in this case went out of their way to emphasize:

It is clear—and [state attorney] Mr. Bach informed us that this was made crystal clear in government debates—that in this [Beit El] ruling, the court did not give preemptive legal legitimacy to all land requisition of private land for civilian settlement in Judea and Samaria, but rather there is a requirement to examine in each case if in fact the military’s needs, as must be interpreted, justified the requisition of private lands.\textsuperscript{16}
In reviewing the facts of the Elon Moreh settlement, the court concluded that it was political pressure, rather than security needs, that guided the military’s land requisition. First, contrary to previous cases, there was disagreement over the settlement’s security justification. While the Chief of Staff gave an affidavit attesting to the security need, this was met with statements from the Defense Minister who recognized only the security need for a military base and not for a civilian settlement in the area, and with affidavits given by the former Chief of Staff and a retired general. These respectively stated that a settlement in the area would weaken security as the military would be defending it instead of engaging in combat and went even further to claim that “the argument regarding the security value of the settlement ‘Elon Moreh’ was not given in good faith and has one purpose alone: to justify land requisition that could not be justified any other way.”

Compounding the holes that were identified in the security justification, the justices analyzed the order of events and proceedings that led to the land requisition, identifying the weighty role Gush Emunim played in influencing the government’s decision, which would then be processed into a security need by the military (Kretzmer and Ronen 2021: 201–205). Recognizing that this was a political rather than security decision, the justices went further and referenced international law with regards to land requisitioning by an occupying force, emphasizing that while security needs allow for land requisition by the military, this cannot be understood as broader ‘national security’ desires such as settling Jews in the land. The HCJ thus ruled for the first time that the requisition of private Palestinian lands for the Jewish settlement was done illegally, that the settlers be evacuated, and the land returned to its previous owners.

The Israeli government, now restrained by the democratic institutions in its ability to requisition private Palestinian land in its non-democratically governed territory, then turned to other means of settlement development. Taking advantage of the fact that only one-third of land in the West Bank and the Gaza Strip had been registered prior to 1967, the cabinet launched a massive campaign, spearheaded by the State Attorney’s Head of Civil Division Plia Albeck, to declare all unregistered land in the Territories as state land, thereby allowing for the construction of settlements on this area while still adhering to the HCJ’s ruling that private land may only be requisitioned for security purposes (Kharif 1979). Crucially, a provision was added declaring that if a territory was declared state land it would be deemed so unless proven otherwise (Kretzmer and Ronen 2021: 205–208). Thus, while Palestinians’ rights were once again disregarded as the government maneuvered to take over as much land as possible, the mere fact that the government launched such a campaign in order to adhere to the
The court’s decision speaks volumes. Had the judicial system been weakened to the point where the executive could overrule court rulings, or that legal councillors could not restrain ministries from acting illegally, even the minimal protection Palestinians now had if they could prove land ownership would be null and void.

The case of requisitioning private Palestinian lands for Jewish settlements would come before the court again in the second decade of the twenty-first century. Spearheaded by the extremely hawkish parliamentarian Bezalel Smotrich, in 2017, the government passed the Law Arranging Settlement in Judea and Samaria (Arrangement Law). Focusing on a series of over 100 unauthorized settlements—meaning West Bank territory that settlers took over from Palestinians without official approval but with government tacit acceptance—the law stipulated that under specific circumstances such territory would be retroactively requisitioned from its Palestinian owners, who would be compensated for their loss of territory.

Ruling on the petitions against the law in 2020 (after suspending it in August 2017), the HCJ dealt a devastating blow to the government. Accepting the petitioners’ claim that if the Knesset extends its jurisdiction to regulate laws regarding lands in the OPT in place of the military government then such laws are open to judicial review and are subject to the same restrictions as all other laws governing the state of Israel, the court evaluated the law in light of Basic Law: Human Dignity and Liberty (Kretzmer and Ronen 2021: 111–112). Extending this Basic Law’s protection to the Palestinian population, combined with evaluating the reasonableness of the law and its violation of international laws, the court struck down the Arrangement Law in its entirety. Not surprisingly, it is the same Bezalel Smotrich and his party members who, alongside others, have driven Israel’s 2023 democratic backsliding, which would remove the court’s ability to rule on the reasonableness of laws and government actions and would allow the Knesset to override the HCJ and reinstate laws that the court ruled out. Such a move would strip Palestinians of the protection offered by the HCJ as it threw out the Arrangement Law, yet again denying them what minimal protection Israeli democracy offers them in their non-democratic status.

