Habeas Corpus and the Strategy of "Catch Us If You Can"

How the Israeli Supreme Court Dealt with Palestinian Detention Cases During the Gaza War

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In the opening pages of his 2025 book, *The Rule of Law in Israel: Confronting the Threat to Democracy* (published in Hebrew by Reichman University), retired Supreme Court Justice Yitzhak Zamir offers a pointed disclaimer: "This book discusses only the situation within the State of Israel, and not the situation in the Judea and Samaria area." This omission is not an isolated instance in Zamir's writing. In his weekly *Haaretz* op-eds, where he frequently calls for defending the Supreme Court as the ultimate guardian of Israeli democracy, Zamir maintains a conspicuous silence regarding the Court's adjudication of issues involving Palestinians in the Occupied Territories.

Echoing Zamir's approach, the Israeli Supreme Court has spilled oceans of ink over the last two years, proclaiming its defense of the rule of law. For example, in the name of protecting the rule of law and democracy, the Court, in a series of decisions, ruled that Supreme Court Acting President Judge Yitzhak Amit must be appointed as the Court's permanent President against the Government's wishes (HCJ 1711/24). As the authorities of the permanent Court's President are identical to those of an Acting President, the appointment was primarily necessary as a symbolic victory for the judiciary. Yet, the Court's judges described it as key to ensuring the rule of law.

Rhetoric and Silence

Yet, all this grand rhetoric regarding the rule of law in this and other Court decisions, cannot obscure the grim reality of utter lawlessness reflected in hundreds of Supreme Court decisions over the past two years regarding Palestinians in Gaza. These rulings lack the grand rhetoric and the length of the Court's "saving democracy and the rule of law" judgments. Often spanning a mere two or three pages, this caselaw exposes the way in which Palestinian subjects in the Gaza Strip have been treated and reveals a starkly different meaning for what the rule of law is for Supreme Court judges.

One of the most revealing ways to track the erosion of the rule of law in the Court's caselaw is through examining its jurisprudence in "Habeas Corpus" petitions. Literally translated from Latin as "produce the body," this type of petition requires the state to bring a detainee before a court to justify the legality of their imprisonment.

Originating in medieval English law, the writ of Habeas Corpus established the foundational bedrock of individual liberty against the monarch's unchecked power. To this day, in systems influenced by English law, it is regarded as the most basic tool for the judiciary in ensuring human liberty.

Recognizing the vital role of Habeas Corpus petitions in safeguarding human liberty, one of the first steps of the Israeli Supreme Court, even amidst the turbulence of the War of Independence, was the fortification of the Habeas Corpus decree. In his book, Zamir traces a 1948 judgment in a Habeas Corpus petition as a foundational moment for the rule of law in Israel (HCJ 7/48). In its landmark judgment, the Court ordered the release of a Palestinian suspected of collaborating with the enemy, simply because the detainee had been denied the right to appeal his incarceration. Zamir notes that while the legal defect appeared "marginal" on the surface, the Court, "which

was in its early days and still lacking in reputation and experience, was determined from the very outset to defend the rule of law."

"Catch us if you can"

Contrary to the Court's early days, during the Gaza War, the Court did not stress the importance of the rule of law in Habeas Corpus petitions. Consider the case of Hilal al-Bashiti, a 16-year-old Gazan teenager detained in late June 2025 while standing in a food line near Rafah. Al-Bashiti was seen being taken by IDF soldiers, after which he effectively vanished, and his fate was unknown to his family, as happened with thousands of other Gazans throughout the war.

His family turned to the human rights organization *HaMoked: Center for the Defence of the Individual*, which contacted the IDF. The Israeli military confirmed al-Bashiti was in custody but barred him from meeting with a lawyer. *HaMoked* filed a Habeas Corpus petition to the Supreme Court, and subsequently, the State decided to release al-Bashiti back to Gaza. Consequently, the Court quashed the petition without holding a hearing because it was "moot" in light of Al-Bashiti's release (HCJ 78111-07-25).

Several weeks ago, I met with attorneys from *HaMoked*. One of them, Advocate Ameeneh Qumber, shared a staggering statistic: she has filed over 60 Habeas Corpus petitions on behalf of Gaza detainees after their families contacted *Hamoked*. Yet she has not met a single one of her clients. In every case, the detainees were released before the scheduled hearing, leading the Court to quash the petitions as moot following their release.

A review of dozens of the Court's rulings reveals a clear pattern: the State has used this procedural loop to dodge any substantive judicial review of its wartime detention policy. The Israeli security forces have detained thousands of Palestinians in Gaza during the war—many of whom were never even suspected of militant activity—and held them for varying periods. In the vast majority of these cases, no petition was ever filed. Yet, in those rare instances where families managed to reach human rights organizations and file for Habeas Corpus, the following pattern emerged. The Court would order on a hearing scheduled within a few weeks, only for the security forces to "opt" to release the detainee back to Gaza just days before the court hearing. By promptly quashing these petitions as "moot," the Court has effectively allowed the State to evade any scrutiny over its arrest policy. The fundamental question—whether these detentions were ever justified—has remained unanswered.

Human rights organizations attempted to challenge this detention policy by submitting what is known as "public petitions," which aimed at the general policy rather than an individual case. Yet these petitions fared no better during the war. In these instances, the Court repeatedly granted the State Attorney's requests to postpone the submission of the state's reply, pushing hearings further and further down the road.

In this manner, the state devised a "catch us if you can" strategy that allowed security forces to detain thousands of Palestinians without the legality of their detention policy ever facing genuine judicial scrutiny.

When dealing with public petitions from public interest groups on matters such as the appointment of a Supreme Court President, the Court has acted with the utmost urgency. In those cases, rulings are handed quickly, framed by the dire warning that democracy and the rule of law stand on the brink of collapse.

But when it came to the detention of Palestinians from Gaza, many of whom were not involved in the fighting, the sense of urgency mysteriously evaporated. After all, these are merely human beings—flesh and blood Arabs—rather than the clean, abstract, and beautiful concepts like "Democracy," or "The Rule of Law."

Producing a Body in a Habeas Corpus Petition

Yet, not every Habeas Corpus petition in the last two years ended without the Court producing a human body. Consider the case of Ihab Diab, who vanished from the Gaza Strip in December 2023. In September 2024, the IDF responded to his family's inquiries by stating that "there is no indication that the individual in question was arrested or is being held by our forces." After further efforts by the family to locate

Diab proved fruitless, in May 2025 his brother and wife filed a habeas corpus petition.

In July 2025—a year and a half after his disappearance—the State Attorney's Office informed that Diab was "no longer alive," and the IDF was holding his body. A Military Police investigation into the circumstances of his death in custody was subsequently opened. To explain why the family had been left in the dark for nearly two years, the military informed that it had been "decided to refine the phrasing of the response [...] to avoid providing answers that might convey the wrong message." (HCJ 78757-05-25)

The panel of Supreme Court judges in the Diab case included Judges Ofer Grosskopf, Alex Stein, and Khaled Kabub. Writing for the Court, Judge Kabub explained that the petition had "exhausted itself" and hence had to be quashed. Indeed, as the meaning of *Habeas Corpus* is to "produce the body," in the Diab case, the Court did the job. True, the English judges who envisioned the Habeas Corpus writ intended for a living person to be brought before a court of law to test the legality of their confinement. Yet, Israeli Supreme Court judges have always boasted of developing administrative law far beyond its humble English origins.

The same judges who place petitions regarding the appointment of a Court President at the very heart of the struggle to "save democracy and the rule of law," sounding every alarm bell that the rule of law is in mortal peril, are those who do not flinch in emptying Habeas Corpus petitions of any meaning when it comes to Palestinians. But what, truly, is the "rule of law" when the writs of Habeas Corpus have been stripped of meaning?

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