



## **One Rule, Two Legal Systems:** **Israel's Regime of Laws in the West Bank**

### **Report Summary**

#### **Preface**

This document examines one of the most prominent and disturbing characteristics of the Israeli military rule in the West Bank – the creation and development of an official and institutionalized legal regime of two separate law and court systems, on an ethnic-national basis. The long-standing settlement of the residents of the State of Israel, the occupying power, in the heart of the occupied territory has led to systematic discrimination, which is anchored in legislation and rulings and affects every aspect of the lives of the Palestinian residents of the West Bank.

With the occupation of the West Bank in 1967, military rule was established in the area. The military commander declared himself as the sovereign of the territory and assumed all governmental and legislative authorities. As required under international law, the military commander initially ordered that the law applying to the occupied territories prior to the occupation shall remain in effect – a requirement intended to ensure that a legal void would not be created in the occupied territory. However, through pamphlets and declarations, the military commander has introduced far-reaching changes to the law applying to the West Bank. Among other things, a criminal law system and a military court system were declared.

Ostensibly, the military rule and the laws that it enacted, apply to any person that is found in that territory, including Israelis, whether they are visiting the area or living in it. Yet from the point of view of the Israeli authorities, the affairs of the Jewish inhabitants of the area should be regulated according to Israeli law, as they would if they were living inside Israel and not in the Occupied Territories. As such, the Israeli legislature and the Military Commander

began to apply Israeli law to the settlers, and to exclude them, in practice, from the jurisdiction of the military courts.

In accordance with this approach, and since the Israeli legislature could not apply Israeli law to the Occupied Territories without violating the prohibition on annexation imposed by international law, the Knesset extended Israeli law to the settlers on a personal and extra-territorial basis. Regulations that are extended and amended every few years apply **Israeli criminal law** to the **Jewish residents (even if they are not Israeli) of the West Bank**, even for offenses they committed in that territory. In addition, the Jewish residents of the West Bank are subject to laws pertaining to **entry to Israel, national health insurance, national insurance, taxation, Knesset elections, consumer protection** and more.

In addition and parallel to that, the military commander subjected the settlements and their residents to a long list of Israeli legislative articles in a variety of civil areas, by use of military orders. The two main orders are those arranging the administration of the local Jewish authorities. These orders, together with the regulations for local authorities that they established, created a *de facto* distinction between **two types of communities in the West Bank: Palestinian cities and villages, which are subject to Jordanian law and Israeli military orders, and Jewish local and regional councils, which are subject to Israeli law and enjoy the benefits and budgets granted by Israeli legislation.** This situation created a new legal system, which Prof. Amnon Rubinstein dubbed, already 25 years ago - “enclave-based justice.”

The Israeli High Court of Justice acknowledged the fact that this legal duality contradicts the foundations of modern law, according to which one law must apply to one territory. Despite that, the HCJ accepted the separation of the justice systems in the West Bank, viewing the settlements in the territories as “Israeli islands” to which Israeli law has to be applied. Moreover, the HCJ and other Israeli courts enshrine the separation of the justice systems in the West Bank by applying Israeli law to settlers whenever they deem it possible; for example, in civil disputes between Israelis and Palestinians.

The HCJ has even applied Israel’s Basic Laws, which enshrine human rights, to Israelis – but chose to leave as “requiring review” the question of whether the Basic Laws apply to Palestinians that are in a territory under Israeli control. On occasion, the HCJ applies the Basic

Laws to Palestinians in the territories, within the framework of legal hearings in petitions targetting the decisions and actions of the military commander in the area. However, in these cases, it is done from the viewpoint that the military commander, being part of the Israeli rule, has certain obligations under the Basic Laws, and not from the viewpoint that the Palestinian population has rights by virtue of the Basic Laws.

**Thus, in a gradual manner stretching over four decades, the Israeli legal system has been applied to settlers in the West Bank almost in its entirety, while the Palestinian residents of the same territory remained subjected primarily to the military legal system, which is generally much stricter.** The separation of the laws touches upon almost all areas of life: criminal law, planning and building, freedom of movement, freedom of expression and more.<sup>1</sup>

## Criminal Law

In the criminal sphere, the differences between the two legal systems are extremely clear, and their implications on basic rights are particularly significant. The identity of the suspect or defendant determines which law will apply to them and who will have jurisdiction over them. A Palestinian resident of the West Bank, who committed an offense in that territory, will always stand trial under military law before one of the military courts. Israeli settlers in the West Bank, who can formally be charged under military law, *de facto* stand trial only before the courts inside Israel. In exceptional cases where Israelis were brought to trial before military courts, they were mostly (and since the 1980s – only) Arab citizens or residents of Israel.

The separation between the legal systems manifests itself on several levels. Military law includes a significant number of offenses that do not appear in Israeli legislation, including stone-throwing, assaulting a soldier (which under military law is more severe than a simple assault) and more. It should be emphasized that these are not minor offenses, but rather offenses for which the minimum penalty is five years in prison.

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<sup>1</sup> This summary refers to the first three areas; see the full report for more about other areas.

Even parallel offenses in the two legal systems can be defined differently in each system, and the penalty for an offense is often significantly lower under Israeli law than under military law. Security legislation, for example, stipulates that the penalty for offenses of “attempted solicitation” will be identical to the one established for the offense itself, whereas criminal law stipulates that the penalty for such offenses will be half the penalty established for the main offense. Another example: under Israeli law, the penalty for simple assault is a **two-year prison term** and for assault causing actual damage – a **three-year prison term**; by contrast, military law establishes a **five-year prison term** for simple assault, a **seven-year prison term** for assault causing actual damage and a **ten-year prison term** for assaulting a soldier.

Criminal procedural laws are also markedly different; for example, with regard to detention periods, meeting with an attorney and making the proceedings accessible to suspects, defendants and their families. Israeli law usually reflects a reasonable balance between the public interest in prosecuting and penalizing offenders and the rights of suspects and defendants – a balance that is expressed through procedures intended to ensure due process. Military law lacks many of these procedures and protections, and its impaired proceedings lead to violations of the rights of Palestinian suspects and defendants to liberty, privacy and dignity.

The maximum **detention periods** established by military law are longer than those established by Israeli legislation. As a result, Palestinians are placed in detention for much longer periods than Israelis suspected or accused of committing the same offenses, and they are therefore exposed to a harsh and severe violation of their rights. These matters were discussed in two petitions submitted to the HCJ in 2010: one by the Palestinian Prisoners Office and the other by the Association for Civil Rights in Israel (ACRI), Yesh Din and the Public Committee against Torture in Israel.<sup>2</sup> Following these petitions, the state shortened the detainment periods applying to Palestinians, but there are still great differences between these periods and the ones that apply to Israelis.

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<sup>2</sup> HCJ 3368/10 **Palestinian Prisoners Office v. Minister of Defense** and HCJ 4057/10 **Association for Civil Rights in Israel v. Commander of IDF Forces in the Judea and Samaria Area**.

Despite the fact that the HCJ has ruled long ago that **the right to meet with an attorney** and the right to be represented by this attorney is a basic right, the periods established by security legislation for preventing a Palestinian detainee's meeting with an attorney are substantially longer than those established by Israeli legislation, sometimes even twice or thrice as long. The right to due process and representation is further violated as a result of the fact that many Palestinians who are tried before military courts are held in detention and incarceration facilities within the State of Israel. Consequently, their attorneys – who are usually also Palestinian and need a permit to enter Israel – encounter difficulties in visiting their clients in the incarceration facilities. It should be noted that other than with regard to detention periods, the stringent proceedings established by security legislation are applied to Palestinians in any offense, even if it is a criminal offense that is not security-related in any way.

The distinction between Israelis and Palestinians in the West Bank is particularly severe when it comes to the treatment of **minors**. Two children, an Israeli and a Palestinian, who are accused of the same act, such as stone-throwing, will receive a substantially different treatment by two separate legal systems. The Israeli child will be afforded the wide protections and rights that are granted to minors under Israeli law, which greatly emphasizes the protection of minors. By contrast, the Palestinian child will be granted only limited protections and rights, which are insufficient for ensuring this child's physical and mental wellbeing and do not adequately reflect his or her unique needs as a minor.

For example, under the Israeli Juvenile Law, minors between the ages of 12 and 14 must be brought before a judge within 12 hours of their arrest, and minors over the age of 14 – within 24 hours. Military law, on the other hand, allows the holding of Palestinian minors between the ages of 12 and 14 for a full 24 hours in detention without seeing a judge, and even two days in exceptional cases. Minors over the age of 14 can be held for up to 48 hours in regular cases and an additional 48 hours in exceptional cases. In security offenses, military law allows the holding of minors over the age of 16 for up to four days, and under exceptional circumstances even eight days, without judicial review.

While Israeli minors under the age of 14 are protected from prison sentences by law, Palestinian minors who are 12 and 13 years old are arrested on a regular basis, sometimes even

for periods of several months. Furthermore, Palestinian minors do not have the right to have their parents present during an interrogation, as opposed to Israeli minors, and the law does not require audio or visual documentation of their interrogations. All of these factors provide fertile grounds for wrongful conduct during an interrogation and for violations of the rights of minors, as is often the case according to reports by organizations that deal with the representation of Palestinian minors in the West Bank.

## Planning and Building

In 1976, there were approximately 3,200 Israeli citizens living in the West Bank. Today, there are some 341,000 Israeli citizens in the West Bank (not including East Jerusalem), living in approximately 130 state-recognized settlements and in approximately 100 outposts that were founded without an official permit. Over the years, military legislation has altered the Jordanian Planning Law that applied to the West Bank prior to its occupation and created a dual and separate planning system: for Israelis in the settlements and for Palestinians.

The amendments to the Jordanian law introduced by the military commander have turned the law into **an instrument for restricting Palestinian construction on one hand and an efficient tool for planning construction in Israeli settlements on the other hand**. Under the dual planning system that applies in the West Bank, Israelis enjoy significant representation of their interests in the planning committees, and they are full partners in drafting the planning procedures that pertain to them. Moreover, the settlements themselves are responsible for issuing building permits and supervising construction. By contrast, the Palestinians lack any representation in the planning system that pertains to them and have no influence over outline plans for their communities, which are determined by institutions that are staffed by Israelis. Most of the settlements in the West Bank have detailed and updated master plans, which enable their expansion and the issuance of building permits. By contrast, in most of the Palestinian villages that are under the authority of the Civil Administration, construction is restricted by freezing the planning situation that existed there more than four decades ago.

The enforcement policy concerning building violations and the demolition of structures is much stricter with regards to the Palestinian population. In dozens of settlements and outposts, enforcement actions are not carried out, even in cases where permanent residential structures are being built. By comparison, demolition orders for the Palestinian population are routinely issued for houses, small sanitation structures and even the water-wells that are essential for survival and basic sustenance. Between the years 1987-2013, 12,570 demolition orders were issued for Palestinian structures and 6309 for Israeli structures; in practice, 2445 Palestinian structures were demolished (approximately 20% of all structures for which a demolition order was issued), compared to 524 Israeli structures (approximately 8% of all structures for which a demolition order was issued). In other words, the extent of enforcement toward Palestinians is 2.5 times higher than the extent of enforcement toward Israelis living in settlements.

## Restrictions on Freedom of Movement

Freedom of movement is an essential condition for the realization of most basic rights, and it is therefore considered by Israeli law as a basic and fundamental liberty. Without the opportunity to move freely, an individual faces difficulties in making a living, receiving an education and healthcare services, having a family life and so forth. Yet in the West Bank, a person's ability to move freely is derived from their nationality. For about two decades, the movement of Palestinians in the West Bank has been restricted in a manner that severely infringes upon their ability to live their lives in their land and in their homes. These restrictions, which are manifested in different orders and directives that explicitly apply **only to Palestinians**, include checkpoints, roadblocks, the Separation Fence and movement prohibitions. These directives hinder the residents' movement both between the different areas of the West Bank and within each area itself. By contrast, the movement of Israelis is permitted almost without any restriction throughout most of the West Bank area.

## **Settlements as Closed Military Zones**

In 1997, the military commander in the West Bank published an order declaring all municipal areas of settlements as a “closed military zone” for Palestinians. This order does not apply to Israelis and includes under the term “Israeli” all citizens and residents of Israel, Jews entitled to the right of return and any person who is not a resident of the area and holds a valid entry permit to Israel. By contrast, most of the West Bank area, including Palestinian villages in Areas B and C, is open to the movement of Israelis without any restriction (Israelis are prohibited from entering Area A by order of the military commander).

In recent years, an additional restriction on movement was imposed in vast areas surrounding the settlements to further preclude Palestinian access to settlements. Parallel to the closing of these areas, a procedure was devised to allow Palestinian owners of farmlands that were trapped within this area to enter in order to cultivate their land, contingent on prior coordination with Civil Administration bodies. This arrangement applies only to the landowners, their nuclear family and their employees. Palestinian farmers wishing to access their land are required to prove their ownership of it and to coordinate their entry date with the Civil Administration. Even though these areas were designated as an uninhabited “deterrence zone,” they remain open for the free access of settlers, without any supervision.

## **The Permit Regime**

In 2003, Israel began to implement an extensive and institutionalized separation regime in the “Seam Zone” – the lands trapped between the Separation Fence and the Green Line. These areas were declared a closed zone. While Israelis and tourists have a general permit to stay in these areas, every Palestinian – whether a resident of this area or not – is subject to a rigid and bureaucratic “permit regime” and needs a personal permit, which must be renewed from time to time, or a Seam Zone resident certificate in order to pass through this area, live in it or work there. The result is an additional separation, both physical and legal, between Palestinians and Israelis, as well a segmentation of the living areas of the Palestinian population and the isolation of entire villages. The permit regime has caused an absurd situation, wherein the Palestinians living in enclaves created by the Separation Fence might be considered illegal



residents in their own homes and on their own land. This situation severely violates their basic rights – first and foremost their freedom of movement, their right to earn a living and to a dignified existence and their right to have a family life. As of mid-2012, some 7,500 Palestinians were living in the Seam Zone. When the construction of the Separation Fence ends, this regime will leave approximately 23,000 Palestinians trapped in the area between the Separation Fence and the Green Line.

The permit regime is leading to a systematic expulsion of Palestinian residents from their land in the Seam Zone. Research conducted by OCHA concerning 67 communities in the West Bank found that only 18% of the people who used to cultivate land in the closed area before the construction of the Separation Fence were granted a permit to continue doing so. This means that through the permit regime, Israel has denied access to approximately 80% of the people who had cultivated their land and their families' land in the “Seam Zone.”

### **Restricting Entry to the West Bank**

With the occupation of the West Bank, the Israeli military declared the entire area as a closed zone and decreed that Palestinians who wish to enter this area or to relocate to it shall be required to receive a permit from the military. Approximately 270,000 Palestinians who had lived in the West Bank and Gaza before 1967, but were not present in the area when the military commander conducted a survey of the Palestinian population, found themselves outside of the official population registry, and Israel prevented many of them from returning to the occupied territories under the claim that they were ineligible to apply for residency status. By contrast, the policy guiding the authorities since the occupation of the West Bank has been to allow the free and unlimited passage of Israelis into the West Bank without any need for a special permit, as if Israel and the West Bank was one territorial unit. Indeed, an order published in 1970 stipulated that Israelis wishing to change their place of residence to the West Bank are required to carry a personal permit; but in practice, not one of the hundreds of thousands of settlers who moved to the West Bank over the years was required to carry such a permit. Thus, in practice the West Bank became an area that is highly restricted for Palestinian entry and residence, but relatively free for Israeli entry and residence.

Over the years, the conditions for Palestinian entry into and exit from the territories were tightened. In January 1991, it was established that any resident of the West Bank seeking to enter Israel shall be required to obtain a personal permit. In 1993, Israel imposed a “general closure” on the West Bank, which continues to this day. Passage from Gaza to the West Bank was also restricted and conditioned upon individual permits, which are sparingly issued to pre-decided categories of people, such as merchants, patients who have a serious medical condition and first-degree relatives of patients in critical condition, of deceased persons or of people getting married. In April 2010, the limitations placed by Israel on the realization of Palestinians’ right to live in the West Bank were exacerbated, this time through an order stipulating that any person found in the West Bank without permission from the military commander or Israeli authorities shall be deemed as an infiltrator and face imprisonment, even if this person is a Palestinian who is permanently living in the West Bank. The wording of this order enables its application to both Israelis and Palestinians, but the IDF Spokesperson made it clear that it will not be used against Israelis.

## The Legal Flaw

The reality reflected in this report is as follows: In one territorial unit, and under the same regime, live two populations that are subject to two separate systems of laws and norms. Those belonging to one population enjoy rights and entitlements that are enshrined in law, while those belonging to the other population do not enjoy the same rights and often find themselves subjected to discriminatory laws, which directly violate their rights. Israelis living in the West Bank live their lives, in almost every aspect, like the residents of Israel itself. On the other hand, the Palestinian residents have been living for decades under a military regime, whose laws fail to meet international standards and are inferior, in almost every way, to the law that applies to Israelis in the very same territory. The particular severity of the situation illustrated by this report stems from the fact that it is not a particular or technical discrimination, or individual decisions, but rather **a system that enshrines institutionalized discrimination through legislative and governmental institutions.**

It is important to clarify that the military rule in the West Bank contravenes provisions established by international humanitarian law and human rights laws, in the areas reviewed in this report and in other areas, even without any connection to the existence of two legal systems and the discrimination embedded in them. For example, the detention periods applying to Palestinians in the territories are incompatible, in our opinion, with the international standard – even without comparing them to those applying to Israelis living in the territories. Similarly, the lack of planning for Palestinian villages and the prevention of Palestinian development in Area C violate, in and of themselves, Israel's obligations under international law – even when ignoring the accelerated development of the settlements. Furthermore, some of the violations mentioned in this report would have probably existed even had Palestinians and Israelis been subject to one legal system under the Israeli rule in the territories.

However, the structural discrimination described in the report enhances and exacerbates the violation of the rights of Palestinians, and in some cases it constitutes the cause of the violation. Moreover, the dual and discriminatory legal system is, in itself, a violation of international law, because its very existence contravenes the basic principles of modern law and severely undermines equality and human dignity as moral and legal principles.

The existence of the two separate legal systems constitutes **a clear violation of the principle of equality** and contravenes the prohibition against discrimination, which is enshrined in various conventions of international law and human rights law, including the International Covenant on Civil and Political Rights (1966) and the International Convention on the Elimination of all Forms of Racial Discrimination (1965), which Israel ratified long ago. The assertion that the Palestinian residents of the occupied territories are all deserving of a separate legal system, which extensively violates their rights compared to the Jewish residents of the West Bank, is an assertion that gravely violates not only their right to equality, but also **their right to dignity**. It incorporates a wrongful basic assumption that **they are less worthy of a strict protection of their rights than others**.

Furthermore, the existence of a dual legal regime contravenes the provisions of **international humanitarian law**, and particularly the provisions of the law of belligerent occupation, which impose on an occupying state **the obligation to protect the interests and**

**rights of the original population of the occupied territory**, unless security needs demand otherwise. The Palestinians are defined under international humanitarian law as “protected persons,” entitled to special protections by the foreign occupying power, who is ruling them in a manner that is supposed to be temporary. By contrast, Israelis and foreign citizens are not entitled to such special protections. Favoring the rights and needs of the settlers over the needs of the Palestinians creates a distorted mirror image of one of the most fundamental principles of international humanitarian law.