

RAJA SHEHADEH

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THE  
LAW  
OF THE  
LAND

*Settlements and Land Issues  
Under Israeli Military Occupation*

PASSIA

Palestinian Academic Society for the Study of International Affairs

**RAJA SHEHADEH**

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**Palestinian Academic Society for the Study of International Affairs**

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## INTRODUCTION

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The policy of settling Israelis in the areas occupied in 1967 began in 1968 but it was not until 1978 that a concerted effort was made to find legal solutions to justify massive appropriations of Palestinian lands on the one hand, and to organize the administrative aspects of Jewish settlements and their relationship to Israel on the other.

This coincided with the time when I had finished my legal education and training. I looked for material to read to understand what was happening but found very little. There was also no evidence of a systematic effort to keep up with Israeli legal maneuvers. I began to read the primary material, beginning with the Ottoman Land Code. I read British Mandate and Jordanian precedents interpreting the provisions of this Code. My late father, Aziz, who was a renowned expert on the land law, helped me in finding my way. Then I discovered the military orders. At that time the military authorities were sending copies of these perfunctorily to lawyers. However most of the lawyers paid little attention to them, dismissing them as contrary to international conventions relating to the powers of a military occupier. No collection of orders was published. For the sake of easier reference for our office purposes, my late father asked me to index these orders. This started a stage when I delved into these military legislations and began to realize the immensity of the changes the Israeli military authorities were making to our legal system.

Until 1978 the usual method for acquiring land for the settlements was through expropriation. The High Court case of *Elon Moreh* (HCJ 390/79) effectively ruled this out. And so began the search for a new method for land acquisition.

I remember going to the Land Registry in the late seventies and finding the employees there busy in ante chambers preparing surveys and charts. Only later did I realize that their work was utilized to determine the percentage of the land falling in each category and the registered proportion of each. This information was never made public. It was used to help Israeli planners and legal experts make proposals for the best

method of acquiring land for the settlements. After this survey was completed, the Land Departments were sent circulars restricting the access of the public to the land records. This restriction continues to be in place until today.

From these surveys it was determined that little over a third of the land was fully registered. The rest had other kinds of registration, mainly for fiscal purposes, or was not registered at all. In the landmark Elon Moreh case in 1979, the High Court had already ruled that only seizures of privately owned land could be prevented or reversed by recourse to the Court. This left the majority of the land in the West Bank vulnerable for seizures. The High Court further ruled that it was not prepared to intervene in any disputes over the ownership status of land. The new method for acquiring land that began to be used after 1979 was declaring land as public domain. This was done through issuing declarations by the Custodian of Public Land who is an officer appointed by the military commander under military order 59. Once the custodian issued such a declaration, it became the responsibility of whoever claimed they owned the land to prove their private ownership of it. But this could not be before the local courts, even though until the occupation they had enjoyed exclusive jurisdiction over all matters of land falling within their jurisdiction. Military Order 164 declared that when the military or any of its agents were a party to a case, the local courts did not have jurisdiction to hear the case. Nor was the Israeli High Court willing to hear such cases, as was mentioned above. Jurisdiction over such matters was given to a special military committee, called an objections committee established under Military Order 172. This committee was staffed by Israeli military personnel. In the course of my professional work I had many occasions to appear before this committee and to try different legal arguments. My experience leads me to conclude that winning a case before this committee is very rare, if not impossible. In a 1982 case (Francois Albina vs. The Custodian of Public Property, 16/82) the Committee ruled that I had succeeded in proving that the land in question was privately owned. However, the Committee went on to find that because (in its words) the custodian had acted "in good faith" when he leased the land of my client to the Jewish Agency, then the long-term lease shall be allowed to stand. My argument that the Custodian needed to do no more than check the records of the land registry, and that by not doing so he could not be described as having acted in good faith, was not accepted.

But was there such a category as public land in the local Jordanian law when Israel occupied the West Bank? This is the question that I discuss

in the first article in this collection. In the third article, I survey the other ways in which land was alienated and analyze the legal claims upon which the Israeli military authorities justified these different ways of acquiring land.

Although acquisition of land is the first and most significant requirement for settlement, there were other legal challenges facing the settlement program. Unless it was possible for Israelis to live outside Israel, and still be considered as Israeli citizens entitled to the benefits which residency in Israel avails them, they would be reluctant to move to the settlements. But if Israeli law were to be applied in the Occupied Territories, this would be tantamount to annexation. How then could Israeli law be applied to the Jewish settlements in the West Bank while the land has not been annexed? And how can this be done without availing the Palestinian residents in the same area of the benefits under Israeli law? The methods by which this was done were numerous. These are discussed in the second article in this collection where a comparison is made between the local administration of the settlements and the Palestinian centers of habitation. The administrative aspects of this separation are also discussed in the fifth article in this collection.

Having allocated land for the settlements and created for them a separate and preferential administration distinct from the Palestinian community, it was also necessary to ensure that the Palestinians, who constituted the vast majority of the residents of the area, will not expand spatially and squeeze these settlements and restrict their future growth. To determine this, attention began to be paid to the land use planning. The interest in this area of the law began to be most acute in 1983 and is described in brief in the fourth article in this collection.

The sixth article attempts to provide a general survey of the military orders by classifying them into four legislative stages. Although this survey is not confined to orders dealing with land and settlement, it helps put these in historical perspective. The article also makes the helpful distinction, relevant to the subject of land and settlement, between the different military orders that rendered the Occupied Territories a separate juridical area and those that rendered the territories de facto annexed to Israel. All the other articles in this collection dealt with the officially sanctioned illegality. The



last article provides examples of the unofficial illegalities such as the burning of the land records.

The articles collected here were written over a ten-year period. They were written by a practicing lawyer not an academic. My curiosity about these legal matters was my first motivation. I wanted to understand the Israeli legal maneuvers and claims and their presumed consistency with local law. But if curiosity was the initial incentive the overriding one was an activist objective. The beginning of my professional career as a lawyer coincided with the period of intensive colonizing activity on the part of the Israeli government. It was impossible for me to remain idle. Every time I published another of these articles it was my hope that I may be contributing to the general struggle against the Israeli colonization program.

My own legal challenges by which I tested different arguments enriched my experience and increased my legal understanding. What I learned I tried to include in what I wrote. I have made no attempt to edit or summarize the articles collected here. They are reproduced as they were written at the time. Inevitably there is repetition even though the same material in the later articles is informed by the increased experience. I hope the reader will be tolerant.

It may be difficult for those readers who are not jurists to appreciate that there was a special thrill in pursuing the subjects covered by these articles even though law is often accused of being dry. Unfortunately, the writing style used in these article will not reflect this.

When I began to study the military orders I came upon Order 569, "Concerning the Registration of Special Transactions in Land." It was only much later that I appreciated the significance of this order. Not only had access to land records been denied to the public, the lands which were acquired through the various methods and which became the subject of long leases to settlers and settlement agencies, were registered in a separate department. I had assumed that this department was situated in Beit Eil at the Headquarters of the Civilian Administration. It was much later that I realized, quite by accident, that in fact this department was in Israel at the Israel Lands Authority. This discovery put many things into place for me. It was as though the last piece of the jigsaw puzzle which I had been trying to piece together for a number of years had fallen into place. The ideology regarding the West Bank land which for Israeli extremists ties everything together is simply that the land of "Judea and Samaria," the biblical names

of the West Bank, is Jewish land. The non-Jews who happen to inhabit this area are at best tolerated to continue using the land on which they reside. If they leave the area, then their land becomes "abandoned land" (which is how land of absentees is referred to) and therefore it reverts to the "real" owners-the Jewish people. At the same time, land which the non-Jewish residents could not prove title to, was public land. As such, it was for the exclusive use and benefit of the only recognized public who has the ultimate patrimony over the land, the Jewish people. In Israel of pre-1967, 93% of the land came to be designated as public land and the Israel Land Authority administers it for the benefit and use of the Jewish public. Since the land in the occupied West Bank was subject to the same ideological base as the land in Israel, it was only natural that the ultimate custodian of Jewish land would be that same Israeli authority.

Just as the ideological position was important to tie the whole process together, the Camp David agreement was an important framework that determined the course of the legal developments. It was only six days before the signing of the peace treaty between Israel and Egypt that Military Order 783, establishing five regional councils in the West Bank, was issued. In 1981, the Civil Administration was established confirming the separation in civilian matters between the two groups of residents in the Occupied Territories, the Israeli settlers and Palestinian inhabitants. To the last detail, Israel was preparing for the day when it would be called upon to fulfill its obligations under the Camp David Framework. It was therefore determined to reconcile its obligations under the agreement - as it interpreted them - with its policy of acquiring the majority of the land for the settlements. This objective had been achieved by the time the Madrid peace conference took place.

The mistake of the Palestinian side was to operate under the convenient assumption that because the Palestinians had rejected Camp David, they succeeded in annulling it. In fact what happened was that Israel was left free to implement the main elements of the agreement unilaterally, in accordance with the interpretations it imposed on the terms of that agreement, and unchallenged. What remained was to be able to hand over to a recognized Palestinian authority those aspects of civilian life that had been separated from the rest of the legal and administrative system applicable in the Occupied Territories.

One of the most distinctive characteristics of the Israeli occupation is its legalistic nature. Almost every action taken by Israel has a legal justification from the Israeli point of view. It is impossible to challenge the Israeli occupation and its ways without first looking very carefully at the Israeli arguments. It is not sufficient to dub all the Israeli practices as contrary to one or the other of the international conventions or agreements. Deeper analysis is called for. It has been my belief for a long time now that the Palestinian national movement has neglected the legal challenge and chose not to focus on it. If we are to make progress in our struggle for liberation more attention has to be paid to the legal aspects of our struggle. I hope this collection will help in this focus.

In any form of negotiations with Israel there will inevitably be the need to negotiate Israel's legal maneuvers and find a way to reverse them. This will not be an easy task, Israel's case is well prepared. But we must not be daunted.

This fact along with Israel's success at finding legal justifications to its settlement drive, however spurious these are, does not detract from the fact that Israel's solution for its legal problems is reminiscent of the solution found by the whites in South Africa. The legal system that was put into place there is called apartheid. Unlike the case of Israel, the white South Africans declared openly that they were practicing a policy of racial discrimination. To them the reality of their situation as a minority in a country where the majority were blacks justified a discriminatory racial system. After it was tried for many years in South Africa, apartheid failed. Human nature the world over despises discrimination. Whether it is based on race or religion or any other basis. There are differences between the system now in force in the Occupied Territories and apartheid. But there are also many significant similarities. It is difficult to imagine that a discriminatory system which denies the majority of Palestinians living in the Occupied Territories of their share of the natural resources of their land, can be a viable basis for a lasting peace. It is my hope that this collection will help all those involved in the search for a just peace based on equality and an end to discrimination.

Jerusalem,  
July 1993

## PART I

# The Land Law of Palestine\*

## An Analysis of the Definition of State Lands

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### *Introduction*

I was prompted to write this article by the official announcements, published in the Israeli and the Arab press in Jerusalem on May 22 1979, of the Israeli decision to take control of all *miri* lands in the West Bank on the presumption that this land is state-owned.<sup>1</sup> The latest of these came on May 4, 1980, when it was announced by the Israeli cabinet that the survey of the West Bank carried out to determine the size of state lands had been completed. Judging from previous statements, the official government definition of state lands includes all *miri*, *mawat*, and *matrouk* lands. The falsification of the real definition of the categories of land that exist under the prevailing law, and the exploitation of the scarcity of literature on the subject have prompted me to attempt here to shed some light on this sensitive and highly controversial area of West Bank law. In this article I hope to clarify the categories under which land in the West Bank is classed, focusing on the definition of *miri* land, and to analyse whether or not it is distinguishable from land used for public purposes and commonly known in most countries of the world as state land. I also hope to explain here the origins and evolution of the land law of Palestine, surveying the changes that have affected it under Ottoman, British, Jordanian and Israeli rule.

### *The Land Law Of Palestinian In Historical Perspective*

Two main principles have dominated the land law of Palestine from its very early stages:

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\*. This Article was published in *Journal of Palestine Studies*, winter 1982, Vol. XI, No.2. issue 42.

1. *Al-Fajr* (Jerusalem), May 22, 1979, p. 1.

- a. The conquerors regarded themselves as the true owners of all the conquered lands, and
- b. ownership is limited by use.

The second principle is derived from the *Hadith* - the sacred sayings attributed to the Prophet Muhammad - according to which every individual who leaves uncultivated for three years a piece of land of which he has possession shall lose his rights over the land; and if a third party appears who will cultivate it, this latter shall have a greater right to possess it than the former. These two principles, amongst others, dominated the system of land tenure in Palestine at the time of the original Arab and later Ottoman conquests.<sup>2</sup>

It is not difficult to appreciate that it is not in the interest of the conqueror to apply the first principle very strictly because, firstly, the conqueror needs the cooperation of the original inhabitants and so he cannot, practically speaking, dispossess them completely. Secondly, the land *per se* is of no value to the conqueror since he will never have enough of his own people to cultivate it. What the conquerors were interested in were the dues on the yield from the land and the obligations they could impose on the "lords" of the land, such as contributing a certain number of men as soldiers.

This being so, it was the case with both the original Arab conquerors and the Ottomans to grant to the local inhabitants who embraced Islam land classed as *ushri*, paying tithes amounting to one tenth of the gross yield of the land.

The non-Muslim inhabitants were also sometimes allowed to keep land. This was classed as *kharaji* (tribute-paying land). The owners of these lands paid either a tribute proportional to the gross yield, or a fixed amount which was due as soon as the land was fit for cultivation, whether or not it was actually in cultivation.<sup>3</sup>

The above two classes of land are the origin of the category of land which has now come to be known as *mulk* land, or land held in private

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2. Fredric Goadby and Moses Doukhan, The Land Law of Palestine (Jerusalem: Shoshany Printing Co., 1935), pp. 2,3.

3. *Ibid.*, p.2

ownership. However, in keeping with the first principle mentioned above, the Sultan or Emir, who considered himself the ultimate owner of all the conquered lands, exercised in certain instances his right of seizing *mulk* land. This was especially true in the case of *kharaji* lands when, because of the multiplicity of claims to the right to inherit from the deceased, collection of the tribute became difficult. The Sultan also granted *iqtaa* lands to private individuals for cultivation under the second principle. The grantees would hold the land subject to the liability of being dispossessed if it was not cultivated for three successive years. The grantee of *iqtaa* lands would be given either a right of *mulk* ownership, or a more restricted right to hold the land while the Sultan or Emir retained the ultimate true ownership (or *rakaba* as it was called) of the land.<sup>4</sup>

As a result of the application of the above two principles, most of the lands of Palestine were lands whose ownership (or *rakaba*) was in the hand of the Emir, and hence they were of the class which came to be known as *emirieh* or *miri* lands.

### 1. The Kinds of Tenure Which Existed in Palestine

Under the Ottomans, grants of land were made to military leaders (*sipahis*), as a reward for their services. This military tenure was of two kinds: *ziamet* and *timar*. The holder of a *timar* tenure had to provide in times of war a certain number of armed horsemen proportionate to the amount of revenue. The *ziamet* was the larger fief and had to bring in a revenue five to ten times as high as the *timar*. Both of these tenures were heritable and devolved upon the elder son on the death of the *sipahi*. The *sipahis* had to reside on the land; they farmed part of the fief directly and raised taxes from the peasants who worked the rest.

But this system began to fail; the *sipahis* shirked their military duties and sought to transfer their fiefs into private property. This led the Ottoman government in 1839 to abolish the system of *ziamets* and *timars*. These feudatories were replaced by tax farmers (*multazimeen*) who were supposed to raise from the peasants only a stipulated amount, but in fact enjoyed great power. Their extortionist practices and the abuse of their powers were assisted by the lack of a strong government administration and the

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4. Ibid., p. 3.

non-availability to the peasants of legal redress.<sup>5</sup>

In an attempt to curb their strength, the government replaced the tax farmers (*multazimeen*) by the tax collectors (*muhasileen*). However, when they failed to serve the interest of the state in collecting revenue from the land, the Ottoman government became anxious to devise a system of land tenure which would achieve better results.

## 2. *The Ottoman Land Code*

A code on land was compiled in 1858. The immediate object of this legislation was to tax every piece of land. This purpose was to be achieved by clearly establishing the title to the land by registering its legal owner. The Land Code abolished the system whereby the right of possession to cultivators of land was given in the name of the Sultan through the *sipahis*, and later through the *multazimeen* and *muhasileen*. From now on, land of the *miri* category (which comprised the majority of land in Palestine) was to be acquired by the agent of the government appointed for the purpose.<sup>6</sup> At first, the officials of the *maliya* (Treasury) were entrusted with this task. Later, land registries were established which still to this day are commonly called *tapu* (Turkish for soil). Henceforth, the right of possession was granted directly by the state upon the payment of a sum in advance (*muajele*), called the *tapu* fee. In return, the possessor was granted a title deed bearing the imperial cipher.<sup>7</sup>

Why, after so many years when no written code of land had existed, did the Ottoman government venture to compile one ?

In the early part of the nineteenth century, the influence of the European, especially the French, system of law and government was beginning to be strongly felt among the intelligentsia of the Ottoman Empire. The Ottoman lawmakers were anxious to emulate the French system and so the codification of laws began at that time. The Civil Code (known as the *mejelle*) was also compiled at the same period. Previous to the Land Code, the judges (who were often not conversant with the Arabic language) based their decisions on their knowledge of Islamic law and whatever other statutes were in existence. In these circumstances, there

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5. Charles Issawi, The Economic History of the Middle East (Illinois: University of Chicago Press, 1966), pp. 71, 72.

6. Article 3, Ottoman Land Code. All translations from R.C. Tute, The Ottoman Land Laws (Jerusalem: Greek Orthodox Press, 1927).

7. Tute, *Ottoman Land Laws*, p. 8.

could be no certainty about the state of the law among either the public, the lawyers or the judges. To overcome these difficulties, the *mejelle* was compiled. It also deals with questions pertaining to immovable property and the Land Code.<sup>8</sup>

Both these codes, the Land Code and the *mejelle*, are poorly conceived pieces of legislation. Of the two, the *mejelle* is perhaps the better work. However, despite their inadequacies both codes continue to be applicable in the main on the West Bank today.

### 3. The Categories of Land in Palestine

The Land Code classifies lands into five categories. But it conceives of land as falling into one or the other of the following three main classes.<sup>9</sup>

- a. *Waqf* lands. These are lands which have been dedicated to some pious purpose. Several classes of *waqf* land exist. Where a *waqf* is created, the proprietary right of the grantor is divested and it remains henceforth in the implied ownership of the Almighty. The usufruct alone is applied for the benefit of human beings, and the subject of the dedication becomes inalienable and non-heritable in perpetuity. Dedicating land to a family *waqf* (*waqf dhurri*) insured for the owner all its benefits to himself and his descendants, while his property was protected by the strongest legal and religious sanctions known to Muslim law from seizure by the state or its officers.<sup>10</sup>

The closest equivalent in English law to *waqf* is the "trust," but the two are not by any means identical, the principle of the English trust being that the trustee is the owner of the property entrusted to him while the enjoyment of the property is for beneficiaries designated to enjoy the property according to the terms of the trust. The obvious advantages derived from turning the land into a *waqf* induced many landowners to take this step and consequently a large proportion of land in Palestine was so dedicated. However, later legislation and the distinctions created between

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8. See generally C.A. Hooper, *The Civil Law of Palestine and Trans-Jordan* (Jerusalem, 1933).

9. Tute, p. 1.

10. Goadby and Doukhan, p. 69.



different classes of *waqf* affected the strictness of the principle that no tampering with *waqf* land should be allowed, which lay behind the meaning of *waqf* as explained above.

- b. The second class of land was *mulk* land. The origin of this class of land was the *ushuri* and *kharaji* lands given respectively to the Muslim and non-Muslim inhabitants of the conquered areas. By 1858, the date of the compilation of the Land Code, *mulk* land had been enlarged to include four kinds which were enumerated in Article 2 of the Code. These were, besides the above two kinds, land which comprises sites for houses within towns or villages, and pieces of land of an extent not exceeding half a dunum situated on the confines of towns and villages which can be considered as appurtenant to dwelling houses," and "land separated from *miri* land and made *mulk* in a valid way ..."
- c. The third class comprises the second, fourth and fifth categories of land described by the Code, namely *miri*, *matrouk* and *mawat* land. The common element in these three categories is the fact that the ultimate ownership (or *rakaba*) of all three lies with the state.

To understand the division of land into these categories, it must first be borne in mind that the theory underlying land law was that all land was owned by the Sultan by right of conquest, with the exception of *waqf* and *mulk* land. All the lands owned by the Sultan, comprising arable fields, meadows, summer and winter pasturing grounds, woodland and the like,<sup>11</sup> were termed *miri*. This kind of land lay close to the villages. Lands used for public purposes - such as public highways - and lands falling between several villages and used by all as a common pasture were categorized by the Code as *matrouk*.<sup>12</sup> The word *matrouk* express the conception behind this category, meaning lands which the state has left (*tarakat*), hence *matrouk* for public use.

Finally, "vacant land such as mountains, rocky places, stony fields ... and grazing ground which is not in possession of anyone by title deed, nor assigned *ab antiquo* to the use of inhabitants of a town or village, and lies at such a distance from towns and villages from which a human voice

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11. Article 3, Ottoman Land Code.

12. Article 5, Ottoman Land Code.

cannot be heard at the nearest inhabited place is called dead or *mawat* land." Article 103 of the Land Code, where this definition of *mawat* land appears, continues, "anyone who is in need of such land can, with the leave of the official, plough it up gratuitously and cultivate it on the condition that the ultimate ownership (*rakaba*) shall belong to the Sultan."

Thus, if we conceive of concentric circles with the village as the nucleus, the first circle around the nucleus would consist of lands which are cultivated by the inhabitants, or *miri* lands. This circle may be crisscrossed with radii representing the connecting roads, and the land comprising these would be *matrouk* land. Within this same circle there may be lands dedicated and turned into *waqf*, and there may also be *mulk* lands. If another larger circle is drawn, representing a distance from the nucleus from which a human voice cannot be heard, then all the lands lying beyond the circumference of that circle would be lands falling into the category of *mawat*; those within it would be *miri* lands.

The lands of the third class are those which the Land Code was compiled specifically to deal with. The *mulk* and *waqf* categories were dealt with in the *mejelle* and other special laws. Before the passing of the Land Code, it was easy to convert *miri* land into *mulk* by building on it or cultivating it. The effect of this was to transfer the *rakaba* from the state to the individual. On becoming full owner in this way, the individual was under considerable inducement to pass the land into the *waqf* class by dedication on terms which would ensure all its benefits to himself and his descendants, and protect it from seizure by the state. The effect of this was obviously to deprive the state of very valuable benefits. The Land Code was intended to put a stop to this, and at the same time to bring the cultivators of the lands into direct relation with the state without any intermediaries.<sup>13</sup>

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13. Tute, p. 2.

#### 4. *British Mandate Period*

The above were the legal categories of land in existence when the British Mandate was established in Palestine in 1921. According to Article 46 of the Order-in-Council of 1922,<sup>14</sup> "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman law in force in Palestine on Nov. 1, 1914 ... or any ordinances or regulations as may hereafter be applied or enacted ..." A review of the ordinances enacted during the British Mandate and of the policy with regard to land reveals that, in general terms, the mandatory power, in order to implement the terms of the Mandate which provided for the establishment of a Jewish state in Palestine and hence the division of the land between Arabs and Jews, attempted to establish a clearer division of the land in order to facilitate the exercise of greater control. Hence, from very early on, the government of the Mandate began land survey and settlement of dispute operations. A Land Transfer Ordinance<sup>15</sup> was passed which required a permit to be obtained before land could be transferred. It will be noticed that settlement of dispute operations were begun in areas where Jews were interested in purchasing land, in order that purchasers would have a clear and undisputable title over land. In pursuance of this intention, the *Mawat* Land Ordinance enacted in 1921<sup>16</sup> required anyone who had taken possession of what at any time previous to the issue of this Ordinance had become *mahlul*<sup>17</sup> (or vacant), owing to failure of heirs or non-cultivation, in accordance with the provisions of the Ottoman Land Code, to inform the government within three months of the date of the Ordinance. Also, under the *Mawat* land Ordinance, Article 103 of the Land Code was amended to the effect that anyone who, without obtaining the consent of the Director of Lands, broke up or cultivated any waste land would, contrary to the situation as it existed before the amendments, obtain no right to a title deed for such land and would be liable to be prosecuted for trespass.

The Order-in-Council also introduced a new and hitherto unknown category of land which is, strictly speaking, state or public lands. These were defined in Article 2 of the Order-in-Council of 1922 as, "all lands in

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14. Norman Bentwich, compiler, *Legislation of Palestine, 1918-1925*, Vol. 1 (Alexandria: Printed for the Government of Palestine by W. Morris, Ltd., 1926), p. 1.

15. *Ibid.*, p. 62.

16. *Ibid.*, p. 135.

17. See the definition in the next section, below.

Palestine which are subject to the control of the government of Palestine by virtue of Treaty, Convention, Agreement or Succession and all lands which are or shall be acquired for the public service or otherwise."<sup>18</sup> Article 12 (2) vested in the High Commissioner, in trust for the government of Palestine, all such lands. Public lands included all mines and minerals.<sup>19</sup>

### *5. The Period from Jordanian Rule to the Present Day*

When Jordan took over the control of the West Bank in 1948, the Jordanian military governor issued a military proclamation that all laws existing on May 15, 1948 that were applicable to the West Bank of the Jordan should continue in force until otherwise amended or repealed. Later, when the two Banks were joined together to form the Hashemite Kingdom of Jordan, this proclamation was canonized by the Law Amending the Law of Public Administration.<sup>20</sup> These provisions were later embodied in the constitutions of Jordan that were passed consecutively in 1951 and 1952.<sup>21</sup> A survey and analysis of the land laws passed during the Jordanian rule of the West Bank will be made in the second part of this article.

When Israel occupied the area, a military proclamation was promulgated that all laws which were in force in the area on June 7, 1967 should continue to be in force, to the extent to which they did not contradict with any other proclamation or order made by the military area commander and with the changes necessitated by the occupation of the area by the Israel army.<sup>22</sup> As it has turned out, however, many substantial changes have been made to the land law in sensitive areas.

For example, the military government passed an order making it imperative to obtain the consent of the officer of the Israeli army in charge of the judiciary before any transfer of land could take place.<sup>23</sup> It also made many amendments to the expropriation laws<sup>24</sup> and to laws affecting

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18. *Legislation of Palestine*, Vol. 1.

19. *Ibid.*, Article 19.

20. Subhi Kutub, compiler, *Law of Jordan*, Vol. 3 (Amman: Jordan Bar), p. 9.

21. Constitution of Jordan, 1951 and 1952.

22. *Military Government Order 2*, Vol. 1, 1967 (hereinafter M.G.O. 2).

23. M.G.O. 25. Vol. 1, 1967.

24. M.G.O. 108, Vol. 7, 1967 and M.G.O. 321, Vol. 18, 1967.

water.<sup>25</sup> It vested the lands of all individuals who were not present at the date of the occupation in the hands of the Custodian of Absentee Properties,<sup>26</sup> and most notably suspended all operations of the settlement of disputes over land,<sup>27</sup> which had been continued by Jordan from the point they had reached during the period of the Mandate. The obvious reason for the suspension of settlement operations is to prevent owners from obtaining the chance to prove their title to the land. Furthermore, both locally and internationally, Israel has misrepresented the basic principles of the land law to suit the purposes of the occupation, and has popularized false interpretations of the classes of land. The most widespread of such interpretations is to misrepresent *miri* land as state land, so that when the military authorities expropriate these lands they can claim they are not expropriating land in private ownership.

## The Legal Analysis

### 1. *Is Miri Land State Land ?*

A good model to use for comparative purposes is the theory of English land law. The theoretical basis of English land law is that all land in England is owned by the Crown. A small part is in the Crown's actual occupation, called crownhold. The rest is occupied by tenants holding either directly or indirectly from the Crown. This position can be traced from the Norman conquest. William I regarded the whole of England as his by conquest. To reward his followers and those of the English who submitted to him, he granted and confirmed certain lands to be held of him as overlord. These lands were granted not by way of an out-and-out transfer, but to be held from the Crown upon certain conditions, such as the provision of five armed horsemen to fight for the Crown for forty days in each year, and the like. The maxim, *nulle terre sans seigneur* (no land without a lord) applied. There is no allodial land in English.<sup>28</sup>

The same principle holds in Palestine. The basis of land law in Palestine is almost identical to the English land law. As explained above,

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25. M.G.O. 92, Vol. 6, 1967 and M.G.O. 158, Vol. 8, 1967.

26. M.G.O. 58, Vol. 1, 1967.

27. M.G.O. 291.

28. P.V. Baker, *A Manual of the Law of Real Property* (London: Megarry, Stevens and Sons, Ltd., 4th ed., 1969), pp. 9-11.

the Sultan considered himself the true and only owner of all conquered land, with the exception of land which became *waqf* whose ultimate owner became the Almighty. It was explained above that even *mulk* land could, under certain circumstances, be claimed back by the Sultan. The terminology used to explain this is to say that the *rakaba* (ultimate ownership) lies in the hands of the Sultan while the *tessaruf* (use) is granted to private persons. The Ottoman commentators speak of the *miri* holder (*mutassarif*) as holding land from the state under a "lease." The *mutassarif* can only exercise such rights in regard to leased lands as can be shown to have been accorded to him by the state. He acquires possession by paying the *tapu* fee and a form of tithe or tax of a periodical nature, called *ijara zemin*, which can be thought of as a rent. Every interest in *miri* land has its origin in a *tapu* grant which cannot come into being without a grant issuing out of the *tapu* office which acts on behalf of the ultimate owner, the holder of the *rakaba*, the Sultan.

What started as real and actual ownership by the Sultan of all lands, slowly and necessarily developed to become a mere theoretical reality. Just as in English law Parliament passed laws on land which amended the nature -and increased the possibility - of the variety of tenures and estates without changing the theoretical basis whereby the ultimate ownership of the land is in the Crown, and just as this state of affairs does not now mean that all English land is state land, so it is in Palestine. The course of these developments can be followed by reference primarily to the Ottoman Land Code and then to subsequent British and Jordanian legislation.

Before the passing of the Land Code, the Sultan acted through his "feudal lords". No relationship existed between him and the workers of the land, who had no rights over it except permission to cultivate it. The Land Code organized the nature of the relationship between the *miri* holder and the holder of the *rakaba*, the Sultan. Certain concessions for more rights over land were made.

Previous to the Code, the principle was that *miri* land was cultivable land and that it was an implied term of the grant that it must be kept under cultivation at all times. And this was strictly observed.

In conformity with this principle, the Land Code in its first chapter listed in great detail the restrictions imposed on the right to deal with the soil and the subsoil, what was allowed and what was prohibited. Digging *miri* land to make bricks was prohibited,<sup>29</sup> as was mining and burial of the dead in the land.<sup>30</sup>

This was so because the land was essentially granted for cultivation. The only reason for the Sultan's generosity was his hope of deriving a proportion of the proceeds of the land. If the grantee failed to cultivate, he was causing the Sultan to lose benefits and he must therefore be replaced. The Land Code permitted the making of *tapu* grants of land not intended for cultivation, but intended to be used as pastures, meadows or woodland. It also defined the legitimate causes for keeping the land uncultivated, such as resting it (see articles 20, 24 and 30).<sup>31</sup> Provisions were also made for cases where buildings were erected on the land and trees planted. When this happened, the legal situation resulting was that two kinds of ownership became physically fused into one. The land was theoretically the property of the Sultan, but the accretions were legally the *mulk* property of their possessor. The category of quasi-*mulk* was thus created.<sup>32</sup>

However, these changes left intact the original principle that if land was left uncultivated without legal excuse for more than three years, then it escheated to the Sultan. Such land became *mahlul* land.<sup>33</sup> This category can be explained linguistically in the following manner: when the land was still under cultivation and therefore *miri*, a certain tie or nexus existed between the Sultan and the *mutassarif*. This tie was loosened and severed (in Turkish, *mahlul*) when the *mutassarif* failed to cultivate it. The land therefore became known as *mahlul* land. Such lands, according to the Code, were subject to the right of *tapu* (*mustaheki tapu*), which meant that the Sultan was not entirely free to grant them to any person he chose, but was restricted by the provisions of the Code which specified that certain persons had preferential rights to obtain a grant by *tapu* of the land.

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29. Article 12, Ottoman Land Code.

30. Article 33, Ottoman Land Code.

31. Ottoman Land Code.

32. See Tute, *op. cit.*, commentary on Article 25.

33. See generally Book One, Chapter IV, Ottoman Land Code.

In Book one, chapter two of the Code, the transfer of *miri* land is dealt with. Before the Code, the principle that *miri* holding was personal and could not therefore be transferred was observed.<sup>34</sup> The Code now conferred upon *miri* holders a legal right of disposition *inter vivos* with leave of the land registry (*dafter khani*), which was given in pursuance of a special formality known as *takhrir*. This was a declaration made before the official by both parties to the transaction.<sup>35</sup> Any disposition of *miri* interest was, of course, limited to the *tessaruf* (use) of the land; it could not affect the *rakaba*, which remained in the Sultan. The right transferred was only the limited right of the holder. Indicative of this basis of disposition is the word used to describe it. The transaction is not called a sale (*bey*), but *feragh* (transfer), and continues to be so called to this day. Dispositions of *mulk* properties, however, are called sale (*bey*).<sup>36</sup>

These are some of the changes that were brought about by the land Code. The pattern is clear. While the theoretical basis was preserved, more rights over the land were conferred and others were defined. This trend was continued by the mandatory and the Jordanian legislation. However, the Land Code continues to be in force to this day. It was amended but it was not repealed, and those amendments preserved its theoretical foundations intact. The position today, as far as the rights of a *miri* holder are concerned are spelled out in Jordanian Law No. 49 of 1953.<sup>37</sup> the Law of Transfer of Immovable Property. Article 6 of this law provides that, "the possessor of a *miri* land may sell the land, lease it, rent it, mortgage it, plant it and use what grows in it without planting, cut down the trees and vines growing on it. Demolish all structures on it, use it as a pasture or for plantation erection it houses, shops, factories or any other structure he may need for his purposes". The effect of this is to allow the holder of *miri* land all possible uses of it. But although this is the case, practical differences do still remain between *miri* ownership and ownership of other kinds of land. These have to do with the laws that govern the succession of each upon the death of the owner, and the laws that apply to the proving of title in the case of lands over which the settlement of disputes has not been completed.

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34. Goadby and Doukhan, *op. cit.*, p. 137.

35. Article 40, Ottoman Land Code.

36. Goadby and Doukhan, *op. cit.*, p. 138.

37. Law of Transfer of Immovable Property, *Official Gazette*, Vol. 2. Law No. 49 (Amman. 1953). p. 224.



From what has been said above, it is clear that *miri* land is not state land. Nor, by the same token, is *matrouk* land or *mawat* land although the state is in theory, ultimately responsible for these lands. *Matrouk* land is land left for public use such as the building of roads, the maintenance and upkeep of which are the responsibility of the state. In the case of *mawat* this responsibility consists of ensuring that no illegal use is made of the lands - such as starting fires. This is imperative because in some cases these lands are not in the private possession of any citizen. And whereas in 1922, the date of the passing of the British Order-in-Council referred to above, all land in Palestine fell under one or the other of these five categories,<sup>38</sup> no "state land" was in existence at that time.

## 2. State Land

Having shown that *miri*, *mawat*, and *matrouk* land are not state land. The next question that must be dealt with is whether or not a category of land called state land in the strict sense exists in Palestine today.

Here, once again, reference to English land law is useful. In England a category of land called crownhold exists. This is the land in the actual ownership of the Crown and which is used for its own specific purposes.<sup>39</sup> In the same sense and to the extent that crownholds are those lands owned and held by the Crown, or the state, a category of land has come into being as a result of British legislation which is the category of state land.

It is perhaps more accurate to assume that such lands were always in existence long before the Mandate, being lands in the actual possession of the Sultan or his government and which were not the subject of any grant. However, the British, in their attempt to establish greater order and control over the system of land tenure, spelled them out in the legislation and called them "public lands" in the 1922 Order-in-Council. To this extent they created a new category of land. Article 2 of the Order-in-Council defined public lands as 'all lands in Palestine which are subject to the control of the government of Palestine by virtue of Treaty, Convention, Agreement or Succession and all lands which are or shall be acquired for the public services or otherwise.'

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38. Article 1 of the Ottoman Land Code states: "Land in the Ottoman Empire is divided into classes as follows: I. *Mulk* Land, that is, land possessed in full ownership; II. *Miri* land; III. *Mawquf* land; IV. *Matrouk* land; V. *Mawat* Land."

39. Baker, *op. cit.*, p. 587.

It is apparent from the definition that public lands are restricted to lands which are subject to the control of the government and used in execution of its purposes, such as the erection of government houses, etc. They do not include all land which is not the subject of a grant to the public, and therefore exclude *miri*, *mawat*, and *matrouk* lands whose *rakaba* are in the Sultan, but upon which not actual control is exercised by the Sultan. The definition includes lands which are to be acquired for the public service, by expropriation, for example. The High Commissioner was vested with all rights in or in relation to such public lands in trust for the government of Palestine.<sup>40</sup> The place of the Sultan as the ultimate owner of the land (the holder of the *rakaba*) was necessarily transferred to the High Commissioner who came to replace him and who inherited the Sultan's ultimate theoretical ownership of all the lands of Palestine.

### 3. *The Changes Made to Miri Holdings during the Period of Hashemite Rule*

Although several laws were passed during the Jordanian period amending the land laws that existed prior to Jordanian control of the West Bank, no changes were made effecting the fundamental theory upon which the land law was based. In Israel, on the other hand, a land law was passed in 1969 which put everything on a different basis.

Among the laws passed during the Jordanian regime was law No. 41 of 1953,<sup>41</sup> which permitted the change of the category of land from *miri* to *mulk*. The effect of this law was to change all *miri* lands falling within municipal boundaries from *miri* and *mulk*. The justification behind this change was to eliminate certain constraints placed on lands of the *miri* kind which were found to be restrictive and outdated (for example, *miri* lands could not be the subject of a will). Article 2 of the Law gives the holder of *miri* lands who wishes to make the land the subject of *waqf* the right to submit a petition to the Council of Ministers, to change the land into *mulk*. The necessity of obtaining the permission of the Council of Ministers, who could be considered as the successors of the Sultan,

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40. *Ibid.*, p. 7.

41. Law Changing *Miri* Land to *Mulk*, *Official Gazette*, Vol. 3, Law No. 41 (Amman, 1953), p. 234.

emphasizes the continuation of the theoretical basis of the land law, whereby the *rakaba* of *miri* lands was held by the Sultan.

#### 4. *State Land in Jordanian Legislation*

In 1953, the Law of the Administration and Vesting of State Land and Properties was passed.<sup>42</sup> It vested in the Director of the Land and Survey Department all power to administer state land and properties. He could lease or grant all properties owned by the government, provided that, in cases involving properties whose rent exceeded a certain limit, the recommendation of the Council of Ministers be first given. This law was superseded by the law of 1965 discussed below.

The term "state lands" is defined in two Jordanian laws. The first was passed in 1961,<sup>43</sup> and deals with the protection of state lands and properties. The other, passed in 1956,<sup>44</sup> deals with the administration of state properties. The definition given in the first law is in the following terms: state lands and properties are all immovable properties registered in the name of the Treasury as principal or on behalf of those having an interest therein, or registered in the registry of *mahlul* lands and any other lands or properties of the state. They include *mawat* lands, but not forested land, the protection of which is vested in the forestry department.

The law of 1965 defines state property as all immovable property which the state uses or owns according to the laws in force. The Director of the land and Survey Department is vested, by virtue of Article 3, with the duty of administering all state lands and properties.

Jordan continue with the policy of the mandatory power to settle disputes over land and to issue final indisputable certificates of title. However, with the limited means at the disposal of the Jordanian government, the process took a very long time.

In the twenties, thirties and forties, the main source of income for the inhabitants of this area was agriculture. Migration was not yet common,

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42. Law of the Administration and Vesting of State Land and Properties, *Official Gazette* (Amman, 1953), p. 1130.

43. State Land Law of 1961, *Official Gazette* (Amman, 1961).

44. State Land Law of 1965, *Official Gazette* (Amman, 1965).

and the land was extensively cultivated. Those who were not fortunate enough to own land for cultivation close to the village had to travel for miles by donkey to reach the land they owned and plant it. By the fifties and early sixties, however, conditions had changed. Migration and dispersion of the population resulted in a reduction in the number of people working on the land. As a result, much land was going to ruin and areas previously green with vineyards and other trees became barren.

In many cases, members of the older generation still survived and they could point out which land belonged to which family. But in their view, land not in cultivation and in ruin was of no value. Furthermore, to complete the survey of land and its settlement, every plot had to be defined by clear borders and registered in the name of an owner. To find out to whom the land belonged, the settlement officers had to ask the villagers. When they were dealing with lands far away from the village and now in a bad condition, the villagers were not interested in registering this land, which they considered worthless, in their name. They were anxious to avoid paying tax on land from which they derived no income. When the settlement officers suggested that this land be cited as *muattalah*, or *outlieh*,<sup>45</sup> that is, land which is out of use, the villagers agreed.

Later, when the final schedules of right were made, these lands were registered in the name of the Treasury. With a quantity of lands now registered in the name of the state, there was a need to pass laws for the protection of these and other lands. The percentage of the lands actually registered in the name of the Treasury as a result of the settlement operations (from what I could gather from interviewing people who had worked as Jordanian settlement officers) is not very large.

The 1961 law created a special court to investigate cases of trespass on land. It was intended to provide for the protection of the lands registered in the name of the state and lands without a registered owner (obviously in areas where settlement operations had not been completed). That is why *mawat* land was included in the definition of state lands in that particular instance. The definition of state land referred to above in the 1965 law,

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45. This is abundantly clear from an examination of survey maps drawn prior to the completion of settlement of claims.

however, does not include *mawat* land. Had the basic definition of state land recognized by Jordanian law been that which appeared in the preamble to the 1961 law, the later law of 1965 which deals with the subject more generally would either have referred to the earlier definition or repeated it in similar terms. This, however, is not the case. Indeed, the preamble to the 1961 law states that, "for the purpose of this law, the definition of state land is as follows ..."

It is, therefore, safe to assume that *mawat* and *mahlul* lands are not generally to be considered as state lands, and that their inclusion in one instance in the definition of state land was to achieve the special purposes for which the law was passed.

It is important also to note that, consistent with the theoretical basis by virtue of which ownership of all lands always exists with the state, the law of 1965 does not say that the minister may sell state land, but only that he may lease or grant it. The idea is that since the ownership of all lands, including state land, is in the hands of the state, they cannot be sold. If the law had provided that they could be sold, this would have been a violation of its theoretical basis.

### *5. Development during the Period of the Israeli Occupation*

The Israeli military government has promulgated several military orders affecting the sale of immovable property.<sup>46</sup> Although none of these orders affects the theoretical basis or the classification of lands according to the law existing before the occupation, they have been designed to facilitate purchase of land by Israelis, to reduce public scrutiny of the expropriation of lands by the state for public purposes, and to deprive the courts and civil tribunals of their role in the process of expropriation. The Israeli authorities also passed military proclamation No. 811 which has the sole purpose of validating land purchases made by virtue of irrevocable powers of attorney which, except for this order (which extended the validity of these powers of attorney to ten years), would have become void because the period of validity under Jordanian law is only five years.

However, perhaps the most important proclamation was order No. 291 which put an end to the process of settlement of land claims. Despite

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46. The total number of Israeli military proclamations, on all subjects, issued by the date of writing this article was 835.

requests by some local inhabitants that the process be continued, at least in cases where it was at the last stage, with all the work complete except publication of the final schedule of rights (e.g., the case of the lands of the village near Ramallah called Batunia), the military authorities have refused to respond. The obvious reason for this is that after the settlement of claims, when people are given the chance to declare the land in their possession and prove their title to it, the land becomes registered in their names and their title is indisputable. This state of affairs does not suit the purposes of the occupation which would prefer ambiguity of registration of title and vagueness in the law in order to be able to minimize the criticism made of its expansionist policies. It is more palatable, the Israeli government seems to believe, for the people outside to be told that private land is not being interfered with, and that only "state" land is used for building settlements.

### CONCLUSION

I have attempted to show how the first main legislation on land in Palestine, the Ottoman Land Code, conceived of all land in Palestine as falling into one of five categories. If the land was neither *mulk* nor *waqf*, but cultivable lands and pastures close to the village, then it was *miri* land. Land left for public use (for building roads, etc.,) was *matrouk* land, and all other land falling about a mile and a half away from the village (as Article 103 of the Land Code puts it)<sup>47</sup> was *mawat* land. In this class were included all the lands that were not cultivated, and all mountainous areas far from inhabited areas and which were not in use. All land in Palestine fell into one or the other of these five categories. I have tried to show that none of these categories qualifies to be defined as state land in the sense commonly understood today.

As explained, the new class of land - state land - was created by the Order-in-Council of 1922. Subsequent Jordanian legislation on this subject was surveyed above. I analysed how this class only included the very restricted amount of land in the actual occupation or use of the state and its organs, and that it did not include the residue of all unused lands.

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47. *Mawat* land is also defined in Article 6, Ottoman Land Code; and Article 1270, Civil Code (*Mejelle*) found in G.A. Hooper, *op. cit.*, Vol. 1, p.328.

The unused land which is neither *waqf* nor *mulk* land is either *miri*, or if left for public use, *matrouk*. If it falls under none of these categories (the land in uninhabited rocky, mountainous areas, forests or deserted places, etc.), it is *mawat* land which, though not in any private ownership, is not state land.

The situation of the West Bank is that of occupation by one country of the lands of another. The interests of the occupying state are diametrically opposed to the interests of the occupied. International law protects the land of occupied territories from confiscation by the occupier, and prevents the occupying state from transferring its population into the occupied lands. Israel is, however, contravening international law, making the claim, which has gone unchallenged, that the land used to build settlements is not private, but state land.

I have analysed why this claim is false. Of course, even if it were otherwise, Israel as an occupying state has no right to take even state lands for the purpose of building settlements, or for any other purpose which falls short of what is required for strict security purposes.

## PART II

# The Legal System of the Israeli Settlements in the West Bank\*

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### *Introduction*

Much has been written about the legal history of Palestine and the status of the occupied West Bank. Many Israelis and apologists for Israel have attempted to interpret that history so as to justify the Israeli military presence and the military authority's extensive amendments of the laws existing there.

It is not my purpose here to add to that literature. I would, however, like to emphasize from the start that even by the standards set up by the Israeli High Court of Justice and the recent publication of the Israeli section of the ICJ, *the Rule of Law in the Areas Administered by Israel*, the extensive legislation on settlements which is the subject of this study cannot be justified.

An interesting analysis of the legal status of the West Bank was made by Dr. Allan Gerson in his book Israel, The West Bank and International Law. The conclusion reached by Dr. Gerson is that the West Bank was under tutelage or in trust to the mandatory for the benefit of the inhabitants of the territory; and even though, as claimed by Israel, Jordan may not have been the legitimate sovereign of the West Bank before 1967, Israel derived from that fact no proper claim of sovereignty. Such sovereignty remains with the Palestinians. However, although the Palestinians possess sovereignty over the territories, Dr. Gerson argues, they have never effectuated their sovereign power so as to establish governmental structures and laws which Israel must maintain in existence

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governmental structures and laws which Israel must maintain in existence pending Palestinian exercise of sovereignty at the termination of the occupation. Thus, in Gerson's view, Israel "would not be barred from implementing any changes in the existing laws or institutions *provided such amendments were in the best interests of the inhabitants.*" (My emphasis). I do not agree with Dr. Gerson's analysis. However, even if we accept this analysis, the recent military orders affecting the settlements cannot be justified.

Israel has already established more than 80 civilian settlements in the occupied West Bank of Jordan. These have now been granted their own legal structure which is separate and distinct from that of the other Arab population centres in the region. They also have their own court system. In military order #892, the military commander of the West Bank has proclaimed that "the Area commander shall determine the jurisdiction of these courts, the law which they shall apply, their constitution as well as any other necessary matter for the proper administration of these courts" (art. 2b). The settlements have also been given their own defence system.

This article is divided into two parts: in the first a comparison is made between the Jordanian laws as amended that are applicable to the local government units of the Arab populated centres, namely the villages and municipalities, and the military orders and the regulations made by virtue of these orders applicable to the regional and local councils of the Jewish settlements. The settlement courts and defence system are also discussed in detail in this part.

In the second part I discuss, in the light of the orders and regulations passed by the military government of the West Bank which I have been able to obtain, the manner in which settlements are administered. Next I discuss the significance of the policy of having the settlements administered by regional and local councils instead of the other units of local government available under the Jordanian law applicable in the territories. Finally I discuss the significance of the timing of the proclamations of these military orders coming after 13 years of settlement activity characterized by few legislative enactments on the subject. I also attempt, in the second part, to put this legislation in historical perspective and to show how the military government in its recent enactments, and in its policy towards the Jewish and Arab population in the West Bank, is being guided by the policies of the British government of the mandate which ruled over Palestine before the establishment of the state of Israel.

It is not my intention to discuss in this article the question of the legality of the settlements under International Law because this has been dealt with adequately in other places (see for example ICJ Review #19, December 1977, p. 27). I do, however, intend to consider from the outset the extent to which the military government legislation concerning Jewish settlements is consistent with the alleged scope and justification for military government legislation, as set out in the recent publication *The Rule of Law in the Areas Administered by Israel* attributed to the Israeli National Section of the International Commission of Jurists.

The anonymous authors of that publication in the chapter on the legislation of the Regional Commander write:

*"Under International Law, the Regional Commander is empowered to determine obligatory norms of conduct in matters of security, public order and the general welfare of the local population. The exercise of such authority involves a certain latitude in amending existing local law."*

They then go on to quote from the majority decision of the High Court of Justice in the case of the Christian Society for the Holy Places v. The Minister of Defence:

*"... On inquiring whether some enactment of an occupying power is consonant with article 43 of the Convention, great importance attaches to the question of the legislator's motive. Did he legislate to forward his own interest or out of a desire to serve the well-being of the civilian population, "la vie publique" of which article 43 speaks."*

The examples the authors choose to indicate to the reader the "selectivity of the military government in amending local law" do not include the legislation (which was in force at the time of the publication of the booklet) affecting the settlements. This legislation clearly goes beyond the scope which the learned authors describe and cannot be justified by the arguments they put forward.

Despite the large quantity of these orders and the fact that they clearly exceed even the scope which the authors of the booklet posit and which can neither be justified by the precedents of the Israeli High Court

of Justice nor the scholars of international law whose works they quote the authors reach the conclusion that:

*"the law in force in Judea and Samaria (the West Bank) when Israel first took over the administration thereof, has remained in effect . . . but, in view of the many social and economic developments occurring in the Region, there was an urgent need to amend existing legislation and adapt it to changing circumstances. In doing so, Israel has acted in a lawful manner in accordance with International Law."*

The authors of the publication in question conclude the first paragraph quoted above about the power of the regional commander to amend existing local law, by stating that:

*"needless to say, the publication and circulation of all enactments by the regional commander is a condition sine qua non for the exercise of this power."*

They refute the accusation made in *The West Bank and the Rule of Law*, that :

*"the military orders are not available to the public (and that) some regulations affecting specific groups of people in the society are distributed only to those with whom they deal. Lawyers are not provided with them."*

They do this by referring to the bound volumes of the collected orders which appear long after the orders are issued as an official gazette. In fact these bound volumes do not qualify to be considered as a gazette because, amongst other things, they do not contain all official announcements and notices such as those for example that are made by the office of the Registrar of Companies, they are not made available to the general public and are not published at regular intervals. They go on to say that :

*"further, in order to bring the contents of an enactment to the attention of the local residents as soon as possible, every enactment is published individually, in Hebrew and Arabic, in large quantities. It is then immediately distributed in the Region free of charge to all those persons and bodies whose names appear on a list..." (My emphasis).*

After inquiring from those persons and bodies whose names are mentioned as being on the list, I have learned that some do not get any of the military orders and *none* get all of them.

But this unavailability of military orders is not only true of those orders that are published in between the dates of the publication of what is referred to as a gazette. Volume 45 of the collected orders which was published on September 24, 1980 includes orders #781 to #805, i.e. it includes order #783 but does not include those regulations on Regional Councils made by virtue thereof. Article 149 of the Basic Regulations passed by virtue of order 892 which is neither published in a bound volume nor has been distributed, states that these regulations affecting settlements shall be published as follows :

- 1) By posting them on the notice board in the offices of the Council (i.e. the Council of the settlement).
- 2) In the collection of the council's regulations.

Of course the general Arab public has no access to the offices of the settlements' councils, nor to its collection of regulations, which means that this category of legislation will be unavailable to the general Arab public. It also means that whenever the General Commander of the West Bank prefers that a certain order be immune from the scrutiny of the Arab public, he can call it a regulation and declare that it be published in the manner mentioned above.

The author of this article has therefore been unable to see all the orders referred to in this paper. They are not in the last published volume of the collected orders (referred to as the gazette), nor in the possession of the people or bodies listed in the booklet to whom it was claimed that all the military orders are distributed.

I was fortunate to have access to some of the orders affecting the settlements and these were only available in Hebrew (they do not seem to have been translated into Arabic). My request made to the authorities last July and repeated in October to obtain the rest has not been granted.

This limitation in the available sources has meant that some gaps remain in this study, such as in the definition of the regional councils and the relationship between this unit and the smaller unit, the local council.

Within this limitation of primary sources mentioned above, I have endeavored to analyze the legislation applicable to the Jewish settlements in the West Bank and to put it in historic perspective.

## ***Part I: Comparison between Arab Municipalities and Israeli Councils***

Prior to March 25, 1979 the military orders pertaining to Jewish settlements on the West Bank consisted of a small number of orders declaring the creation of what the orders called "religious councils" for the administration of specific settlements such as order number 561 of 1974 for the administration of Kiryat Arba settlement. This order states that "the settlement shall be administered in accordance with administration principles which the military commander shall declare by internal regulations." However, these regulations to my knowledge have never been made available to the public.

The most important post-1979 orders passed by the military government of the West Bank on the subject of settlements are order 783 of March 25, 1979 and order 892 of March 1, 1981. The former introduced the local government unit, the regional council. Without defining what a regional council is, the order declared that all the settlements listed in the appendix to that order are to be considered regional councils. As to the manner in which a regional council is to be administered, article 2(a) of the order stated that it shall be in accordance with the manner in which the area commander shall decide in regulations. I have to date been unsuccessful in obtaining copies of these regulations despite several applications to the authorities for them.

It is worth mentioning here that subsection (b) of article 2 which was subsequently repealed by order 806 of September 30, 1970 stated that

*"no regulation passed by virtue of the above (i.e. article 2(a)) shall diminish from any law or security regulation unless specifically so stated (or unless stated clearly in any other order or regulation)."*

The second major legislation on the settlements is order #892 on the administration of local councils dated March 1, 1981. By virtue of article 2(a) of this order regulations were passed setting out the rules for the administration of local councils. The order lists the following as the local councils to which the order applies: Alkanah, Ariel, Ma'aleh Adomim, Ma'aleh Epraim, and Kiryat Arba. The first council administering these Local Councils was appointed by the "person responsible" who is appointed by the military commander and who is responsible to him. Thereafter every resident of the local council over the age of 18 is eligible to vote and to be elected. It is worth mentioning here that there is no mention in the order as to how local councils may be created. The list of existing councils can only be enlarged by a new proclamation made by the military commander amending the above order. This means that even if an Arab village or municipality should wish to be turned into a local council there is no mechanism whereby this can be done.

What follows is a comparison between the provisions of these regulations and the Jordanian Municipalities law of 1955, as amended, i.e. the law which applies to the Arab municipalities in the West Bank.

### *A. The Jordanian municipality law and the Regulations for the administration of Local Councils*

It is important to point out, before beginning the comparison between the Jordanian law on the municipalities and the order on the local councils, that all the powers vested by the Jordanian law in the King, the Council of Ministers and the Ministers of the Interior and Finance have been vested by virtue of military orders 194 and 236 in the hands of the "person responsible" who is appointed by the Commander of the West Bank. As will be seen later, the military commander also appoints a "person responsible" who has certain powers according to the Regulations applicable to local councils (hereafter The Regulations).

It will become clear from the survey below that Jordanian law has vested ultimate authority in many areas affecting municipalities in government ministers. As these powers are now enjoyed by the "person responsible" who is appointed by and serves the Military Government which

is responsible for the creation of the settlements on the West Bank, it is to be expected that he will use his power to ensure that the growth and development of the municipalities does not jeopardize that of the settlements. In practice he uses his authority whenever possible to limit and discourage the growth of these Arab centres. A recent example of this is the prohibition on municipalities without an approved town planning scheme to issue building permits and the transfer of this power to the Higher Town Planning Council, which is constituted exclusively of Israeli officials.

All this is contrary, of course, to how his counterpart, the persons responsible for the 'local councils', acts in relation to these councils whose establishment and development is the policy of the government he serves. Unlike the Arab inhabitants, the Jewish settlers have direct access to the persons responsible, either through fellow settlers who work in the Military Headquarters or through friends. They are therefore able to urge that the orders and decisions taken concerning the Arab centres and the Jewish local councils facilitate the development of the latter and restrict the growth of the former<sup>1</sup>.

When studying the Jordanian municipality law (hereafter the Jordanian law), and the regulations for the purpose of making a comparison between them, the first thing that strikes the reader is the length of the regulations as compared with the Jordanian law. The regulations consist of 152 sections as compared to the sixty-five sections of the Jordanian law. They are therefore the longest single piece of legislation produced by the West Bank Military Government authorities during the fourteen years of occupation.

The Jordanian Law gives the Council of Ministers and the Minister of Interior important powers over the municipal council. The Council of Ministers on the recommendation of the Minister of Interior may for example dismiss a mayor if he is convinced that this serves the interest of the municipality. His decision is final and is not subject to any form of appeal. Similarly the Minister of Interior with the agreement of the Council of Ministers may appoint, in addition to the elected members, 2 members to any municipal council and "these 2 members shall enjoy all the rights of the elected members." No similar powers are given to any official in the

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1. Shlomo Amar, an Israeli official in the military government of the West Bank acting as Minister of Interior, was appointed by the Military Commander on March 27, 1979, as a member of the Council Administering the settlement of Ma'aleh Adomim.

military government by virtue of the regulations for the administration of local councils.

Both the municipalities and the local councils are juridical bodies. Both councils are empowered to administer the affairs of their areas and to exercise the powers mentioned in Section 68 of the Regulations and 41 of the Law which are compared below. However unlike the municipal council, the local council has the power to appoint committees for the execution of certain functions.

### *Functions*

The municipal council has the power over such areas and functions as roads, buildings, water, electricity, gas, sewage, crafts and industries, health, cleanliness, public places, parks, etc. In all the list comprises 39 areas. Some of these powers are similar to the powers given to the local councils. However the local council enjoys in addition to them other powers. To begin with, a local council acts as the trustee, custodian or representative in any public case involving the inhabitants of the local council<sup>2</sup>. It is also empowered to administer, implement and establish services, projects and institutions which the council believes are important for the welfare of the inhabitants living within its area<sup>3</sup>. It is also empowered to oversee the development of the local council, the improvement of life in it and the development of the financial, social and educational affairs of its inhabitants or any sector of them<sup>4</sup>. It can also organize, restrict or prevent the establishment or administration of any service, project, public institution or any other organization, craft work, or industry of any kind<sup>5</sup>. It is also empowered to oversee irrigation, pastures, the preservation of the soil and any other matter of agricultural significance provided that it is administrated for the benefit of the various farmers within the area of the local council<sup>6</sup>. The council may establish any corporations, cooperative or any other organization for the execution of any

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2. Article 68(3) of the Regulations for the Administration of Local Councils.

3. *Ibid*, article 68(1).

4. *Ibid*, article 68(2).

5. *Ibid*, article 68(6).

6. *Ibid*, article 68(11) and 12.



of its functions and buy shares in it<sup>7</sup>. It is also empowered to prepare the facilities for emergency and to operate them at the time of emergency including the organization of rationing and provision of the necessary services<sup>8</sup>. The council is also empowered to give certificates and to certify and issue licences for any of the matters included within its powers.

The council administering a local council may, according to Article 88 of the Regulation, with the agreement of the "person responsible" make regulations concerning any matter which the council has jurisdiction over. By Article 93 these regulations shall be considered as security legislation issued by the area commander. They shall be published by posting on the notice board in the offices of the council and in other public places within the area of the local council or in any other way as the council shall decide. Municipal councils on the other hand, may make regulations only after a decision to this effect is taken by the Council of Ministers with the agreement of the king.

### *Taxes*

A local council may, with the agreement of the "person responsible" impose taxes called "arnona," membership fees and other obligatory payment<sup>9</sup>. The council is empowered to impose any additions on the arnona after publishing a notice to this effect in the area of the local council<sup>10</sup>. The council may reduce the tax or fine for late payment taking into consideration the financial situation of those on whom it is levied or for any other reason to which the person responsible agrees<sup>11</sup>.

A municipal council on the other hand may impose taxes on vegetables and fruits for sale in the market, or for any of the other matters mentioned amongst its powers in article 41 of the Municipalities Law, the amount and percentage of which is determined in regulations issued by the council with the agreement of the council of ministers<sup>12</sup>.

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7. Ibid, article 68(13).

8. Ibid, article 68(14).

9. Ibid, article 76.

10. Ibid, article 81(b).

11. Ibid, article 87.

12. Jordanian Municipalities Law of 1955, article 41(c) added by a 1956 amendment.

## ***Finances***

A municipal council may only borrow money after obtaining the agreement of the Minister of Interior who will consider who the lender is and the purpose for which the fund is to be used<sup>13</sup>. It is on the basis of this article that many municipalities in the West Bank are prevented from collecting money contributed to them from Palestinians outside.

Property tax payable to the municipality is collected by the ministry of finance<sup>14</sup> and the customs authority collects custom duties on combustible liquids according to percentages specified in the law<sup>15</sup>. By virtue of article 52 all funds collected for the municipalities by the ministry of finance are kept in trust for the municipalities and distributed in the percentage which the Council of Ministers, on the recommendation of the Minister of Interior, decides according to criteria mentioned in article 52 (2), provided that some of these funds may be allocated to finance other matters.

The yearly budget prepared by the municipality is acted upon after it has been approved by the council and authorized by the Minister of Interior<sup>16</sup>. Similarly, a local council needs the approval of the "person responsible" for its yearly budget<sup>17</sup>. However a local council does not need to get approval for borrowing money or receiving contributions<sup>18</sup>.

The accountant who inspects the finances of the municipalities is decided upon by the Council of Ministers. However a local council appoints its own accountant. Also the Minister of Interior with the agreement of the Council of Ministers publishes regulations as to the proper administration of the municipalities' financial matters. A local council, however, has discretion to administer its own finances without any interference. Regulations are made for the municipalities as to tenders, purchase of

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13. *Ibid*, article 45.

14. *Ibid*, article 47.

15. *Ibid*, article 49.

16. *Ibid*, article 56(1).

17. The Regulations article 97(c).

18. *Ibid*, article 101.

material and all other financial matters. A local Council decides these matters without interference except when the sale involves a monopoly or a concession.

Chapter 16 of the Regulation mentions power which the area commander and the "person responsible" has in special cases. These include interference in the administration of the local council if they see that the council is failing to carry out any of its functions under the regulation or under a security order. In case of emergency, and when there is no possibility for convening the council to take a decision which needs to be taken by the council in session, the "person responsible" may order the head of the council to take any action in accordance with the Regulation if he deems that the prompt execution of such action is necessary for the safety of the members of the council. The area commander may also appoint a new council if it has been proven to him that the council does not carry on its duties according to the Regulation or that there are financial misdealings. But he can only do this after he has warned the council and it did not take heed of his notice.

### *B. The Settlements' Court System*

The Military Commander has used his power under order #892 to establish courts for the settlements and declared the establishment of such courts in article 125 of The Regulations. Acting also within his power according to order 892 he has determined the jurisdiction of the court as follows:  
Art. 126

- a. *"the court shall have jurisdiction to look into any offence committed contrary to the Regulations for the administration of Local councils except those mentioned in chapter three (on rules for election of the council). It shall also have jurisdiction to look into offences against any regulations that the council may make and also any offence committed within the area of the council against any law or military order mentioned in the appendix to The Regulations. The court shall be competent to impose the punishment determined in The Regulation, other regulations made thereby, and laws or military orders that are mentioned in the appendix.*
- b. *in addition to what has been said in (a) above the court shall be competent to look into other matters which shall be determined in The Regulations or in any other military order".*

The Regulation as it stood on March 1, 1981 mentioned only the Jordanian Law of Town Planning in the appendix. However, as is clear from the above, more laws can be added and these need not be Jordanian laws because The Regulation does not restrict the court's jurisdiction to look into violations of Jordanian laws but says "any law mentioned in the appendix." In view of the provision in The Regulations which states that this or any other regulations made by virtue of it or in any other way need not be published except in the offices of the local council, it is possible that the jurisdiction of the court might be enlarged without the knowledge of anyone outside the settlement.

The judges of the settlement's courts are appointed by the commander of the area<sup>19</sup>. Judges for the first instance court are appointed from amongst magistrate judges, and for the appeal court from amongst judges of the District Court<sup>20</sup>. Whereas the judicial system in the West Bank does have District Courts, the implication is that the choice will be from among Israeli District Court judges.

It is important to note here that no connection is made between the West Bank judicial system and the system of settlement courts. For the West Bank the Minister of Justice has been replaced by the Officer in the Israeli army in charge of the judiciary. Judges for West Bank courts are chosen by a committee composed of military officers of whom no mention is made in The Regulations, where the choice of the settlement's judges is left to the area commander. And although no formal connection with the Israeli system is established, the judges would be from amongst judges chosen in accordance with Israeli laws to serve in Israeli courts.

As with judges, the area commander also chooses the public prosecutor<sup>21</sup>. The appeal court sits anywhere the area commander designates<sup>22</sup>.

The procedure and the rules of evidence which the court applies are those applied in Israeli courts. The court also has all the powers held by an Israeli

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19. *Ibid*, article 127(a).

20. *Ibid*, article 127(d).

21. *Ibid*, article 131.

22. *Ibid*, article 128(a).

magistrate court as regards subpoena of witnesses and any other matter related to the hearing of a criminal case. Similarly the appeal court has all the powers which an Israeli District Court in Israel has when it convenes as an appeal court. Furthermore the court has all the powers given to military courts when it looks into the violations to laws and orders mentioned in the appendix<sup>23</sup>.

The court may impose fines which are paid to the treasury of the local council<sup>24</sup>. If a fine is not paid the court may sentence the violater with actual imprisonment for up to one month. It is natural to ask how the court will execute its judgements. Will it use the West Bank execution departments and police, or the Israeli ones or will it have its own? But this is not the only question which The Regulation leave unanswered. What categories of people does the court have jurisdiction over? What if a Palestinian is brought to appear before it, can he deny its jurisdiction over him and claim that only a local Arab court has the right? And when does the military court have jurisdiction over violators of military orders if these orders are mentioned in the appendix to The Regulation? From the wording of The Regulation it is possible for the settler's courts to assume the powers of the military courts which implies that the settlers are not only given autonomy but also power over the local Arab Palestinian population.

### *The Municipal Courts*

Until January 1976 municipalities had no courts nor did the Jordanian law give them the power to establish any. To date only the Bethlehem Municipality has applied in accordance with order 631, and has acquired a municipal court of its own.

According to order 631<sup>25</sup>, the Officer in charge of the Judiciary is responsible for the municipal courts<sup>26</sup>. The judges for the court are appointed by the officer from amongst magistrate judges who serve in West Bank courts<sup>27</sup>. No appeal court may be established and the court's

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23. Ibid, article 134.

24. Ibid, article 137.

25. As amended by order 713 of June 10, 1977.

26. Military Order 713 article 1.

27. Ibid, article 4(a).

decisions are appealable at the West Bank court of appeal<sup>28</sup>. According to the order, the court shall apply the rules of procedure and evidence applicable in criminal cases in magistrate courts<sup>29</sup>, and the court shall have jurisdiction to hear violations against the regulations of the municipality and any violations committed within the area of the municipality which are listed in the appendix, which includes nine laws. The municipality is empowered to appoint from amongst its employees the officers of the court<sup>30</sup>, these employees are responsible to the officer in charge of the judiciary who may issue instructions to the municipality to change any officer or to cancel his appointment. He may also appoint any employee of the West Bank Judiciary to the court<sup>31</sup>.

### *C. The Defence of the Settlements*

A number of related orders need to be discussed when considering the powers and functions of a local council. These are the orders dealing with what is called "the Defence of Villages".

These orders are modelled after an Israeli law of 1961,<sup>32</sup> the local Authorities Regulation of Guard Service Law<sup>32</sup>. This law defines in its preamble 'the officer-in-charge of the guard-service' as a person whom the Brigadier-in-Command has appointed to be the officer-in-charge of the guard-service. Provided that in a Command in which the guard-service is in the hands of the Police, the Brigadier-in-Command shall empower the person responsible on behalf of the police for the guard-service. 'Guard-service' is defined to include exercises and any activities which in the opinion of the officer-in-charge of the guard-service is required for protecting the security of the inhabitants of a settlement or their property, and 'local authority' is defined as a municipality or a local council. Article 2 of the Israeli law states that:

*"the Minister of the Interior may, after consultation with the Minister of*

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28. Ibid, article 10.

29. Ibid, article 8.

30. Ibid, article 12(a).

31. Ibid, article 15(b).

32. Published in Sefer Ha-Chukkim no. 346, June 13th, 1961, p. 169.

*Defence, impose, by order, the duty of guard-service on the inhabitants of any settlement or settlements . . ."*

The connection with Israeli law does not stop at the level of providing a model for the military orders on the same subject. In article 11 of order 432, the first of the orders passed by the West Bank Military Commander<sup>33</sup>, it is stated that whoever is injured while performing guard-service shall be considered as one who has been injured during performance of guard-service in accordance with the above-mentioned Israeli law. This direct reference and application of an Israeli law is one of the first to be made in the Military Proclamations in force in the West Bank.

Order 431 defines a village as one which has been established after 1967. As only settlements have been established after 1967, the order clearly refers to settlements. Defence is defined as training or any other activity deemed necessary by the person appointed by the Military Commander of the West Bank as the officer responsible under the order. The officer is empowered by the order to impose upon every settler the duty to defend the settlement. He is also empowered to appoint an authority to carry out the defence.

Order 669 amended the definition of a resident in order 432 to include:

*"whoever lives in the village and is unregistered as a resident in its registers whether he was from the West Bank or from Israel and who does not carry out guard duty in any other village."*

The order also determined the age of the person eligible for guard duty as from 18 to 60, and provided that whenever guard duty is imposed on a person he shall be assumed to be eligible as long as he has not proven otherwise in the way that shall be provided by order. A fine is imposed on a person who refuses to carry out the guard duty. Order 817 empowers the director, who is defined in the order as whoever has been appointed director of guard duty according to order 432, "to oblige pupils of an institution (defined as a kindergarten, elementary school, junior high school, field school, advanced education institution, children's vacation enterprise, boarding school, youth and sport cultural centre, institution of higher

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33. The date of this order is June 1, 1971.

education, yeshiva or any other institution in which education is provided) aged over 16 to do guard duty as well as the pupil's parents, the principal of the institution, the teachers and the workers," (Article 2 of the order).

A director may also oblige the parents whose children are at an institution to do guard duty. In special circumstances the director may order that an institution be guarded by paid policemen<sup>34</sup>. If the director believes that facilities must be installed in the institution for its protection, he may, with the consent of the police, order the institutions's owners to install them.

Order 484 of June 18, 1980 increased the number of hours of guard duty per person to six hours per week unless the director orders that the number of hours be increased to ten per week for 30 days. An increase above ten hours needs the approval of the commander of the area.

A fifth amendment to the original order<sup>35</sup> substantially increased the powers of the settlers. Article 3 of order 898 empowers them to:

- oblige any person whom the settlers have any reason to suspect of having committed any offence contrary to any military order to show them his identification card;
- arrest any person whose identity has not been proven and to transfer him to the nearest police station and
- arrest any person without a warrant:
  - if he commits before him a felony punishable by five years imprisonment or if he has any basis which makes him believe that a person has of late committed a misdemeanor or a felony punishable by the military orders with five years imprisonment, or
  - if he saw him in suspect circumstance taking precautionary measures to disguise himself without being able to give any reasonable explanation of his actions.

A person who arrests another in the above circumstances must hand him to the police as soon as possible. Any one refusing to obey the orders

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34. Military Order 817, article 7.

35. Military Order no. 898.



of the settlers will be considered as one contravening the military order on security of 1970.

Appended to the order is the format of the card with which the settlers will be issued. The above powers are printed on the card.

As with all the other 921 military orders already in force in the West Bank, the power to interpret the provisions of this order are vested in the military courts.

It has been common practice for the settlers to exceed their powers of guard duty and interfere with the Arab inhabitants of the West Bank. There have been many reported incidents when they have set up and manned road blocks and searched passers-by, and they have attacked nearby villages and made their lives intolerable.

Two reservists were quoted in the Israeli English newspaper, The Jerusalem Post, as saying after Jewish student settlers from the local yeshiva and from Kiryat Arba in Hebron manned the army check-point alongside them: "this is the first time and the last time we will serve in this area." The settlers had joined them at the checkpoint because they said they preferred to defend themselves after the incident in Hebron where several of them were killed.

With the orders of the defence of the settlements promulgated, the organization of the military territorial defence system of Jewish settlers serving in the West Bank into organic military units stationed in their own areas under their own command has been completed.

## ***Part II: Comments***

When the Israeli army occupied the West Bank, the Jordanian law on local government provided for only two types of local government units: the municipality and the village. The regional and local councils that existed at the time of the British Mandate were abolished by article 105(1) of the Jordanian Municipalities Law of 1955 which declared all previous Ottoman, Jordanian and Palestinian laws dealing with municipalities and local councils repealed provided that

*"all municipalities and local councils existing at the date of the coming into*

*force of this law shall be considered municipal councils by virtue of the provisions of this law and shall continue to carry out their functions until replaced by municipal councils elected in accordance with the provisions of this law."*

Despite the continuous settlement activity that has gone on uninterrupted though at an uneven rate since 1967, no substantial amount of legislation was promulgated concerning the administration of the settlements. They continued to be administered by what was called religious councils (as mentioned above) until March 1979 when a number of lengthy military orders were proclaimed declaring that regional and local councils will administer the settlements.

Under the Jordanian law in force in the West Bank, a group of people in a village can petition the District Commissioner to declare their village a municipality. Whereas this function has now been assumed by an officer in the Israeli army, why then did the military government not choose to use the existing local government laws and structures and declare Jewish settlements to be villages or municipalities? Clearly this would have been the easier course, which would have released Israel from having to justify again a charge of violating international law by amending and adding to the local law in a way that exceeds the scope of the legislative powers of an occupier and cannot be justified as necessary legislation for the welfare of the population of the occupied territories.

A possible justification of this choice which the military government may give could be based on the provision in the Jordanian law which stipulates that the candidates for municipal election must, amongst other things, be Jordanian male citizens. However this justification can easily be rebutted by pointing out that the military authorities have already amended this article by removing the condition as to sex, giving the franchise to women. They could have made a further change and eliminated the condition that the candidates and electorate must be Jordanian citizens. It is clear, therefore, that it was not any legislative difficulty that has determined the choice of turning the settlements into local councils rather than municipalities.

Nor is the reason the independence of the municipal councils from the military authorities. As has been shown at length in the first part of this article, the Jordanian law gives more power to the government than the power which the *Regulations for the Administration of the Local Councils* gives to the commander of the area or the person appointed by him to be the "person responsible" for the purpose of the Regulations.

The more likely reason for the choice, to my mind, is the desirability of having separate administrative units for Arabs and Jews to enable separate and independent legislation and policy for the growth and development of each of the two communities.

It is interesting to realize how the military government, in making the choice to establish regional and local councils to administer the settlements, seems to be guided by the policy that was pursued by the British Mandatory government in Palestine before 1948. Article 2 of the Mandate runs as follows:

*"The Mandatory shall be responsible for placing the country under such political, administrative and economic conditions as will secure the establishment of the Jewish national home, as laid down in the preamble, and the development of self-governing institutions, and also for safeguarding the civil and religious rights of all the inhabitants of Palestine, irrespective of race and religion."*

It is not difficult to imagine, though I have no basis to verify this conjecture, that the policy guidelines given by the Israeli government to the military command in the West Bank run on similar lines.

Article 3 of the Mandate provides that:

*"The mandatory shall, so far as circumstances permit, encourage local autonomy."*

In the yearly reports by the United Kingdom to the League of Nations and in the reports of the Palestine Royal Commission, the rate of progress achieved by the government of the mandate in fulfilling the terms of the Mandate and in assisting the Jewish and Arab communities to attain a greater level of local autonomy was reported.

The 1937 report of the Palestine Royal Commission, for example, reported that :

*"there are at present only five Jewish Local Councils, but they rank almost next in wealth and population to the four major municipalities of Jerusalem, Haifa, Jaffa and Tel Aviv and have been active and reasonably efficient."*

The Commission recommended that:

*"the remaining preponderantly Jewish Local Councils, taken together with all the present existing municipalities should be re-classified by means of a new ordinance into groups according to their respective size and importance."*

The military orders relating to the Jewish local councils are not, as far as their content is concerned, modelled after the British Ordinances. They give much greater power to the local councils than was available at the time of the mandate. Despite the difference in degree, the same policy followed by the government of the mandate to achieve local autonomy for the Jewish minority in Palestine is now being pursued by the Israeli government towards the Jewish settlements in the West Bank. The only difference (and it is a very significant one) is that the government of the mandate planned a restricted growth for the Jewish community and was interested in ceding local autonomy to both the Arab majority as well as the Jewish minority, in fulfillment of the terms of the mandate and the Balfour declaration whereby two communities would exist in Palestine. The Israeli government, on the other hand, is interested in incorporating the West Bank into Israel and plans to do this by facilitating the development and growth of the Jewish communities living, or who will be imported to live, in the settlements which have been planned to exist around the Arab population centres. Mattiyahu Drobles, an instrumental figure in government settlement efforts, referring to West Bank Arabs as "minorities" said<sup>36</sup>:

*"They (the Arabs) will find it difficult to unite and create a continuous territorial entity if they are cut off by Jewish settlements."*

Many other legislative actions of the government of the mandate were also aimed at facilitating the fulfillment of the terms of the mandate. The Land Transfer Ordinance of 1920, for example, gave the government

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36. Reported in *The Jerusalem Post*, July 26th, 1979.

the power to control land acquisition to insure that lands in areas designated for Jews did not get transferred to Arabs. Similarly a military order was passed soon after the occupation whereby the military government acquired the right to control land transfers by making it necessary to get a permit for every transaction in land (order 25).

With strong support from the Jewish Agency and other Jewish organizations outside Palestine, and the greater experience of the European Jewish immigrants in civic administration, the Jewish municipalities and local councils grew often at the expense of the nearby Arab municipalities or local councils. With the establishment in 1948 of the Jewish state, and the exodus of the majority of the Arab population from the region, this policy was pursued systematically, and the present situation of the cities of Jaffa and Tel Aviv is a good example of it. Whereas Arab Jaffa before 1948 was a flourishing sea port and the bigger municipality, with Tel Aviv then considered in size and importance as a mere Jewish suburb, the situation now is reversed with Jaffa a mere suburb administered by the greater Tel Aviv municipal council. The Israeli policy towards the West Bank seems to aim at the continuation of this pattern so that , for example, the Jewish settlement near Ramallah, Beit Eil, whose population is at present approximately 400 would be encouraged to grow and develop to dominate the town of Ramallah which has at present a population of approximately 20,000. Ramallah would then come to be treated as a mere Arab suburb of the Jewish settlement of Beit Eil.

The timing of the legislation for the administration of the settlements as regional and local councils is not without significance. March 25, 1979 was only seven months after the signing of the *Framework for Peace in the Middle East Agreed at Camp David*. Some of the provisions concerning the West Bank in the agreement did not at all please those Jews who had already settled in the West Bank and those intending to do so. It is perhaps not too far-fetched to suggest that the activities and legislation in the West Bank which followed the signing of the agreement indicate the intentions which the Israeli negotiators had in mind when they negotiated the working of the agreement and agreed to sign it as presently worded.

It is not accidental that only in article 1 of the Camp David Accords the expression "Palestinian people" is used. Elsewhere in Sections A.1.(A), (C), (C)1, (C)2 etc. the reference is to the 'inhabitants of the territories' (i.e. the West Bank). The clarification acknowledged in President Carter's letter to Prime Minister Begin on September 22 reads.

*"in each paragraph of the agreed framework document the expression Palestine or Palestinian people are being and will be construed and understood by you as Palestinian Arabs."*

No clarification is sought or given about the expression "inhabitants of the territories". Does it refer to Arab inhabitants or any inhabitants, Arab or Jewish?

Obviously without clarification it will mean what it stands for, i.e. any inhabitant whether Arab or Jewish. This choice of expression was therefore made carefully, and the activities ensuing after the agreement make it clear what the intention was, and what the result of the implementation of the provisions of the Camp David agreement will really mean to the Jewish settlers in the West Bank.

Even the limited powers which the Camp David Accords provide for the Palestinian Arabs will under the newly created reality which Israel has been busy creating, and because of the careful wording of the Camp David agreement, have to be shared by the Jewish and the Arab inhabitants of the area. The concentrated activities aimed at creating more settlements and bringing more Jews to live in them while changing the legislation to facilitate their independence and growth was intensified after Camp David.

Although at present the Arabs constitute the majority of the inhabitants of the West Bank there is no assurance that the elections for the self-governing authority envisaged under the Camp David agreement will proceed on the basis of proportional representation rather than on a regional basis. If the latter is the method then in view of the large number of the settlements already established Jewish representation in that authority will be substantial. In this way even the limited concessions Israel seemed to be making in the Camp David agreement will have been forfeited. This, of course, presuming the Jewish settlers would like to exercise control in this manner.

It is also possible, however, that the settlers may feel that their separate status as "self-governing authorities" gives them more power and better enables them to grow within the large areas of land that have been allocated for them. They might then leave the Arabs to exercise alone the meagre powers given to them.

## *Conclusion*

More than 950 military orders have been promulgated during the 14 years of Israeli military occupation of the West Bank. This violation by Israel of international law has lately become better known. In response to criticism of this practice, the decisions of the Israeli High Court of Justice in appeals submitted to the court against the military commander, and publications by Israelis as well as apologists for Israeli practices, have attempted to justify such violations. In this paper I have attempted to show how even if the standards used by the High Court judges and the authors of these studies to justify these changes in Jordanian laws are accepted and applied, legislation affecting Jewish settlements in occupied territories cannot be justified.

I have also attempted to point out the Israeli policy towards the West Bank concerning the settlements by comparing these regulations to the Jordanian law still in force which applies to the Arab population centres. This comparison proves that two distinct communities have been created with different sets of laws applying to each. The separate development of each of these communities is thereby facilitated.

By referring to the legal situation that existed at the time of the British Mandate over Palestine I have attempted to show that the policy followed in the West Bank is similar to some extent to that of the Mandate Government, which by the terms of its mandate endeavored to facilitate the growth and development of an Arab and a Jewish national presence in Palestine. The only difference in the case of the West Bank being that the military authorities there will continue to attempt to retard the growth of the Arab population and encourage the establishment of a Jewish one.

This paper has shown how a complex and elaborate structure for the administration of the Jewish centres equipped with legal and defence systems has already been established to facilitate this process.

Finally, the direction in which matters seem to be going in future as far as Jewish-Arab relations on the West Bank are concerned, is parallel to a version of the South African Apartheid or separate development policy. Granted the reality and conditions of the two areas differ; so does the extent of the similarity. However, enough parallels do exist in the nature of the problem facing the South African government and the Israeli government (anxious as it is with trying to Judaize and control an area with an Arab majority), and in the nature of the two systems and to some extent the

practices of the two governments, to support a conclusion that there are strong similarities which, all indications point, are only bound to increase with time.



## PART III

# The Changing Juridical Status of Palestinian Areas under Occupation: Land Holdings and Settlements\*

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### *Zionism and Palestinian Land*

Some preliminary observations are helpful as an introduction to the discussion of the legal changes affecting land holdings in Palestine.

Mainstream Zionism has never wavered from the aim formulated early in the history of the movement: to establish in "Eretz Israel" a home for the Jews. There has been a similar continuity in the methods and tactics used by the Zionists to achieve that aim - those same methods are still being employed today in the West Bank and the Gaza Strip to hold the land inalienably in Jewish hands.

Also consistent is the position which Israel has taken regarding the West Bank (not including Jerusalem) and the Gaza Strip - they are "liberated" rather than occupied territories. As a consequence, the military government established there has not been concerned only with safeguarding the security of its members and the state of Israel, but in facilitating the acquisition by Jews of the areas that were occupied in 1967.

Zionism, as professor Edward Said puts it in *The Question of Palestine*, has a culture of discipline by detail. Whereas it was possible and is conceivable that the military government could have acquired full and total possession of all the lands in the occupied territories by force, this did not happen. Legal methods were found to transfer Arab lands to Jewish hands, ensuring wherever possible that Jews acquired inalienable rights over the land. If that had not been the method used this chapter would not have been necessary.

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\*. This Article was published in the AAUG Monograph No. 18, 1983/ and in Aruri, Naseer Occupation: Israel Over Palestine, (2nd Edition), Association of Arab-American University Graduates Inc. Belmont, Mass, 1989.

The Zionists have been concerned with projecting an image of a community ruled by the principles of justice and the rule of law. In order to preserve that image, it was necessary to employ a dynamic and creative approach to law and legal systems and to manipulate existing systems so that Zionist aims could be achieved under a semblance of adherence to the rule of law. The creation, for example, of a military objections committee to function as a tribunal to hear appeals from the acts of the same military power which administers this board is intended to give the impression that the basic principle of the right of appeal is complied with.

The Palestinians have been inflexible in their adherence to formality and in their attitudes and reactions to Israel's policies. The rigidity of the Palestinians' position as a group and as individuals has rendered their reactions predictable. This has made it easier for Israel to plan its actions and has allowed it to take positions which implied readiness for more compromise than it was in fact ready to make. The signing of the Camp David accords is an example of this.

Even so, Zionist policies and aims are based on a conception of the Palestinians and the Palestinians' attitude to their land that differs greatly from the reality. The Zionists have assumed from the beginning that there is no Palestinian nation, that the Arab inhabitants of Palestine are part of the Arab world, and that their tie to the land is weak and can be severed easily. Quite the opposite has proven to be the case, namely, that the Palestinians consider themselves as constituting a distinct national group, and that they have an unusually strong relationship to their lands which has not weakened despite the elapse, in some cases, of more than thirty years. This is evidenced by their general refusal to sell their lands or accept monetary compensation for those parts of it that have been acquired by Jews.

The Zionist movement espoused the physical return of Jews to Zion and the establishment for them there of a national home. The Jewish National Fund was established as "the first instrument for the practical implementation of the idea of the Jewish renaissance." Since its establishment in 1901, it has been dedicated to the acquisition and development of land in Palestine as "the inalienable property of Jewish

people."<sup>1</sup> The conviction that Eretz Israel belonged to the Jews was translated by the active Zionists into an attempt to use whatever means available to acquire good legal title to the lands in the physical area of Palestine for Jews. This conviction and aim has, with most Zionists, been consistent and unchanging. The methods employed to realize it were adapted to the changing times.

Since this aim was formulated, there have been in Palestine the following powers: First there were the Turks, then the British Mandate, then the state of Israel in part of Palestine, Egypt in another (in the Gaza Strip) and the Hashemite Kingdom of Jordan in what has come to be known as the West Bank of Jordan (including east Jerusalem). At present the state of Israel is in control of the whole area of Palestine.

This chapter will trace the legal methods used to acquire lands for Jews since the Turkish times to the present. In the whole of Palestine, except the Gaza Strip and the West Bank, 93 percent of all the lands is owned inalienably by the state of Israel. A substantial percentage of all lands in the Gaza Strip and the West Bank are also similarly owned, although an exact figure cannot be quoted for reasons that will be explained later. Whereas the process for the acquisition of the rest of the Arab lands in both these areas is still continuing, this chapter will focus mainly on the legal methods that are presently being employed. This discussion will be limited to the West Bank, but the same methods, with some necessary adjustments, are being employed on the Gaza Strip.

### *Land Acquisition Through Purchase*

This method has always been the most favored by the Zionists. There are many indications in the Zionist literature that it was a widely held belief, among both the early immigrants and the rich Jewish establishments in the West who supported the Zionist program, that the Arabs of Palestine could be induced to sell their lands by the offer of large sums of money. Zionists were, in fact, successful in buying large tracts of very fertile lands held by feudal lords who lived outside Palestine. Much lobbying and diplomacy at the Turkish parliament was necessary to allow Jews to register land in their names.

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1. Quoted in Ian Lustick, *Arabs in the Jewish State* (Austin: University of Texas Press, 1980), pp. 97-98. (From Keren Kayemeth Le'Israel-The Jewish National Fund, "Who's Who in Israel," p. 416.)

These efforts continued after the transfer of power in Palestine to the hands of the British Mandate. The influence of the Zionists was stronger then, and their efforts conformed in part with the terms of the mandate, which included the creation in Palestine of a Jewish and an Arab state.

In pursuance of this aim the mandatory government passed the Land Transfer Ordinance of 1920, which required that a permit from the mandate government be obtained before any transfer of land could take place. Also the settlement of disputes over land was started in those areas designated as the future Jewish state, so that good title could be transferred to Jewish purchasers. However, despite these attempts and the lucrative purchase price that was offered, by 1948 no more than 6.6 percent of the total land area of Palestine was acquired by purchase.<sup>2</sup>

After the Israeli occupation of the West Bank in 1967 several changes were made to the Jordanian law (which in principle continued to be in force) to facilitate the purchase of Palestinian lands by Jews.

First, public inspection of the land registers was prohibited. Only an owner or a holder of a power of attorney from the owner could obtain an extract of the deed of the land owned. In absence of this, permission must be granted by the court, which must state that the inspection is necessary for an existing court case before inspection of relevant deeds can be allowed.

Second, Military Order 25 (1967) was promulgated, which necessitated that permission be granted by the Israeli officer in charge of the judiciary, in his capacity as registrar of lands, for any transaction in land to be carried out.

Third, in order to acquire ownership over land without going through the land registry (which risks public exposure) acquisition of ownership may, under the local law, be through an irrevocable power of attorney. This is an instrument in which the owner names an attorney who is instructed to register the land in the name of a purchaser in consideration of a stated sum of money for which the irrevocable power of attorney is a receipt. As the name of this instrument implies, the principal may not go

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2. Sabri Jiryis, *The Arabs in Israel* (New York: Monthly Review Press, 1979), p. 77.

back on his instructions. Under Jordanian law this instrument lapsed after five years from the date it was executed. Military orders prolonged the duration of the irrevocable power of attorney from five to ten years, and then to fifteen.<sup>3</sup>

Jewish purchasers sought expatriate Palestinians everywhere in the world and attempted to persuade them by various means to sell their lands by executing irrevocable powers of attorney. Israeli consuls were made the only authority empowered to authenticate signatures on these instruments, and the officer in charge of the judiciary the only authority to legalize that signature.<sup>4</sup>

Given the conditions under which the Palestinian population lived, whereby a permit was needed for most vital matters, those in desperate need of permits feel easy prey to the insistent demands of Jews, either directly or through Arab middlemen, to sell their lands. There are also several reported cases of violence or deception being used to force owners into signing contracts of sale or irrevocable powers of attorney. A common strategy has been to convince the owner that his land is going to be (or in fact has been) acquired for the use of a nearby Israeli settlement, and that no building permit will ever be granted for an Arab to build on it. He is then induced to sell.<sup>5</sup>

In short, the entire administrative and legal system in the West Bank has been changed to facilitate purchase by Jews of Arab lands and to discourage use and transfer to Arabs. The two latest such changes are the following:

1. Military Order 1025, which authorizes the "head of the civilian administration" (appointed by virtue of Order 947) to allow certain juridical bodies the right to own lands in the West Bank even if the conditions required according to the Jordanian law on the subject are not met. The order also declares all land transactions committed contrary to law, which the above order now declares permissible, as done according to the law in force. The date of this order is October 4, 1982.

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3. Military Orders 811 and 847.

4. Military Order 264.

5. See David Richardson, "West Bank Jews Irked over Land-grabbers," *Jerusalem Post*, 10 February 1982.

2. The increase in fees payable upon devolution of land from the name of the deceased owner to his lawful heirs, from one-half a Jordanian dinar to 4 percent of the assessed market value of the property. The effect of this is to render devolution more costly - the authorities now treat it as a transaction in land.

It is not possible to give a good estimate of the land already acquired by Jews through purchase, but the diligence with which the Israeli authorities pursue other methods for acquiring Palestinian lands indicates that the purchase method has not met with great success.

### *Acquisition of "Abandoned" Land*

This method was obviously not used before the establishment of the state of Israel. But the concept of "abandoned" property existed in the minds of the Zionists from early on. Consistent with their belief that the Arabs did not feel strong ties to their land, they were inclined to believe that many had abandoned or were willing to abandon their property if offered property elsewhere in the Arab world. The feudal absentee landowners who lived outside of Palestine were the first targets.

After the establishment of the state of Israel in 1948, the exiled Palestinians left behind immovable property, the estimated value of which was 100,383,784 Palestinian pounds. They also left 19,100,000 Palestinian pounds worth of movable property. These properties included extensive stone quarries, forty thousand dunums of vineyards, 95 percent of Israel's olive groves, nearly one hundred thousand dunums of citrus groves, and ten thousand shops, businesses, and stores.<sup>6</sup> Those Arabs who stayed were termed "internal absentees"-40 percent of their lands were also confiscated as "abandoned" property.<sup>7</sup>

Islamic *wakf* lands (lands dedicated for a pious purpose), which amounted to hundreds of thousands of dunums, were also considered as absentee lands. In 1950 the Absentee Property Law was passed; under its

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6. