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Constitutional Overhaul, the War in Gaza, and the Puzzle of Civic Mobilization in Israel

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Abstract

Much has been written on the constitutional overhaul in Israel, and the attendant constitutional crisis in the first nine months of 2023. Since October 7, however, with the breakout of the Israel-Gaza war, the overhaul was seemingly shelved. This Article seeks to connect both events, by comparing the legal-political response to the overhaul with the legal-political response to the war. It asks why, given the intensity of the protest movement generated by the overhaul, there was a dearth of protest activity after the war, even though both events implicated similar values, namely the rule of law and individual rights, championed by the protest movement. I argue that a central reason for the disparity cannot only be explained by the dynamics of war but also due to the tensions and complexities inherent in Israel's self-professed constitutional identity as a Jewish and democratic state. In particular, I argue that anti-overhaul protests appealed to liberal universalist values to garner bipartisan support, with the effect of bypassing substantive issues such as the occupation of the Palestinian Territories and discrimination faced by Israeli Palestinians. This explains the lack of Arab participation in the protests, as many perceived them to be an internal Jewish Affair. Thus, when post-war repressive measures mostly affected Israeli Palestinians, the protest movement failed to rally in their support. Although anti-overhaul protests could have brought about greater liberal consolidation in Israel, the relative lack of post-war mobilization casts lingering doubts on the possibility of long-term consolidation of liberal values in Israel. Attempts to depoliticize the protests, while perhaps successful in warding off the overhaul, and though impressive on their own, have likely failed in instilling deeper, more resilient, liberal values in Israel.

Keywords: Israel; Palestine; constitution; Gaza; democracy; liberalism

A. Introduction

Since its announcement on January 4, 2023, much ink has been spilled on Israel's constitutional overhaul. Lauded as necessary judicial reforms by its proponents, derided as a constitutional coup by its detractors, the constitutional overhaul¹ has received much attention from scholars, journalists, think tanks, and civil society organizations, both in Israel and abroad.² For about nine

¹I am using the neutral term “constitutional overhaul” because it accurately describes what the legislation seeks to do, while cabining the normative judgment.

²See generally Yaniv Roznai & Amichai Cohen, *Populist Constitutionalism and the Judicial Overhaul in Israel*, 56 ISR. L. REV. (SPECIAL ISSUE 3) 502 (2023); Barak Medina & Ofra Bloch, *The Two Revolutions of Israel's National Identity*, 56 ISR. L. REV. (SPECIAL ISSUE 3) 305 (2023); Iddo Porat, *Political Polarisation and the Constitutional Crisis in Israel*, 56 ISR. L. REV. (SPECIAL ISSUE 3) 369 (2023); Adam Shinar, Opinion, *In Israel, the Worst May Be Yet to Come*, NEW YORK TIMES (July 26, 2023), <https://www.nytimes.com/2023/07/26/opinion/international-world/israel-supreme-court-protest.html>; Eliav Lieblich &

months, it was the most important policy issue amongst the Israeli public. It triggered mass demonstrations that persisted weekly and sometimes daily for over seven months, generating the largest civic mobilization the country has ever witnessed since its establishment in 1948. Attention from the overhaul shifted only when Hamas terrorists invaded Israel on October 7, murdering about 1,200 people, most of whom were civilians, and kidnapping about 240 people, including women and children. At the time of writing, about half of the hostages are still captive in Gaza, although some are no longer living. In response, the Israeli military attacked, initially from the air and later in a ground incursion that is still ongoing. The number of Gazan casualties has likely exceeded 40,000 (including Hamas militants, the exact number of which is unclear), many of whom are civilians.

The constitutional overhaul and the war between Israel and Gaza are seemingly two separate events. Indeed, much of the overhaul stymied even before the war erupted, with the government being able to pass only a minor and less significant part of the overhaul. Some have tried to connect the two, by arguing that internal divisions inside Israeli society made Hamas's attack possible, as Hamas identified a weakness inside Israel, which also affected its military preparedness, given that numerous reservists declared they will not show up for reserve duty if the overhaul proceeds.³ While this may explain part of Hamas's motivation for the particular timing of the attack, this is not the linkage I wish to draw in this Article.

It has been speculated that the protest movement generated a long term, newfound commitment to the rule of law, separation of powers, human rights, and democracy more generally. This Article will argue that, although there may have been a short-term commitment to those goals, those achievements were destined to fail. To be sure, and unsurprisingly, the declining commitment to these values is a result of the war and protest fatigue, yet I will suggest that even when the war ends, we are unlikely to see a resurgence in the centrality of these values and of the protest movement. This is because, as I will argue, the protest movement was directed at structural and institutional features of the overhaul, but without a deep commitment to equality and human rights. As such, the movement was lacking from the beginning, for it failed to acknowledge the tensions inherent in Israel's constitutional identity as a Jewish and democratic state, believing it could focus on the "democratic" part, while neglecting to address the "Jewish" element and its relationship with Israel's democracy. Specifically, the protests' focus on abstract values in order to draw diverse participants effectively excluded Israeli Palestinians, who, as a minority group, faced unique issues not shared by the Jewish population. Indeed, the protests' insistence on the rule of law and equality often rang hollow to a group whose inclusion in the Israeli body politic has been questioned. Thus, when the war began, with government measures mostly affecting Israeli Palestinians, whether directly or indirectly, the protest movement failed to rally in their support. This also explains why some of the gains made by the protest movement diminished during the war, because the target of the government's repressive policies was the very public that was largely excluded or distanced itself from the protest movement. Put differently, although the protests have been heralded as a consolidation of liberal values in Israel, doubts remain as to their success in instilling liberal values. In its quest for universality and consensus, the anti-overhaul protests largely bypassed real and deep conflicts in Israeli society, which resurfaced with vigor once the war began.

Accordingly, this Article will proceed as follows. Part B will discuss the constitutional overhaul. I will begin by briefly summarizing its origins, long before January 2023, the main features of the overhaul, and the unprecedented civic mobilization it engendered and the values it espoused. Part C will turn to the war in Gaza between Israel and Hamas and the demise of the overhaul, at least in its original configuration. First, I will discuss the status of the overhaul post October 7. From there,

Adam Shinar, *The End of Israeli Democracy?* FOREIGN AFF. (Feb. 8, 2023), <https://www.foreignaffairs.com/israel/end-israeli-democracy>.

³Emily Rose, *Hundreds of Israeli Reservists Vow to Refuse Service if Judicial Overhaul Passes*, REUTERS, July 20, 2023, <https://www.reuters.com/world/middle-east/hundreds-israeli-reservists-vow-refuse-service-if-judicial-overhaul-passes-2023-07-19/>.

I will turn to the role of the Supreme Court during the war, and then to attitudes among civil society. The performance of the Court, accompanied by attitudes from civil society, will suggest that the legal and political commitments championed during the overhaul were quickly cast aside as the war began. To be sure, this is to be expected during times of war and crisis, when there is a “rally around the flag effect.”⁴ However, the proximity of the protests to the war raises questions about the lasting impact of the protests and whether when the war ends things will return to what they were in terms of the normative commitments expressed in the preceding months, or whether we’re likely to see a shift in both social and judicial attitudes. In particular, the last Part connects the relative lack of post-war civic mobilization to the targets of the government’s repressive measures, Israeli Palestinians. Largely excluded during the overhaul protests, the war further highlighted that exclusion. Consequently, a possible explanation of the civic mobilization puzzle is that whereas the overhaul protests resonated with general Israeli society, repressive government measures targeting mostly Israeli Palestinians failed to generate similar levels of support.

B. The Constitutional Overhaul

I. Antecedents

On December 29, 2022, Benjamin Netanyahu formed a new government, Israel’s 37th, after years of political upheaval and instability, characterized by frequent elections. Unlike his previous governments, this government was comprised only of right-wing and ultra-orthodox parties, in what has become Israel’s most right-wing and religious government to date. Soon thereafter, on January 4, 2023, the newly confirmed Minister of Justice, Yariv Levin, announced his ambitious plan for “reforming” the justice and law enforcement system, in what has become known as the “legal reform” plan, referred to here as the constitutional overhaul.⁵ Although the overhaul was received with shock and alarm by many in Israel, it hardly came as a surprise to those closely following developments in Israeli constitutional and administrative law,⁶ as discontent by right-wing, conservative, and religious elements has been festering since at least the late 1980s. Indeed, the overhaul leveraged a perfect storm: Public confidence in the Court was at an all-time low,⁷ combined with a political constellation and will that made the overhaul seemingly possible to pass.

But what was the source of this discontent? Briefly, I will offer four reasons embraced by the right-wing, each of which addressed the overhaul attempt. Taken together, they demonstrate how the Supreme Court sought to increase its power vis-à-vis the legislative and executive branches, making it an ever more important actor in Israeli politics. The overhaul was thus an attempt to “restore the balance” that was supposedly lost as a result of judicial aggrandizement, leading to a democratic deficit according to overhaul proponents.⁸ But what were the components of these deficits?

⁴For an early formulation, see John E. Mueller, *Presidential Popularity from Truman to Johnson*, 64 AM. POL. SCI. REV. 18 (1970).

⁵Much has already been written on the overhaul and its various parts. In this Article I only offer a skeletal description. For extended description and analysis, see generally Ittai Bar-Siman-Tov, Tamar Hostovsky Brandes, Eliav Lieblich, Yaniv Roznai, & Adam Shinar, *Scholactivism in the Service of Counter-Populism: The Case of the Constitutional Overhaul in Israel*, SSRN DATABASE, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4606912; Yaniv Roznai, Rosalind Dixon & David Landau, *Judicial Reform or Abusive Constitutionalism in Israel*, 56 ISR. L. REV. (SPECIAL ISSUE 3) 292 (2023); David Kretzmer, *The ‘Constitutional Reform’ and the Occupation*, 56 ISR. L. REV. (SPECIAL ISSUE 3) 397 (2023); Manal Totry-Jubran, *Constitutionalising Israel’s Constitutional System*, 56 ISR. L. REV. (SPECIAL ISSUE 3) 355 (2023); Suzie Navot, *An Overview of Israel’s ‘Judicial Overhaul’: Small Parts of a Big Populist Picture*, 56 ISR. L. REV. (SPECIAL ISSUE 3) 482 (2023).

⁶Yoav Dotan explicitly links the overhaul with transformations in administrative law, although most locate them in Israeli constitutional law. See Yoav Dotan, *Israel’s Constitutional Moment*, 56 ISR. L. REV. (SPECIAL ISSUE 3) 521 (2023).

⁷See, e.g., Avital Sicon, *An Activist Court? Reassessing the Decline in Trust in the Israeli Supreme Court*, 7 CURRENTS, Spring/Summer 2023.

⁸To be sure, judicial aggrandizement is not unique to Israel, and was generally the norm in much of the liberal democratic world during those years. See generally RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2007). However, it is important to emphasize that this was the view of overhaul supporters. Those

First, beginning in the 1980s, the Supreme Court relaxed its two main threshold requirements, standing and justiciability. Standing determines who gets to bring a suit to the Court, whereas justiciability means whether the Court will hear the case on the merits.⁹ Both requirements, which were relatively strict in the first three decades after independence, were significantly eroded in the *Resler* case, which dealt with the conscription of ultra-orthodox men to the military.¹⁰ In *Resler*, the Court held that a petitioner does not need to show a personal grievance or that they were uniquely harmed. Indeed, under the new standing rules, a petition asserting the state violated the law, even if it had nothing to do with the petitioner, was now enough to grant standing, opening the door to “public petitions,” especially civil society organizations and cause lawyering. Similarly, the Court abandoned its erstwhile justiciability requirement, holding that there were always normative criteria available to adjudicate any question.¹¹ However, the Court reserved the option that due to considerations of “institutional legitimacy,” there will be instances, though rare, where an institution will be better equipped to resolve the issue. The upshot of the holding was the conflation of law and politics, because the Court would now hear “political” conflicts, because those too have legal aspects.

What changed is not only these doctrines, but the self-conception of the Court. From an institution whose main purpose was to resolve conflicts between the state and the individual while upholding the rule of law, the Court became an institution tasked with guaranteeing the rule of law more broadly, even without a concrete dispute, often giving itself the final say on divisive issues. Consequently, the Court began to handle more and more high-profile political issues, such as the drafting of ultra-orthodox men,¹² Israel’s separation barrier in the West Bank,¹³ denominational prayers at the Western Wall,¹⁴ and protective measures against rockets in the South of Israel¹⁵ to name but a few salient examples. To be clear, all of this did not mean that the Court became more activist *de facto*, but the potential for judicial intervention was now a real possibility, even if rarely exercised.¹⁶ This meant that the Knesset (Israel’s parliament) and government, when crafting policy, would now routinely factor in “what the Court might do.” Put differently, the erosion of standing and justiciability changed the incentives of other actors and had real downstream effects even if the case law did not significantly change. Israel was not alone in these developments. Courts around the world during these years became more dominant both in their powers of judicial review and in the matters they took up.¹⁷

Second, and around the same time, the Court changed its reasonableness doctrine. Until the 1980s, administrative decisions that were absurd, arbitrary, or capricious—decisions that no reasonable official could make—could have been struck down on reasonableness grounds. Because very few decisions could be characterized as such, reasonableness was not frequently

who resisted the overhaul, although conceding the increase of judicial power, argued that such an increase was necessary to protect individual rights and guard against corruption. See, e.g., Tom Ginsburg, *The Long Hand of Anti-Corruption: Israeli Judicial Reform in Comparative Perspective*, 56 *ISR. L. REV.* (SPECIAL ISSUE 3) 385 (2023).

⁹The Supreme Court, in addition to a court of appeals, also sits as a “High Court of Justice,” a court of first instance for most constitutional matters.

¹⁰HJC 910/86 *Resler v. Minister of Def.*, 42(2) PD 441 (1988) (Isr.). See also Adam Shinar, *Accidental Constitutionalism: The Political Foundations and Implications of Constitution-Making in Israel*, in *THE SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS* 207 (Denis Galigan & Mila Versteeg eds., 2013).

¹¹See Daphne Barak-Erez, *The Justiciability Revolution: An Assessment*, 50 *HAPRAKLIT* 1 (2008).

¹²HJC 910/86 *Resler*; HJC 64727/02 *Movement for Quality in Gov’t v. Knesset*, 61(1) PD 619 (2006) (Isr.).

¹³HJC 2056/04 *Beit Sourik Vill. Council v. Gov’t of Israel*, 58(5) PD 807 (2004) (Isr.).

¹⁴HCJFH 4128/00 *Hoffman v. Dir.-Gen. Prime Minister Off.*, 57(3) PD 289 (2003) (Isr.).

¹⁵HJC 8397/06 *Wasser v. Minister of Def.*, 52(2) PD 198 (2007) (Isr.).

¹⁶Barak-Erez, *supra* note 12, at 20.

¹⁷Ran Hirschl has famously argued that courts have increased their power by judicializing political disputes in order to preserve the power of hegemonies worried about their declining influence. See HIRSCHL, *supra* note 9. Similarly, Lustig and Weiler have noted the increasing role of courts and the rise of judicial review. See Doreen Lustig & J. H. H. Weiler, *Judicial Review in the Contemporary World – Retrospective and Prospective*, 16 *INT’L J. CONST. L.* 315 (2018).

invoked. That changed in the *Dapei Zahav* case,¹⁸ where the Court held that the duty to act reasonably did not only prohibit absurd or arbitrary decisions but also decisions that failed to assign the proper weight to all competing considerations. If the misassignment was severe, the Court would intervene and strike down the decision. This opened the door for much more aggressive review, including political decisions that were previously off limits. Thus, for example, the Court relied on the new reasonableness doctrine to order then Prime Minister Yitzhak Rabin to fire a minister who was indicted on corruption charges, before his trial began, holding that allowing such a minister to continue serving would undermine public trust in the government, even though the law did not prohibit such situations.¹⁹

Third, the Court embarked on what became known as the “constitutional revolution.” In a landmark decision from 1995, the Court held that two Basic Laws enacted in 1992—Basic Law: Human Dignity and Liberty, and Basic Law: Freedom of Occupation—were normatively superior to ordinary legislation, and, moreover, that the Knesset retained constituent power and could pass laws with constitutional status. Consequently, the Court held that it had the power to strike down legislation conflicting with the Basic Laws.²⁰ However, since the Basic Laws were relatively sparse in the number of rights they protected, the Court expanded the number of constitutional rights through interpretation. Specifically, the Court interpreted the right to dignity as including a right to freedom of expression, equality, free exercise, and a minimum core of social and economic rights, including education, housing, and health.²¹

As a result, the Court began to routinely review the constitutionality of legislation, ultimately striking down twenty-four statutes or provisions of statutes. Among them a law allowing for the privatization of prisons, a law allowing the holding of soldiers in military custody for ninety-six hours without seeing a judge, a law allowing the holding of asylum seekers for three years in detention without deportation or the pressing of criminal charges, a law allowing damage suits for calls to boycott Israel or the Occupied Territories without proving harm, and laws exempting the ultra-orthodox from military service. In recent years, the Court has gone a step further, embracing the unconstitutional constitutional amendment doctrine, and striking down an amendment to a Basic Law limiting the Court’s ability to invalidate governmental decisions on reasonableness grounds.²²

Fourth, and finally, the Court developed jurisprudence that empowered the Attorney General, referred to in Israel as the Legal Advisor to the Government, vis-à-vis the executive. In the past, the Attorney General was viewed as an official representing the government’s legal position. That is still the case, but several decisions have consolidated their status as the exclusive interpreter of the law, save for the Court, for the executive branch, and the exclusive agent in charge of representing the government in court. Thus, even when the government disagrees with their legal interpretation, it is bound to adhere to it. Moreover, in cases of disagreement the Court will hear the Attorney General’s position, and it is up to them to decide whether the government is entitled to private representation in such cases. These developments gave the Attorney General significant power over the government, and it made the government’s job more difficult where the legality of its policy decisions were questioned by the Attorney General.

Taken together, these developments have created a more powerful Court and a more independent Ministry of Justice. More constraints were placed on the political process, including legislation, which led to increasing resentment among conservative and religious elites, who embraced an anti-establishment position. Crucially, this resentment was also colored along

¹⁸HJC 389/80 *Dapei Zahav v. Broad. Auth.* 35(1) PD 421 (1980) (Isr.).

¹⁹HJC 3094/93 *Movement for Quality in Gov’t v. Gov’t of Israel*, 47(5) PD 404 (1993) (Isr.).

²⁰CivA 6921/93 *United Mizrahi Bank v. Migdal Coop. Village*, 49(4) PD 221 (1995) (Isr.).

²¹Adam Shinar, *Idealism and Realism in Israeli Constitutional Law*, in *CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM* 257 (Ernst Hirsch Ballin, Maurice Adams, & Anne Meuwese eds., 2017).

²²HJC 5658/23 *Movement for Quality in Gov’t v. The Knesset* (unpublished, Jan. 1, 2024) (Isr.).

partisan lines.²³ As the Court began to place greater emphasis on individual rights, religion and state matters, and military actions in the Occupied Territories, resistance grew among right-wingers and the ultra-orthodox. It is therefore not very surprising that in public opinion polls most of the public trust in the Court came from the left, whereas much of the decline can be attributed to the right-wing and Jewish religious groups,²⁴ who viewed the Court as “getting in their way” of governing and thwarting the majority’s will.²⁵

II. The Overhaul as a Response to Judicial Aggrandizement

Netanyahu’s right-wing coalition enabled the rhetoric to become reality. To be sure, this was not the first time that elements in Netanyahu’s government attempted to introduce changes to the judiciary. However, in the past there were always moderate—or moderating—elements in Netanyahu’s coalition that pushed the brakes.²⁶ Not so this time around. Fighting for his political life amidst criminal charges of corruption, Netanyahu assembled an extreme right-wing coalition, flanked by religious fundamentalists and Jewish supremacists. Their lack of love for the Court was widely known, as was that of Yariv Levin, the newly appointed Minister of Justice who, for years, expressed a need for dramatic changes to rein in the Court and restore majoritarian democracy. On January 4, 2023, Levin announced his ambitious “reform plan.” All the elements of the plan correspond with the four developments discussed above, with the objective of scaling back the Supreme Court’s power and placing more of that power in the hands of the *Knesset* and government. Below I offer a brief summary of the plan, though it’s important to acknowledge that during the nine months since the plan was introduced, some elements of the plan changed, some were toned down due to public pressure, and others were temporarily abandoned, only to wait for a more opportune moment.

Initially, the overhaul provided for the following structural changes: First, changing the composition of the judicial selection committee. As presently structured, the committee is comprised of nine members, three of whom are Supreme Court judges, two members of the bar, two government ministers—one of whom is the Minister of Justice—and two members of *Knesset*. Appointments to the Supreme Court require seven out of the nine votes, ensuring that there is a broad consensus among competing factions, such as judges and politicians. Under the new plan, the committee’s composition would have changed dramatically by giving the ruling coalition the power to dominate the committee, decide on both appointments and promotions, without the need for compromise or taking into account the judiciary and the bar. This would have transformed the appointment process from a hybrid professional-political model to a completely political process.²⁷

Second, upset with the Court’s power of judicial review of legislation and review of Basic Laws, the plan introduced an override clause, designed to enable the *Knesset* to “override” any judicial decision striking down a law with a majority of sixty-one out of the 120 member *Knesset*. Another provision provided that Basic Laws will no longer be subject to judicial review at all. Given that

²³For a political science perspective on Israel’s democratic crisis, pinning the explanation with conservatives who embraced both anti-elitist and anti-establishment positions, see Noam Gidron, *Why Israeli Democracy is in Crisis*, 34 J. DEMOCRACY 33 (2023).

²⁴See, e.g., Haviv Rettig Gur, Opinion, *Battle Over High Court Exposes Frailty of Israel’s Piecemeal System of Government*, TIMES OF ISRAEL (Jan. 11, 2023), <https://www.timesofisrael.com/battle-over-high-court-exposes-israel-weak-piecemeal-system-of-government/>.

²⁵This type of populist thinking, which views unelected institutions are barriers to democratic rule, is hardly unique. See generally JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2017); Cristóbal Rovira Kaltwasser, *The Responses of Populism to Dahl’s Democratic Dilemmas*, 62 POL. STUD. 470 (2014).

²⁶See Ori Aronson, *Why Hasn’t the Knesset Repealed Basic Law: Human Dignity and Liberty? On the Status Quo as Majoritarian Difficulty*, 37 YUNEI MISHPAT 509 (2016) (Heb.).

²⁷Amichai Cohen & Yuval Shany, Opinion, *The Fight Over Judicial Appointments in Israel*, ISRAEL DEMOCRACY INSTITUTE (Feb. 16, 2023), <https://en.idi.org.il/articles/48011>.

Basic Laws are created through the same process as ordinary legislation, this meant that the *Knesset* could immunize any law from judicial review simply by naming it a “Basic Law.”²⁸

Third, the plan called for scaling back the Court’s conception of reasonableness. Instead of the more expansive version that required assigning proper weight to all competing considerations, the government opted for doing away with reasonableness altogether, at least as applied to decisions by ministers and the government as a whole. Decisions made by civil servants, however, as opposed to elected officials, would still be subject to reasonableness review.

Fourth, and finally, the plan sought to change the status of government lawyers. Under the current regime, government lawyers are appointed by committees, where politicians play a non-decisive role. Moreover, as described above, their “advice” was binding on the executive. The plan attempted to change both these elements, by politicizing their selection, and by providing that ministers—as opposed to civil servants—would not be bound by their advice and could disregard it.²⁹

As stated above, numerous aspects of the overhaul changed over the period between January and September, largely due to public resistance. My objective here however is not to detail the various changes in formulations, but rather to show the overhaul’s ambitious initial scope, for it was this ambitiousness that generated resistance.

III. Public Mobilization Against the Overhaul—the Importance of Rights, Separation of Powers, and the Rule of Law

Even before the overhaul was formally announced, the intention to enact an override clause drew criticism from law professors, who began to organize against it.³⁰ When the full overhaul was announced, it was met with fierce public mobilization, which included mass protests, road blockades, including around the Israel’s national airport, threats of strike, and even international pressure. Moreover, the protests were not limited to existing civil society organizations, but included the high-tech and finance sectors, academia, students, journalists, labor unions, new organizations established to fight the overhaul, and unaffiliated individuals.³¹ The scope, intensity, and duration of these protests was unprecedented in Israeli history.³² As a result, Netanyahu announced a halt in the legislation in favor of negotiations under the auspices of Israel’s President, Isaac Herzog.³³ Those failed and the plan resumed. In the “end,” up until the war began, the government was successful in partially repealing reasonableness review. However, the law was

²⁸Allison Kaplan Sommer, *Explained: What Is Israel’s Proposed Override Clause, and Why Is It a ‘Terrible Mistake?’*, HAARETZ (Dec. 14, 2022), <https://www.haaretz.com/israel-news/2022-12-14/ty-article/premium/explained-what-is-israels-proposed-override-clause-and-why-is-it-a-terrible-mistake/00000185-1114-da2c-a387-31fdd52e0000>, (Heb.).

²⁹*Forming the Legal Position of the Government and Ministers*, LAW PROFESSORS’ FORUM FOR DEMOCRACY (Updated Jan. 15, 2023), https://www.lawprofsforum.org/post/___pp1, (Heb.).

³⁰Netael Bandel, *126 Law Professors Against the Override Clause*, ISRAEL HAYOM (Nov. 13, 2022), <https://www.israelhayom.co.il/news/law/article/13300460>, (Heb.).

³¹Aeyal Gross, *The Battle Over the Populist Constitutional Coup in Israel: Spring of Hope or Winter of Despair?*, VERFASSUNGSBLOG (March 31, 2023), <https://verfassungsblog.de/the-battle-over-the-populist-constitutional-coup-in-israel/>.

³²See Bar Peleg, Allison Kaplan Sommer, Dina Kraft, Nati Yefet, Adi Hashmonai, Amir Tibon, & Josh Breiner, *Biggest in Israeli History: Organizers Claim Half a Million Protesters Against Netanyahu’s Constitutional Coup*, HAARETZ (Mar. 11, 2023), <https://www.haaretz.com/israel-news/2023-03-11/ty-article/premium/biggest-in-israeli-history-organizers-claim-half-a-million-protesters-in-tenth-week/00000186-d261-dfef-a3ef-d26d9bbc0000>. See also Doron Shultziner, *The Movement Against Democratic Backsliding in Israel*, 38 SOCIOLOGICAL FORUM 896 (2023) (for a scholarly analysis). The protests also drew on the experience of civil society in other countries facing democratic backsliding. See, e.g., Joep van Lit, Carolien van Ham & Maurits J. Meijers, *Countering Autocratization: A Roadmap for Democratic Defense*, DEMOCRATIZATION 1 (Nov. 2023), <https://www.tandfonline.com/doi/full/10.1080/13510347.2023.2279677>; Melis G. Laebens & Anna Lührmann, *What Halts Democratic Erosion? The Changing Role of Accountability*, 28 DEMOCRATIZATION 908 (2021).

³³Maayan Lubell, *Netanyahu Agrees to Delay Israel’s Judicial Overhaul Until Next Parliament Session*, REUTERS (Mar. 27, 2023), <https://www.reuters.com/world/middle-east/israeli-president-urges-halt-judicial-overhaul-after-protests-2023-03-27/>.

challenged and then struck down by a full panel of the Supreme Court in an 8-7 decision.³⁴ Yet even without the recent Court ruling, the war that began on October 7 put a de facto end to the overhaul because of the formation of an emergency government and shift in political efforts.³⁵

Even though it was the war that halted the overhaul, it is clear the protest movement played a decisive role of postponing and even gutting the overhaul. Nine months of intense protests, in various forms, such as demonstrations, teach-ins, community lectures, social media activity, op-eds, conferences, and grassroots organizing, contributed to intense public and political pressure on the government and its coalition in the *Knesset*. But what was the basis for the protest movement? What values did it draw on when resisting the overhaul?

At bottom, the conflict between proponents and opponents of the overhaul was a disagreement about the proper conception of democracy. The proponents of the overhaul claimed that over time judges and government lawyers were replacing, bypassing, and usurping elected officials, thus converting Israeli democracy to a juristocracy, where those who made the “real” decisions were immune from replacement, thus creating a situation of authority without accountability. The overhaul, so they claimed, was meant to give back the power that elected officials lost, hence democratizing Israel’s flawed democracy.

But for opponents, the constitutional project taken up by the overhaul was exactly the opposite. What proponents saw as an enhancement of democracy, opponents identified as a culmination of a populist majoritarian conception of democracy, led by the previous Netanyahu governments.³⁶ Democracy, they claimed, was not simple majoritarianism. Any proper understanding of democracy must include restraints, grounded in the rule of law, separation of powers, and human rights. All of these are necessary barriers to majority rule, which the overhaul placed at the forefront. The overhaul was thus not a project of bolstering Israel’s flawed democracy, but a populist project in line with those occurring in places such as Poland or Hungary, seeking to eliminate restraints on legislative and executive power.³⁷ Moreover, given the institutional landscape in Israel, such moves would have even more dire consequences. Being a parliamentary democracy, the government dominates the *Knesset*, making the Court a crucial brake on government power. And, unlike other jurisdictions, Israel has only one house of parliament, does not decentralize executive power, is not part of a supranational body such as the EU, and is not subject to any international tribunal such as the European Court of Human Rights.³⁸ This makes the overhaul even more dangerous, as it consolidates more power in the executive, but with fewer restraints on that power.

The protest movement thus focused on structural features of Israel’s democracy: The decentralization of political power, the rule of law as a limit on political power, separation of powers as a way to curtail political excesses, and human rights as a limit to majority rule. Substantive policies, other than their structural features, were rarely addressed. So, for example, the protest movement, even though it was decentralized, did not, for the most part, address the Israeli Occupation of the Palestinian Territories, arguably the most important policy issue for the past fifty years; it did not, for the most part, address inequalities between Jewish and Arab citizens of Israel; and similarly, it did not address any tensions in the concept of a “Jewish and democratic”

³⁴HJC 5658/23 Movement for Quality in Gov’t v. The Knesset (unpublished) PD (Jan. 1, 2024) (Isr.).

³⁵See, e.g., Isabel Kershner, *To Fight Hamas, Israel’s Leaders Stopped Fighting One Another. For Now*, NEW YORK TIMES (Dec. 14, 2023), <https://www.nytimes.com/2023/12/14/world/middleeast/israel-war-cabinet-gaza-netanyahu.html>.

³⁶See, e.g. Natan Sachs, *Israel on the Brink*, THE ATLANTIC (July 25, 2023), <https://www.theatlantic.com/ideas/archive/2023/07/israel-limit-supreme-court-power-protests/674819/>. See also Roznai & Cohen, *supra* note 3. Recent research, however, is more skeptical, arguing that support for the overhaul can be better explained by attachment to Netanyahu and less by a majoritarian conception of democracy; Noam Gidron, Yotam Margalit, Lior Sheffer, & Itamar Yakir, *Who Supports Democratic Backsliding? Evidence from Israel* (working paper, Sept. 2023), <https://osf.io/zxukm/download/?format=pdf>.

³⁷Viktor Zoltán Kazai, *The Misuse of the Legislative Process as Part of the Illiberal Toolkit. The Case of Hungary*, 9 THEORY & PRACTICE OF LEGISLATION 295 (2021).

³⁸Roznai & Cohen, *supra* note 2.

state, choosing instead to celebrate Israel's declaration of Independence, which attempted—without explaining how—to fuse the two.³⁹

To be sure, this was a conscious choice. By choosing to focus on “neutral” or “procedural” values such as the rule of law or separation of powers without attending to their distributive outcomes, protest leaders could bring together under one tent disparate groups that differed sharply on substantive issues. The protests, therefore, were more about the “rules of the game” than the policy choices these rules generate. Indeed, on occasion conflict arose among the protestors, including statements that “this is not the time” to also demand the end of the occupation.⁴⁰ This sentiment was well expressed in an interview by one of the protest leaders, Moshe Radman:

I [will] tell you what. It [is] a real dilemma. On the one hand, there are many ills in Israeli society. Not all of them are directly related to the constitutional overhaul, and we're also trying, you know . . . not to be patronizing, and also not to take our eyes off the ball. It [is] an attempt that sometimes, you know, makes us not advance things, that personally each of us believes in, in order to keep this broad tent of the protest.⁴¹

Radman was not an outlier. Most protest leaders, though not all, came from traditional Israeli elites, be it academia, the high-tech sector, or, for the most part, from the Ashkenazi center-left. Perhaps the most prominent organization at the front of the protests was “Ahim Laneshkek” (“Brothers in Arms”), a group of Jewish military veterans who leveraged their combat experience against the government's plan. As such, it is unsurprising that the focus of their interests was core democratic values rather than deeper problems that traditionally characterize the left, such as Israel's ethnic democracy or the occupation.⁴² This also helps to explain why, notwithstanding the massive protests, Israeli Arabs were largely absent.⁴³ For the most part, there were very few Arab speakers in demonstrations; the participation of Arabs in the protests was far below their share of the population, around 20%, and protests were usually not held in Arab cities and towns. In a poll conducted by the Israel Democracy Institute, 93% of Arab respondents did not participate in any of the protests against the overhaul.⁴⁴ Given that the government sought to dramatically alter Israel's institutional landscape by concentrating more power in a right-wing nationalist coalition, what accounts for this conspicuous absence?

³⁹Protesters in Tel Aviv Carry Massive Declaration of Independence; Dozens Dress as 'Handmaids', TIMES OF ISRAEL (Feb. 18, 2023), https://www.timesofisrael.com/liveblog_entry/protesters-in-tel-aviv-carry-massive-declaration-of-independence-dozens-dress-as-handmaids/.

⁴⁰Jonathan Guyer, *What's Going on with Israel's Massive Protests, Explained*, VOX (Mar. 27, 2023), <https://www.vox.com/world-politics/23629744/why-israelis-protesting-netanyahu-far-right-government-judiciary-overhaul> (“Largely absent from the protests' calls has been attention toward the already abysmal situation for Palestinian citizens of Israel and Palestinians living under occupation in the West Bank.”); Avi Cohen & Michele Makul, *Tens of Thousands Demonstrated Against the Legal Reforms; Conflict between Demonstrators in Tel Aviv*, ISRAEL HAYOM (July 1, 2023), <https://www.israelhayom.co.il/news/local/article/14338906>.

⁴¹Nir Gontarz, *On the Line with Moshe Radman*, HAARETZ (Aug. 10, 2023), <https://www.haaretz.co.il/magazine/2023-08-10/ty-article/highlight/00000189-d9ad-dc5a-a9fb-fffd67f40000>, (Heb.).

⁴²See Sammy Smooha, *Ethnic Democracy: Israel as an Archetype*, 2 ISR. STUD. 198 (1997) (on Israel being an ethnic democracy). *But see* As'ad Ghanem, *State and Minority in Israel: The Case of Ethnic State and the Predicament of Its Majority*, 21 RACIAL & ETHNIC STUD. 428 (1998) (claiming Israel is not a democracy due to its ethnic identity).

⁴³See Hanan Abojabel & Liat Ayalon, *Why Are Older Israeli Arabs not Part of the Protests Against the Judicial Reform? A Qualitative Study*, J. AGING & SOC. POL'Y (2024), <https://doi.org/10.1080/08959420.2024.2349489> (discussing the absence of Israeli Arab's in overhaul process and concluding that among the reasons for non-participation were a perception that the protests were an “internal Jewish conflict,” being accustomed to discrimination, a sense that that the protests won't be effective, and concerns about voicing political opinions).

⁴⁴Netael Bandel, *Why is the Arab Society Staying Away from the Protests Against the Reform?*, ISRAEL HAYOM (July 20, 2023), <https://www.israelhayom.co.il/magazine/hashavua/article/14410781>.

In conversations with Israeli Arabs, several reasons have surfaced. First, the overhaul was perceived as just “more of the same.” Arabs who already felt discriminated against by Israeli policy were not especially concerned with an additional policy failure which would not significantly alter their situation. Second, the protests were perceived as “Jewish,” concerned with issues that bothered Jews and not Arabs. As one young female activist noted:

The Arab society has many sites of struggle, but in none of them do we see significant Jewish presence. And I’m not talking about political demonstrations, for prisoners or for our people in Gaza or the West Bank – I’m talking about social issues, like the struggle against violence and crime. Just last week there was a strike in Lod (a mixed Jewish and Arab city in Israel – A. S.) after two murders there in one day. Did anybody care? Then why should we be part of a struggle of the Israeli center-left? Even when they passed the Nation State Law, which harms all of Arab society, there were about 25,000 demonstrators. Where were the hundred thousand of today? That too was a law violating democracy and human rights. But when the victims are Arabs, it’s easy to ignore. It should be clear that those who don’t respect the minority’s rights, at a certain stage won’t respect rights at all.⁴⁵

Similarly, another young activist and lawyer said:

The demonstrations talk about democracy as if it only applies to Jews. What about the rights of Palestinians who live under occupation? Separating the occupation from the issue is problematic. As if despite the occupation and settlement expansion Israel was a democracy and only now with the implementation of judicial reforms it will become undemocratic. The protests do not cancel the Jewish nature of the state and do not discuss it. Reform opponents are not asking whether the country can be both Jewish and democratic. The idea of a Jewish state is agreed to by all in these protests, and the demonstrations are about the nature of the democratic system in the state.⁴⁶

These sentiments seem to be widely shared.⁴⁷ As one former Arab politician stated, “the leadership of the opposition, the side that’s protesting, is ignoring the Arab voice. They are excluding us from the protests. Their messages are not coordinated with us. We understand that the Court’s importance is in protecting minorities, but it’s important to remember that we are enmeshed in graver problems: violence, crime and chaos that are ripping us from inside.”⁴⁸ Some Arabs, who did participate in the protests, did so notwithstanding criticism of past decisions that did not protect minority rights sufficiently, for they believed that the overhaul would further weaken an already embattled institution, which was their last hope.⁴⁹

To conclude this section, the protest movement, dispersed and decentralized as it was, put forward three core values: Democracy, rule of law, and separation of powers. Those values generated a wealth of support among disparate groups along the political spectrum—though concentrated in the center-left camp—but failed to garner much support among Israel’s Arab minority, although generally they did not support the overhaul. My tentative explanation for this non-participation and exclusion is that although the protest was couched in universal terms—democracy, separation of powers, human rights, etcetera—it was widely understood as

⁴⁵Nadine Abu Laban and Ran Shimoni, *Six Arabs Explain What Keeps the Arab Public Away from the Demonstrations Against the Coup*, HAARETZ (Mar. 6, 2023), <https://www.haaretz.co.il/news/politi/2023-03-06/ty-article-magazine/.premium/00000186-942c-de23-adf6-d76cda5c0000>, (Heb.).

⁴⁶*Id.*

⁴⁷See *als* Bandel, *supra* note 44 (explaining why the sentiment is widely shared).

⁴⁸Abu Laban & Shimoni, *supra* note 45.

⁴⁹*Id.*

implicating particular Jewish concerns, for it failed to explicitly address the occupation and other issues germane to the Arab society in Israel.

C. The War in Gaza and the Demise of the Overhaul?

I. October 7 and the Status of the Overhaul

By now, it is almost a cliché to say that October 7 changed everything.⁵⁰ And yet it did. The attack by Hamas in southern Israel and the massacre that ensued, upended, or at the very least revised, all understandings about Gaza, Hamas, Israeli policy, and the conflict. The war that has been raging ever since has made everything more complicated, and the future is as grim as it is unclear. For obvious reasons, this Article will not address these issues and will focus only on the overhaul.

Unsurprisingly, as war broke out, all the plans to continue with the overhaul were shelved, which also fits well with a familiar pattern of “suspending divisions” during crises. Soon after the attack, on October 12, an “emergency government” was formed when the National Unity party joined Netanyahu’s coalition. The new coalition agreement stipulated that all non-war related legislation would be frozen.⁵¹ As a result, no overhaul legislation has advanced since October 7. This also includes the centerpiece of the overhaul—the restructuring of the judicial appointment committee.

However, the coalition agreement was limited to legislation, which meant that the overhaul could continue, or at least not disappear, in other forms. For example, although the composition of the judicial appointments committee has not changed, the Minister of Justice and the overhaul’s architect, Levin, has refused to convene the committee during the war’s first two months, and only recently did he agree to convene it, but without appointing new Supreme Court judges, where three vacancies are waiting to be filled.⁵² Moreover, the only reason Levin conceded was because a petition to convene the committee was pending before the Court, which would have likely decided against him.⁵³ In a similar vein, Levin has refused to nominate a new President for the Supreme Court, ignoring the long held constitutional convention of seniority that determines the order of Presidents. Displeased with both the convention and with the identity of a future liberal president, Levin has opted instead to stall and appoint only a few lower court judges.⁵⁴

So, although the overhaul was officially “shelved,” it has not disappeared. Levin and others have already declared that once the war is over they will return to implement their program.⁵⁵ In the meantime, the government has been taking small sub-constitutional measures intended at weakening veto points, as will be discussed below, that also further the overarching goal of the overhaul—increasing executive power at the expense of the Court and civil service. This

⁵⁰See, e.g., Andrew Sillow-Carroll, *Insights on How Jewish Life has Changed (So Far) after the Oct. 7 Hamas Massacre*, TIMES OF ISRAEL (Dec. 12, 2023), <https://www.timesofisrael.com/insights-on-how-jewish-life-has-changed-so-far-after-the-oct-7-hamas-massacre/> (“Everything changed after October 7. It’s an axiom being heard around Shabbat tables, in rabbis’ sermons and in countless opinion pieces after the Hamas massacre in southern Israel plunged the country into war.”); Haggai Matar, *How October 7 Has Changed Us All – and What it Signals for Our Struggle*, +972 MAG (Nov. 8, 2023), <https://www.972mag.com/october-war-israelis-palestinians-historic/>.

⁵¹Zvi Zerahiya, *The Emergency Government is Freezing the Overhaul Laws*, CALCALIST (Oct. 11, 2023), https://www.calcalist.co.il/local_news/article/bk2sp8ezp.

⁵²Yuval Yoaz, *The War is Canceling the Achievements of the Protest – and the Constitutional Overhaul is Still Here*, ZMAN ISRAEL (Oct. 20, 2023), <https://www.zman.co.il/430855/popup/>.

⁵³HJC 5692/23 Movement for Quality in Gov’t v. Minister of Just. (unpublished, Dec. 6, 2023) (Isr.).

⁵⁴A recent Supreme Court decision held that Levin must convene the Committee to appoint a president. At the time of writing this Article, he has yet to do so. See HJC 1711/24 Movement for Quality in Government v. Minister of Justice (unpublished, Sep. 8, 2024).

⁵⁵Editorial, *Israel’s Justice Minister, Unrepentant and Unrelenting*, HAARETZ (Nov. 12, 2023), <https://www.haaretz.com/opinion/editorial/2023-11-12/ty-article/premium/israels-justice-minister-unrepentant-and-unrelenting/0000018b-c018-dedf-adab-c518edfc0000>, (Heb.).

“stalemate” has also generated a dilemma among protestors about the right time to return to the streets.

Unsurprisingly, the war has enabled the government and other state authorities to constrain individual rights. During wars people tend to “rally around the flag,” which consists of increasing their support of the state and its leaders while minimizing dissent.⁵⁶ In Israel, the “rally around the flag effect” has played out differently. The majority of the public holds the government responsible for not preventing the October 07 attack. Most Israelis want an election once the war ends and according to polls conducted three months into the war, Netanyahu’s Likud party would have lost about half of its seats in the *Knesset*.⁵⁷ Thus, and departing from extant research on the “rally around the flag effect,” rallying around the flag in Israel is not about supporting the current government, but about supporting Israel more generally. This explains the rise in patriotic and national sentiments, very much divorced from those who hold actual power. It is against this background that criticism is perceived as unpatriotic, whereas rights limitations are perceived as both rational and necessary.⁵⁸

Soon after war erupted, and against the background of pro-Palestinian protests, the Commissioner of Police said to officers: “[I]f you want to be a citizen of Israel – welcome. If you want to identify with Gaza, you’re invited to do so. I’ll put you on buses that go there now.” In another statement the Commissioner clarified that there will be no permits for demonstrations.⁵⁹ Permits for demonstrations against the war or calling for a ceasefire, of the type that would have been granted prior to the war, have been denied, or secured with great difficulty.⁶⁰ This time, most of the protestors were from the Israeli left or Israeli Arabs. Permits for demonstrations by the right supporting the war or calling for Jewish settlement in Gaza were granted as a matter of course.⁶¹ Over time, and slowly, more demonstrations received permits—more on this below—but police violence toward protestors grew.⁶²

In a similar vein, the police and state prosecution have initiated dozens of investigations and indictments on charges of incitement to terrorism and identifying with a terrorist organization, the vast majority of which targeting Israeli Arabs. These indictments and investigations often focused on expressions made on social media, including WhatsApp groups. Importantly, soon after the war began, official policy on speech offenses changed. Prior to the war, the state prosecution had to sign off before the initiation of a police investigation, due to the sensitivity of

⁵⁶Marc J. Hetherington & Michael Nelson, *Anatomy of a Rally Effect: George W. Bush and the War on Terrorism*, 36 POL. SCI. & POL. 37 (2003).

⁵⁷See, e.g., Accord Center, *Public Opinion during the Gaza War* (Feb. 12-13, 2024), <https://drive.google.com/file/d/1SWLTtSpBxgFXT4dUjN9O74MzzHcVXn2J/view?pli=1>, (Heb.); *Surveys Show Gantz Holds Commanding Lead Over Netanyahu, as War Approaches 100 Day*, TIMES OF ISRAEL (Jan. 12, 2024), <https://www.timesofisrael.com/surveys-show-gantz-holds-commanding-lead-over-netanyahu-as-war-approaches-100th-day/>.

⁵⁸Adam Chilton, Kevin Cope, Charles Crabtree & Mila Versteeg, *Red and Blue America Agree That Now Is the Time to Violate the Constitution*, THE ATLANTIC (Mar. 25, 2020), <https://www.theatlantic.com/ideas/archive/2020/03/coronavirus-america-constitution/608665/>; Adam Chilton, Kevin Cope, Charles Crabtree & Mila Versteeg, *Support for Constitutional Rights During Crisis: Evidence from the Pandemic*, SSRN DATABASE, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3591270.

⁵⁹Ran Shimoni, Deiaa Haj Yahia, & Adi Hashmonai, *Police Commissioner: Those Who Want to Identify with Gaza – I will Put them on Buses that Go There*, HAARETZ (Oct. 18, 2023), <https://www.haaretz.co.il/news/law/2023-10-18/ty-article/premium/0000018b-434f-df22-a5eb-4b7f03dd0000>, (Heb.).

⁶⁰Chen Maanit, *Following a Petition to the Court, the State will Allow Hadash to Demonstrate in Tel Aviv against the War*, HAARETZ (Nov. 16, 2023), <https://www.haaretz.co.il/news/law/2023-11-16/ty-article/premium/0000018b-d84e-dffa-adeb-fe4e-97f50000>, (Heb.).

⁶¹Police permit available at <https://www.police.gov.il/menifa/7999724.pdf>.

⁶²Ran Shimoni & Bar Peleg, *Police Used Excessive Force, and the Protestors are Hoping the Rage will bring Masses to the Streets*, HAARETZ (Feb. 25, 2024), <https://www.haaretz.co.il/news/politi/2024-02-25/ty-article-magazine/premium/0000018d-df5d-d596-a9ef-dfff3700000>, (Heb.).

criminalizing speech. But when the war began, the approval requirement was dropped, followed by an instruction to prosecute even in cases of a single speech act.⁶³ Up until the end of November 2023, the police conducted 269 investigations and indicted eighty-six people for supporting terrorism or for identifying with a terrorist organization.⁶⁴

Of these investigations and indictments, many were for speech that was objectionable, though not criminal. In one extreme case, police interrogated a Palestinian doctor doing her residency in an Israeli hospital “suspected” of blocking her Jewish friends on Facebook and on Instagram. The investigation revealed that no blocks transpired. Instead, the doctor deactivated and then reactivated her account. The doctor was released, but her entry permit into Israel was revoked, despite committing no offense.⁶⁵ In another case that drew particular media attention, police arrested a Jewish civics teacher who, although condemning the attack of October 7, posted on Facebook, prior to the attack, on December 1, 2019,⁶⁶ that IDF pilots are murderers. After the attack, he posted pictures of Palestinians killed by Israel.⁶⁷ The police charged him with “deciding to commit treason,” an offense punishable by up to 10 years in prison. Though he was ultimately released without charges, a magistrate court nevertheless extended his detention where he spent four days in police custody. Finally, the attack on free speech also reached academia, when police arrested on incitement charges an Israeli Palestinian criminology professor at the Hebrew University, for speech made during a podcast where she called to dismantle Zionism and questioned the existence of sexual violence during the October 7 attack—a statement which she later retracted. Although she was released without charges, the case remains open.⁶⁸

Limits on rights were not limited to individual speech. On October 20, the government issued emergency regulations that allow the Minister of Communications, with the consent of the Minister of Defense and the Ministers Committee on National Security, to shut down a foreign channel the Minister of Defense deems to be seriously harming the security of the state. The regulations also allow the Minister of Communications to seize all of the channel’s Israeli assets. So far, the Minister has relied on the regulations to shut down “Al-Mayadeen,” a satellite channel aligned with Hezbollah.⁶⁹

Although the emergency regulations expire after three months, the *Knesset* enacted temporary legislation that preserves the government’s power to shutter the transmission of foreign channels in Israel if they believe, based on intelligence assessments, that the channel seriously harms state security.⁷⁰ On May 5, the government voted to shutter the transmission of “Al Jazeera,” a channel long critical of Israel, claiming that it spread fake news and contributes to misinformation that

⁶³ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL, *THE CONSTITUTIONAL OVERHAUL IN THE SHADOW OF THE WAR: THE CONTINUED ASSAULT ON DEMOCRACY AND HUMAN RIGHTS* (Dec. 10, 2023), https://01368b10-57e4-4138-acc3-01373134d221.usrfiles.com/ugd/01368b_0c422af02f2c43db818a4392b0c5a0bb.pdf, (Heb.).

⁶⁴*Since the outbreak of the war: 269 investigations of incitement and encouragement of terrorism*, YNET (Nov. 26, 2023), <https://www.ynet.co.il/news/article/b11j19gha>, (Heb.).

⁶⁵Oren Ziv, *A Doctor Investigated for Blocking Jewish Colleagues on Social Networks*, LOCAL CALL (Dec. 10, 2023), <https://www.mekomit.co.il/ps/130952/>, (Heb.).

⁶⁶Nir Hasson (@nirhasson), X (Nov., 10, 2023), <https://twitter.com/nirhasson/status/1723004091859661121> (posting a picture of the Facebook post).

⁶⁷Nir Hasson (@nirhasson), X (Nov., 10, 2023), <https://twitter.com/nirhasson/status/1723004086478348410> (describing Bruchin’s Facebook post).

⁶⁸The arrest sparked much criticism, especially in Israeli academia, but symbolized a new threat to freedom of speech. See Emma Graham-Harrison & Quique Katzenbaum, *Political Arrest of Palestinian Academic in Israel Marks New Civil Liberties Threat*, THE GUARDIAN (Apr. 26, 2024), <https://www.theguardian.com/world/2024/apr/26/political-arrest-palestinian-academic-nadera-shalhoub-kevorkian-israel-civil-liberties-threat>.

⁶⁹Emergency Regulations (Iron Swords) (Prevention of Harm by a Foreign Broadcast Entity to the Security of the State), 2023, <https://www.gov.il/he/pages/dec981-2023>; Itamar Eichner, *Cabinet Allowed to Shut Down Al-Mayadeen Activity in Israel: A Trumpet for Hezbollah*, YNET (Nov. 13, 2023), <https://www.ynet.co.il/entertainment/article/syhvoby4a>.

⁷⁰Preventing A Foreign Channel from Harming State Security Law (Temporary Provision – Iron Swords), 2024, <https://www.gov.il/he/pages/dec981-2023>.

harms the state and incites the Israeli Palestinian population.⁷¹ The channel has been removed from some platforms, but the shuttering is relatively easy to bypass, which makes the closure more symbolic than substantive, but it is the first time since 1953 that a media outlet was shuttered due to its content. A petition against the law is currently pending before the Supreme Court.⁷²

The government also restricted rights in more vulnerable contexts such as imprisonment and detention. When the war broke out, there were Gazans present in Israel, mostly persons with working permits who were in Israel legally or Gazans who came to Israel for medical treatment, also legally. Once the war began, Israel closed the border so Palestinians could not return to Gaza or relocate to the West Bank, because Israel restricts the movement of Palestinians between Gaza and the West Bank. The permits were immediately revoked, automatically converting the stay in Israel to illegal, and hundreds of Palestinians were detained in Israeli prisons, some under harsh conditions, including cages.⁷³ At the same time, six Palestinians also died in Israeli custody, some as a result of violence inflicted by guards.⁷⁴

Imprisonment was one issue. Another was the conditions of imprisonment. Crowdedness in Israeli prisons has been a problem for years, with the Court addressing the situation on numerous occasions, ordering that living space for prisoners be increased gradually. The Court based these decisions on the constitutional right of human dignity, to which all persons, including prisoners, are entitled.⁷⁵ Soon after the war began, on October 18, the *Knesset* passed a temporary provision allowing further crowding, with living space under three square meters per prisoner, and imprisonment without providing a bed, in cases of emergency. The Law also provides that “security” prisoners, for example Palestinians either suspected or convicted of terrorist activity, will be crowded or denied basic conditions before the restriction will apply to “criminal” prisoners.⁷⁶ After a declaration of emergency was issued, prison conditions, especially for Palestinian prisoners imprisoned on security charges, deteriorated swiftly, including access to water, electricity, medical treatment, and the right to counsel.⁷⁷ A similar deterioration has been noted with regard to Palestinian detainees captured during the hostilities in Gaza, not all of whom are Hamas militants. Those have been transferred to holding facilities in Israel, and, according to media reports, have been exposed to harsh conditions in violation of Israeli law, including torture, sexual abuse, and numerous deaths.⁷⁸ A petition to the Supreme Court demanded that the operation of the main holding facility, “Sde Teiman”, be ceased immediately. The petition, filed in May 2024, repeated the violations of both Israeli law and international law. The state, in its replies, did not acknowledge the violations, but rather emphasized that detainees were gradually being

⁷¹Isabel Kershner & Matthew Mpoke Bigg, *Israel Shuttters Al Jazeera, A Major Source of News in the Arab World*, NEW YORK TIMES (May 5, 2024), <https://www.nytimes.com/live/2024/05/05/world/israel-gaza-war-hamas#israels-prime-minister-has-had-a-tense-relationship-with-the-network>.

⁷²HCJ 2859/24 Ass’n for Civ. Rts in Israel v. Prime Minister (submitted Apr. 4, 2024) (Isr.).

⁷³*Thousands of Palestinians from Gaza who were Staying Legally in Israel are Held Against the Law*, GISHA (Oct. 23, 2023), <https://gisha.org/joint-petition-for-detained-gaza-workers-pr/>, (Heb.).

⁷⁴Hagar Sheizaf, *Six Palestinians Died in Prison Since the War Began, at Least Two with Marks of Violence*, HAARETZ (Dec. 20, 2023), <https://www.haaretz.co.il/news/politics/2023-12-06/ty-article-magazine/premium/0000018c-3b9b-d11b-a3bf-fbb16d80000>, (Heb.); Yehoshua Breiner & Hagar Sheizaf, *19 Prison Guards are Suspected of Beating a Security Prisoner who Died in Ktziot Prison*, HAARETZ (Dec. 20, 2023), <https://www.haaretz.co.il/news/law/2023-12-20/ty-article/premium/0000018c-88fa-d60e-afdf-ecfe938b0000>, (Heb.).

⁷⁵HCJ 1892/14 Association for Civil Rights v. Minister of Internal Sec. (unpublished, Jun. 13, 2017).

⁷⁶A Bill to Amend the Prison Ordinance (No. 64 – Temporary Provision – Iron Swords) (Imprisonment Emergency), 2023), <https://rfa.justice.gov.il/SearchPredefinedApi/Documents/2jgbWakXidFcbk0eXxJce~fDC9fFCC3L0pV2k5+vwco>.

⁷⁷*Violations of Prisoners’ Rights During the War in Gaza*, ASSOCIATION FOR CIVIL RIGHTS IN ISRAEL (Oct. 10, 2023), https://www.acri.org.il/post/_967.

⁷⁸Tamara Qiblawi, *Strapped Down, Blindfolded, Held in Diapers: Israeli Whistleblowers Detail Abuse of Palestinians in Shadowy Detention Center*, CNN (May 11, 2024), <https://edition.cnn.com/2024/05/10/middleeast/israel-sde-teiman-detention-whistleblowers-intl-cmd/index.html>; Tara John and Michael Conte, *State Dept calls for Israel to Investigate allegations of ‘horrific’ sexual abuse of Palestinian Detainees*, CNN (Aug. 7, 2024), <https://edition.cnn.com/2024/08/07/middleeast/us-israel-sexual-abuse-palestinian-detainees-intl-latam/index.html>.

transferred to other facilities. On September 18 the Court accepted the petition, in that it held, unsurprisingly, that Israel must follow the law. However, the Court did not determine that any human rights violation occurred in the facility. Moreover, it expressly held that its decision was “forward looking”, and that any past wrongdoing must be handled through other legal channels.⁷⁹

To summarize, this part sought to briefly describe domestic developments in Israel after the war broke out. As to be expected, restrictions on individual rights, such as the freedom of expression, liberty, and due process, increased. Some of these developments were also addressed by the Supreme Court and will be discussed below. My purpose, however, is not only to detail regressive measures, but to inquire into how these measures were met, especially because the preceding months saw a supposed emergence and consolidation of liberal values because of the protest movement. As I will argue below, liberal commitments expressed during the constitutional overhaul protests did not prove especially resilient.

II. Did the Protest Movement Succeed in Consolidating Liberal Values?

As expected, war brought about new restrictions on individual rights. This is not an anomaly since during wars and other times of crisis, the sense of urgency, loss of security, and a host of cognitive biases lead to the adoption of more restrictive policies. Crucially, these biases are shared by both the general population and the experts tasked with policy administration.⁸⁰ It is thus not surprising, at the descriptive level, that the police, the state prosecution, and the government sought to constrain individual rights after war broke out.

And yet, a possible argument is that given the resurgence of liberal values in Israel between January-September 2023 due to the broad reach of the protest movement, many of the steps taken during the war should have received closer scrutiny, both from the public and, in appropriate cases, the Supreme Court which reviewed several of the measures discussed above. This did not happen.

Official police policy on demonstrations, as shown above, tightened significantly after October 7. The overall tone was dictated by the Commissioner, and it was translated to policy on the ground. Arabs and left-wing protestors have been denied permits or faced conditions that would not have been imposed prior to the war (for example date, time, and place restrictions).⁸¹ In a case that drew the most attention thus far, police refused to grant permits to demonstrations in two Arab cities, Um El Fahem and Sakhnin, that would have called for ending the war and a ceasefire. Hadash, the political party organizing the demonstrations, filed a petition to the Supreme Court arguing that the sweeping refusal violates their right of free expression. The police, on their part, argued that there is a risk that the demonstration would include incitement to violence and would lead to an escalation of an already tense situation. Furthermore, it argued that police forces were already strained, and that allocating additional police to secure the demonstrations would create undue hardship on the police, especially in a time of war.

The Court, in a surprising decision, sided with the police. Although it recognized the demonstrators’ right to demonstrate, it held that resource constraints meant that the risk to public safety would be almost certain. Realizing that suppressing free expression, especially of voices critical of the war, was problematic, the Court tried to cabin its decision to the unique circumstances at hand, stating explicitly that the right still existed and that future cases will be examined on a case-by-case basis.⁸² What was surprising in the Court’s decision was that it

⁷⁹See H CJ 4268/24 Association of Civil Rights in Israel v. Minister of Defense, PD (1993) (Isr.) (Sep. 18, 2024).

⁸⁰Patrick S. Roberts et. al., *Decision Biases and Heuristics Among Emergency Managers: Just Like the Public They Manage For?* 49 AM. REV. PUB. ADMIN. 292 (2018).

⁸¹Chen Maanit, *Following a Petition to the High Court, the State will Allow Hadash to Hold a Demonstration Against the War in Tel Aviv*, HAARETZ (Nov. 16, 2023), <https://www.haaretz.co.il/news/law/2023-11-16/ty-article/premium/0000018b-d84e-dffa-edef-fe4e97f50000>, (Heb.).

⁸²H CJ 8007/23 Hadash Party v. Comm’n of Police (unpublished, Nov. 8, 2023) (Isr.).

diverged from previous decisions, which always viewed resource constraints skeptically, siding with freedom of expression.⁸³ Indeed, unlike other cases, where the Court pressed the police to allow a demonstration, even with conditions, here it approved a sweeping refusal.

It seems that the Court, too, was aware of the precedential potential of the decision. In a subsequent case, concerning an anti-war demonstration in Tel Aviv, Judge Amit, who wrote the decision in the previous case, said during oral argument that it's important the demonstration take place so that "we will remove the perception that the Arab sector and that side of the political spectrum don't receive demonstration permits."⁸⁴ Thus, the Court reversed course, and as the war progressed began to return, though not completely, to its pre-war stance.

Not so in other cases, especially when it came to detention and prison conditions. As described above, hundreds of Gazans were detained and arrested once war broke out. Petitions demanding information about where they are being held and by whom were submitted to the Supreme Court. Israel in response argued no such duty to disclose this information exists because petitioners were an NGO and not family members. The Court dismissed the petition, holding that there existed no duty to disclose such information, and, moreover, such an obligation does not even extend to family members during times of war and is matter of discretion, not duty.⁸⁵

Soon thereafter, a similar petition was filed, which also demanded that information about Gaza detainees—persons legally working in Israel or present for medical treatment—be released to NGOs and their families. In addition, petitioners requested that detainees who are held unlawfully be released to the West Bank. The Court dismissed this petition as well, holding that since Israel evacuated the Gaza Strip in 2005, it was no longer holding the territory under belligerent occupation, and hence no correlative international law obligations apply. Consequently, petitioners could not establish the state's duty to provide them with information regarding the location of the Gazan detainees.⁸⁶

What was interesting about both decisions, however, was not the holding that the state had no legal obligation to inform the NGOs or the detainees' families of their whereabouts. The decisions were striking because of what they did not contain – the legal basis on which the detainees were held in the first place. The detainees were not prisoners of war, a status Hamas militants are not entitled to, nor were they Hamas militants who could have been held under Israel's law on the imprisonment of illegal combatants. The detainees were also not suspected of any crime because they were in Israel legally, and thus could not have been held under Israel's criminal laws. What, then, was the legal authority under which their liberty was denied? The inevitable answer is that there was no legal basis to detain these individuals and they were held illegally. The Court, by focusing on whether notice must be given, circumvented the more crucial question regarding the legality of their arrest in the first place. Had it probed that question, it would have had to order their release.

Realizing that the arrests were illegal, the government enacted temporary emergency regulations that applied retroactively. These regulations, passed a month after the war began, legalized the arrests and set a legal path for holding and deporting detainees to Gaza.⁸⁷

A similar fate befell petitions challenging prison crowding and conditions. The petition against the law allowing crowding contrary to previous Supreme Court decisions was summarily rejected. The Court stated that although it was mindful of its previous holdings, during wars the situation is

⁸³See H CJ 153/83 Levi v. Commander of S. Dist. of Police, 38(2) PD 393 (1983) (Isr.).

⁸⁴Chen Maanit, *Following a Petition to the High Court, the State will Allow Hadash to Hold a Demonstration Against the War in Tel Aviv*, HAARETZ (Nov. 16, 2023), <https://www.haaretz.co.il/news/law/2023-11-16/ty-article-premium/0000018b-d84e-dffa-edef-fe4e97f50000>, (Heb.).

⁸⁵H CJ 7439/23 Elwahed v. Israel Def. Forces (unpublished, Oct. 31, 2023) (Isr.).

⁸⁶H CJ 7637/23 Kashta v. Israel Def. Forces (unpublished, Nov. 6, 2023) (Isr.).

⁸⁷See Emergency Regulations (Iron Swords) (Custody and Deportation of Illegal Aliens Residents of the Gaza Strip), 2023, <https://www.gov.il/he/pages/dec1052-2023>.

different, and rights violations must be evaluated accordingly. Moreover, the harm was mitigated because the provision is temporary—the law was set to expire in three months.⁸⁸

As for the petition on deteriorating prison conditions, especially for security prisoners and administrative detainees, namely Palestinians, the State argued that although some conditions indeed declined—for example, access to hot water, walks outside, electricity in cells, meeting with counsel, and non-emergency medical appointments—such derogations were necessary given the new security situation brought about by the war. The State also submitted a classified intelligence report which the Court read *ex parte*. The Court dismissed the petition, mostly on procedural grounds, holding that petitioners, NGOs, failed to support their claims with inmate testimony and a host of other threshold requirements.⁸⁹

It is important to view these legal developments alongside the shifting public attitudes during the war. A series of public opinion polls conducted by the Liberty & Responsibility Institute at Reichman University revealed that the commitment to democracy and human rights has declined since the war began. For example, more Jews, compared with July 2023, preferred going to Jewish mechanics over Arab mechanics in November 2023, a spike from 29% to 47%. The same trend holds for handymen and medical doctors.⁹⁰ In July, 56% of the Jewish population believed that the government needed to do more for equality of Israeli Arabs. In November, this figure dropped to 41%.⁹¹ In July, 67% of respondents believed that freedom of speech should also be guaranteed to people “speaking against the state.” In November, only 54% stuck to that belief.⁹² Similarly, in July, 37% of Jewish citizens believed that civil society organizations that harshly criticize the state should be banned. In November, that figure rose to 47%.⁹³ In July, 45% of Jews thought that the right to vote should be revoked for those who refuse to declare that Israel is the nation state of the Jewish people. In November, 61% held that view.⁹⁴ Finally, in July, only 26% of Israeli citizens thought that they should vote for parties and leaders who offered “fast and efficient” solutions even if they were not fully compatible with democratic principles. During the war, that number rose to 35%.⁹⁵ More recently, in a Pew Research Center survey conducted in March and April 2024, 59% of Israelis believed that social media posts that express sympathy for civilians in Gaza should be censored, and 50% of Israelis believed that posts that criticize the Israeli government’s actions in the war should be censored.⁹⁶

The emerging picture, though tentative, is that both the general public and state institutions, police, prosecution, the Supreme Court, have shifted their positions during the war. The public embraced, or increased its preference for, illiberal policies. State institutions also advanced and reflected these sentiments, as can be evidenced by incitement charges, speech restrictions, and declining detention and prison conditions for Palestinians in Israel.

What, then, explains the mass civic mobilization against the overhaul and the dearth of protests against these and other measures? Below, I suggest three non-mutually exclusive answers, without developing them at length given that at the time of writing, the war is still being fought and any definitive conclusions are likely impossible. The first explanation is that rights limitations, on the

⁸⁸H CJ 7650/23 Ass’n for Civ. Rights in Israel v. Minister of Nat’l Sec. (unpublished, Oct. 30, 2023) (Isr.).

⁸⁹H CJ 7753/23 Ass’n for Civ. Rights in Israel v. Minister of Nat’l Sec. (unpublished, Nov. 23, 2023) (Isr.). It should be added that based on a conversation with one of the petitioner’s attorneys, no inmate was willing to come forward and be named for fear of reprisal by prison guards. However, attorneys representing various inmates signed affidavits confirming the deterioration in conditions.

⁹⁰Liberty & Responsibility (@LibResInst), X (Dec. 21, 2023) (<https://x.com/LibResInst/status/1737805118324560093>).

⁹¹*Id.*

⁹²Liberty & Responsibility (@LibResInst), X (Dec. 20, 2023) <https://x.com/LibResInst/status/1737442734024081503>.

⁹³Liberty & Responsibility (@LibResInst), X (Dec. 19, 2023) <https://x.com/LibResInst/status/1737080347022774488>.

⁹⁴Liberty & Responsibility (@LibResInst), X (Dec. 20, 2023) <https://x.com/LibResInst/status/1737382326013960418>.

⁹⁵Liberty & Responsibility (@LibResInst), X (Dec. 19, 2023) <https://x.com/LibResInst/status/1737019945891004437>.

⁹⁶Maria Smerkovich, Many Israelis say social media content about the Israel-Hamas war should be censored (Pew Research Center, Aug. 26, 2024), <https://www.pewresearch.org/short-reads/2024/08/26/many-israelis-say-social-media-content-about-the-israel-hamas-war-should-be-censored/>.

one hand, and public acquiescence, on the other hand, are not an anomaly which warrants investigation. Indeed, these are to be expected during times of war, where both public willingness and state readiness to curtail human rights is salient. This is undoubtedly true. It remains to be seen whether after the war, public attitudes, court decisions, and law enforcement policies will revert to their October 6 levels. And yet, it seems that deeper explanations are also available.

Another possible explanation is that nine months into the longest protest movement Israel has ever known, and given that the war has drafted many and left others worried and traumatized, protestors have hit a weariness that Richard Thompson Ford has referred to as “protest fatigue.”⁹⁷ As a result of this fatigue, some protestors stopped protesting altogether. Others turned to protesting the government’s failed policy regarding the hostages in Gaza. More generally, the war shifted their attention away from the constitutional overhaul, which was already on the wane. Relatedly, for the protests to continue they would have needed to target the very gatekeepers they called to protect only a few months prior, such as the public prosecution and Attorney General. Thus, their unwavering support of these agents—perhaps now their former allies—stood in the way to fully voicing their criticism.

Of course, this also raises a related question. Given that the gatekeepers were active during the overhaul, often resisting attempts of government aggrandizing and even refusing to represent the government in the Supreme Court, what explains their relative silence during the war? One could argue that since the overhaul was suspended, the various gatekeepers could now revert to their day-to-day functions. This explanation, however, does not account for the fact that the resistance to the overhaul championed the very values that were compromised during the war, and which the gatekeepers were now willing to discard. One possible answer is that resistance to the overhaul lay squarely in the gatekeepers’ comfort zone, because it was a direct attack on the power of the Supreme Court and their power. Thus, they viewed the overhaul not only as an abstract threat to the rule of law, but to their own work, power, and status. Their resistance was emboldened, perhaps rendered possible, by the strong public rejection of the overhaul. But once the measures adopted during the war pertained to other areas, not directly implicating their authority and not generating public mobilization, they could “relax their hand” and defer to rising nationalist sentiments. This explanation suggests, *inter alia*, that resistance to the overhaul was also “tainted” by the gatekeepers’ institutional interests. Once their powers remained intact, violations of the rule of law or human rights either became less important or were more difficult to tackle given the prevailing public and political sentiments that largely embraced these measures.

My third and final explanation suggests we take a critical view of the liberal causes the protest movement championed. It is no accident that many, if not all, of the illiberal shifts during the war affected two groups: Israeli Arabs and Palestinians, and, to a lesser degree, Israeli leftists. The protest movement, which abruptly ended as war erupted, championed liberal values such as the rule of law, separation of powers, and freedom of expression, especially as it pertained to demonstrations. And yet that same movement was largely absent from all the developments described above. What explains this?

My argument is that the key to the protest movement’s success was its “depoliticization.” Of course, the movement was “political” in that it challenged the government’s far reaching political and legal program. But it chose a strategy of “depoliticization” in the values it championed, attempting to present them as “above partisan politics.” The protest movement, although it protested against the government, was careful not to color itself along partisan lines. Thus, for example, politicians, especially those from the opposition, usually did not speak during demonstrations. The leaders were all non-political figures, such as academics, the legal and high-tech sectors, or veteran social activists. Most were not affiliated with a political party or held any official office. As such, the movement could claim that all were welcome because the values it fought for were “universal” and generally applicable to all liberal democracies. So, for example, the

⁹⁷Richard Thompson Ford, *Protest Fatigue*, in *PROTEST AND DISSENT* 161 (Melissa Schwartzberg, ed. 2020).

main argument that the constitutional overhaul would concentrate excessive power in the executive could appeal to people on all sides of the political spectrum who believed in a stable distribution of political power, regardless of their affiliation.

But depoliticization also has costs, as can be seen from post-war developments. Depoliticization often masks real sites of struggle and conflicts over power. By focusing on “neutral” principles such as the rule of law and separation of powers, there was an avoidance of substantive policy disagreements that erupted during the war, for example the status of Israeli Arabs, Israeli policy toward the Palestinians, and the occupation, and the identity of Israel as both a Jewish and democratic state. Moreover, the clash between the supposed consolidation of liberal values embedded in the protest movement, and the seeming discarding of these values when war arrived and confirmed the claim made by Israeli Palestinians that the reform was an internal Israeli Jewish affair and not a true liberalization of the Israeli public sphere. This explains why the gains made by the protest movement quickly diminished during the war, and not only because of the war, because the target of the government’s repressive policies was the very public that was largely excluded or distanced itself from the protest movement. Put differently, the penetration of liberal values might be short term not only because of the usual dynamics of war, but also because the protest movement, in its quest for universality and consensus, decided to bypass real and deep conflicts in Israel society, that it left either unresolved or for a later time.

Another way to conceptualize this development is by asking what counts as the Israeli collective. During the protests, the Israeli collective was viewed as, in principle, comprising all citizens of Israel, Jews and Palestinians alike. True, Israeli Palestinians were not singled out as addressees of the overhaul, nor were the protests tailored to their specific goals and needs. Yet the protests were couched in general language precisely in order to garner support from various segments of Israeli society, including, but not limited to, Israeli Palestinians. Thus, the protests were understood as an “Israeli” example of civic mobilization, despite many internal cleavages. The attack on October 7 and the subsequent war shifted the idea of an Israeli collective, from a civic conception that sought to emphasize all Israeli citizens, to an exclusive nationalist collective of Israeli Jews, even though Israeli Palestinian citizens were also killed by Hamas. According to this controlling narrative, Hamas’s attack did not just target Israel; it targeted the Jewish state. It is thus not surprising that the attack was also framed as the deadliest attack on Jews since the Holocaust.⁹⁸

As a result, the Jewish hegemonic understanding of the Israeli collective reverted to longstanding notions about Israeli Palestinians, viewing them as citizens, but not completely part of the body politic; citizens, but with an asterisk, straddling the divide between Arabs, Israelis, and Palestinians, not completely located in either, and caught in the middle of a national and religious conflict.⁹⁹ Such a conception has long historical roots in Israeli history,¹⁰⁰ but has resurfaced with more vigor after October 07, highlighting the tensions of Israeli Palestinian identity.¹⁰¹ Consequently, this was inevitably reflected in the level of civic mobilization post-October 07. As Israeli Palestinians were the targets of government measures, they could not marshal the

⁹⁸See, e.g., Matthew Lee & Aamer Madhani, *Biden Calls Hamas Attacks the Deadliest Day for Jews Since the Holocaust as US Death Toll Ticks Up*, AP, Oct. 12, 2023, <https://apnews.com/article/israel-hamas-us-biden-blinken-99eb4063edabc80fa1fa198fb0bb020e>; Beth Kean, *The Most Deadly Massacre Against Jews Since the Holocaust*, LA HOLOCAUST MUSEUM, Oct. 23, 2024, <https://www.holocaustmuseumla.org/post/the-most-deadly-massacre-against-jews-since-the-holocaust>.

⁹⁹Of course, this is also partly reflected in Israeli Palestinian self-perception. See, e.g., Muhammad Amara & Izhak Schnell, *Identity Repertoires Among Arabs in Israel*, 30 J. OF ETHNIC AND MIGRATION STUD. 175 (2004); ILAN PELEG AND DOX WAXMAN, *ISRAEL’S PALESTINIANS: THE CONFLICT WITHIN* (2011).

¹⁰⁰See Adam Shinar, *Israel’s External Constitution: Friends, Enemies, and the Constitutional/Administrative Law Distinction*, 57 VA. J. INT’L L. 735 (2018) (distinguishing between Palestinians in the Occupied Territories and Israeli Palestinians, and its implications for defining the collective body politics).

¹⁰¹Anwar Mhajne, *What is it Like to be a Palestinian Israeli after October 7?*, THE NATIONAL NEWS, Mar. 22, 2024, <https://www.thenationalnews.com/opinion/comment/2024/03/22/what-is-it-like-to-be-a-palestinian-israeli-after-october-7/>.

support of the protest movement, which had shifted to viewing them as falling not quite inside of the Israeli collective, or at the very least implicitly questioned their status, even if subconsciously.

This is ironic, as surveys two months into the war revealed Israeli Palestinians' growing identification with the state and its policies. And yet, early on, it was Israeli Jews who feared Israeli Palestinian violence at a higher level than similar fears among the Israeli Palestinian society. Although also apprehensive about Jewish violence, which did not materialize, Israeli Palestinian society turned to self-censorship about the war and expressions of sympathy with Palestinians in Gaza.¹⁰² This was also reflected in surveys among Israeli Palestinian students, showing that 72% of students stated they felt under surveillance and persecution for their activity on social networks, whereas 86% said they experienced a hostile environment online and on campus.¹⁰³

All this is to say that notwithstanding familiar war dynamics and gatekeeper performance, the contrast between pre-war civic mobilization and post-war civic mobilization can also be explained along the shifting lines of the Israeli body politic. From an attempt at a more inclusive, though flawed, collective during the overhaul protests, to a more excluding collective during the war. Thus, war measures that mostly affected Israeli Palestinians, whether directly or indirectly, generated relatively little interest and attention from Jewish Israelis, who in turn did not mobilize around these issues. This is not to say that there has been no civic mobilization since the war, but its central focus has been calling for immediate elections and the release of hostages taken by Hamas. Issues that trigger rule of law and freedom of speech, central to the Overhaul, have been minimized if not almost completely neglected.

D. Conclusion

Between January and October of 2023, Israel experienced unprecedented civic mobilization opposing the government's planned constitutional overhaul. This mobilization came to a standstill once war broke out between Israel and Gaza and plans of reform were temporarily shelved. Although this was to be expected, the almost complete absence of protests was also puzzling, as many of the concerns addressed by the protests still existed. This Article sought to explain this puzzle, suggesting that other factors, in addition to familiar war dynamics, contributed to the relative dearth of civic activity against the government. Specifically, civic mobilization against the overhaul was successful because it intentionally focused on universal values, such as the rule of law, and evaded substantive issues at the core of Israel's constitutional identity perceived as polarizing. During the war, when the government targeted vulnerable groups which were either excluded or distanced themselves from the overhaul protests, leaders of the protest movement felt little need to rally to their cause, even though similar values were implicated in both. Struggles of Israeli Palestinians were deemed largely irrelevant to the overhaul protests, which sought to maintain a neutral approach, consciously neglecting more substantive, hence "polarizing" issues, at the heart of the tension between a democratic and a Jewish state.

The puzzle of civic mobilization, I argued, reflects a deeper divide inside Israel, regarding the contours of the body politic of the Israeli collective. During the overhaul, protest leaders grounded their claims in basic democratic tenets such as the equality of all citizens. Indeed, the promise of complete equality entailed in Israel's Declaration of Independence was frequently marshaled. Paradoxically, the focus on equality and other "neutral" values such as the rule of law generated an aversion to the substantive issues faced by the Israeli Palestinian minority and Palestinians in the

¹⁰²Ephraim Lavie, Muhammad Vad, Esteban Claire, Moran Ditch, Rebecca Meler, & Meir Elran, *Arab-Jewish Relations in the Shadow of the War*, OVERVIEW, Dec. 27, 2023, <https://www.inss.org.il/he/publication/jews-arabs-swords-of-iron/>, (Heb.).

¹⁰³Orly Noy, *Survey: 61% of Arab Students Fear for Their Personal Safety*, LOCAL CALL, Dec. 28, 2023, <https://www.mekomit.co.il/%D7%A1%D7%A7%D7%A8-61-%D7%9E%D7%94%D7%A1%D7%98%D7%95%D7%93%D7%A0%D7%98%D7%99%D7%9D-%D7%94%D7%A2%D7%A8%D7%91%D7%99%D7%9D-%D7%97%D7%95%D7%A9%D7%A9%D7%99%D7%9D-%D7%9C%D7%91%D7%99%D7%98%D7%97%D7%95%D7%A0/>, (Heb.).

Occupied Territories. When the war broke out, the same aversion was maintained, but now with more marked results as the main targets of governmental measures were Israeli Palestinians or Palestinians more generally. Put differently, the war exacerbated the sense of exclusion that was temporarily restrained, albeit in a limited way, during the overhaul protests.

The protests against Israel's constitutional overhaul have been described as an awakening of Israeli liberals. Yet, as this Article sought to demonstrate, the contrast between the two periods of civic mobilization, before and during the war, casts lingering doubts on the possibility of long-term consolidation of liberal values in Israel. Attempts to depoliticize the protests, while perhaps successful in warding off the overhaul and though impressive on their own, have likely failed in instilling deeper, more resilient, liberal values in Israel.

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