**The Court’s Shadow**

While the first two sections demonstrate the ways Israel’s belligerent occupation was formally restrained by liberal democratic procedures ‘within the Green Line,’ this last section focuses on the informal ways in which the aura of democratic rule of law worked to restrain the military regime. An early example of this is the Neve Tzuf settlement. Established in 1977,
the land requisition was taken to court by Palestinian inhabitants of the nearby Nebi Salah, claiming that this was their privately owned land. After the court issued a temporary restraint on the settlement’s development while the matter was discussed, the executive changed policy. Avoiding a court ruling, the government decided ‘on its own volition’ to cancel the requisition order, moving the settlement to previously declared state lands (Gazit 2003: 270–271). In so doing, the state avoided receiving a ruling that would have likely been similar to the aforementioned Elon Moreh case, exposing an interesting phenomenon: situations where the governing body identifies that it is likely to lose in court and chooses to grant the petitioners’ aspects of their claim rather than accepting a defeat that would entail a binding precedent. The result is an ultimate victory, or at least partial victory, for the plaintiffs as the governing body indirectly accepts a restraint on its powers, despite the official protocol showing no such restraint.

Such a phenomenon illustrates what David Kretzmer and Yael Ronen (2021: 509) term the “court’s shadow”—the aura of the court’s watchful eye and the need to adhere to its perspective when developing and implementing policies. In such circumstances, the executive recognizes—either being signaled by the court or on its own—that the court is going to rule against it and decides to alter its policies on its own volition. In so doing, the executive avoids the court’s binding ruling, and while the court does not formally restrain the government, it informally forces it to adhere to specific standards.

Expanding this further, recent studies have begun to explore how the court’s presence, specifically its emphasis on human rights as a counterbalance to maintaining national security, can be identified in more latent ways. The most authoritative study on this was conducted by Menachem Hofnung and Keren Weinshall Margel (2010). Focusing on terror-related cases (cases where national security could easily be invoked by the executive), they unpacked those cases in which the plaintiffs’ appeal was rejected, analyzing how many of them achieved at least partial success in their appeal. The results are astounding. Formally, in only 12.2 percent of cases did the court rule either entirely (6 percent) or partially (6.2 percent) in the plaintiff’s favor. However, informally, in 27.8 percent of cases, the petition was rejected only after the state had willingly amended its own position. Thus, rather than viewing the court’s guardianship of human rights solely through the formal prism of how many petitions are rejected (nearly 88 percent), a closer analysis reveals that the court’s presence—its ability to force the executive to change policy—leads the executive to alter its policies in favor of human rights in nearly a quarter of the cases surveyed. Even more telling is the control group the authors identify, showing that
these numbers are far higher in terror-related cases compared to non-terror cases that involve executive decisions (Hofnung and Margel 2010: 678–679).

Extending beyond the factual identification that in 40 percent of terror-related cases, that is two out of every five, brought before the Israeli High Court, the court’s influence weighed in either formally or informally to alter the executive’s policy, the informal power must be especially considered when it comes to democratic backsliding. Formally, backsliding may weaken the judiciary by limiting its ability to carry out judicial review, altering constitutional arrangements, influencing the appointment of judges, and a slew of other changes—all of which have been advanced by Israel’s 37th government. Regarding the court’s informal power as a deterring authority to contend with, it is likely enough for the executive to informally castrate the judiciary, signaling both to the public as well as to anyone along the executive chain—in this case the military—that the court’s authority is no longer to be respected. As such, the benefit Palestinians have had from the HCJ’s aura of supreme authority and power is likely to receive a significant blow from Israeli democratic backsliding, regardless of what formal backsliding ends up taking place.

Summary and Conclusion

Israel’s 37th government launched a massive legislation campaign spiraling the country toward democratic backsliding. While this process occurred in many countries over the past decades, this article focused on a unique characteristic of Israel’s composite regime, wherein an established (albeit weakened) liberal democracy is maintained alongside an established military occupation. Exploring how Palestinians living under Israeli occupation will be affected, it demonstrated how despite being devoid of democratic rights themselves—Palestinians have indirectly been somewhat protected by restraints placed on the belligerent Israeli occupation from the ‘democratic side’ of the country. Analyzing three examples—the need to codify laws and regulations, the prohibition on requisitioning private Palestinian lands for Jewish settlements, and the ‘shadow of the court’ compelling the military to consider human rights—the case was made that Palestinians stand to lose a great deal from Israel’s democratic backsliding, making them among the first populations in history to suffer from democratic backsliding while not living under a democracy.

Thinking broader, Israeli democratic backsliding is likely to have huge implications on the trajectory of the Israeli-Palestinian conflict. Beyond the specific facets mentioned above, the systematic removal of checks and balances paves the way for radical populist moves, such as the complete
Israeli annexation of the West Bank and subsequent deportation of Palestinians or allowing them to stay without any citizen status. This example is not purely hypothetical—it is part of a well-developed plan articulated by top government members, some of whom have repeatedly echoed notions of forced (or ‘encouraged’) Palestinian emigration from Gaza during the Israel-Hamas War—moves the HCJ could not strike down if the judicial reform is completed.\textsuperscript{24} To be sure, the HCJ has far from granted Palestinians liberal democratic protection. Nonetheless, devoid of civil liberties and living without democratic rights, the only minimal protection Palestinians have from such plans are the democratic checks and balances still in effect in Israel. Their removal would enable acts such as these to occur without restraint, dealing a critical death blow to any remaining hope for a peaceful two-state solution.

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\section*{NOTES}

1. While ‘stripping the rights of terrorists’ families’ is a generic statement, ‘neighbor procedure’ refers to a protocol wherein Israeli soldiers required a Palestinian to knock on the neighbor’s door in case of an ambush. The HCJ outlawed this in 2005 (HCJ 3799/02 Adalah – The Legal Center for Arab Minority Rights in Israel v. Commander of Central Command (2005)).
2. This holds true since Israel removed its internal martial law in 1966.

3. This article focuses on Palestinians under Israeli occupation. While in the West Bank the occupation has been consistent since 1967 (with adjustments primarily due to the Oslo Accords), in the Gaza Strip the situation is more complex. Israel evacuated its settlements and military bases from the Gaza Strip in 2005, and since 2007, the territory has been besieged by both Israel and Egypt. As of April 2024, Israel invaded and occupied large parts of the Gaza Strip following Hamas’s 7 October attack, with the future legal status of Palestinians unknown.

4. See Lustik (1997) for some of the complexities of this.

5. This relates to the government-initiated settlement project. Over the years this would be matched and at times subsumed by civilian-led initiatives, championing religious-Messianic justifications for settlements rather than militarized legal ones. See, among others, Haklai (2007); Newman (2005).

6. The Civil Administration was tasked with overseeing all matters relating to civilian lives in the OPT except those directly related to security. While this was meant to present a ‘civilian’ side of governance rather than a military one, it was ultimately another military outfit—staffed by and reporting to the IDF.

7. As noted above, it is presently unclear if such rearrangements will again occur in the Gaza Strip, as elements within Israel’s government are repeatedly calling (as of April 2024) for the reestablishment of settlements as part of the Israel-Hamas War.

8. For more on this, see Kingsley and Kreshner (2023).


10. Extending beyond situations where soldiers violate the law, without the ability to evaluate ‘reasonableness,’ the court would have no legal basis to intervene in situations where military commanders may simply change laws arbitrarily or cancel any and all minimal rights afforded to Palestinians.


19. Other cases brought before the HCJ over the years, such as Netiv Ha’avot (HCJ 7292/14 Mousa v Minister of Defense (2016)) or the repeated cases of Amona, relate to situations where unauthorized settlements are built as settler-initiated projects. Differing from the examples discussed here, while the state has defended these in different ways in court and procrastinated their evacuations, it has not argued for their legality. David Kretzmer (2023) recently made the argument that the aim of the judicial reform is to allow the state to retroactively legitimize such settlements.
22. The authors note that the vast majority of cases, focusing on administrative detentions, house demolitions, land confiscation for the separation barrier, curfews and closures, and military operations, originate from the OPT (673–674). Thus, while the quoted figures do not relate solely to Palestinian petitioners, they are extremely indicative of such petitioners.
23. An example of this respect is the military court of appeals. In the 1980s, a case was brought before the HCJ where Palestinian plaintiffs requested that the IDF be required to establish a military appeal procedure. While the HCJ ruled against the request (HCJ 87/85 Arjuv v. IDF Commander of West Bank Region (1988) PD 42(1): 353), the Justices recommended that the IDF nonetheless set up such an appeal system. This was done, by the IDF’s own admission, based upon the court’s recommendation (see IDF Military Court’s website): “Single Identity Card.” [In Hebrew.] IDF. https://shorturl.at/gquR3 (accessed 20 December 2023).

REFERENCES


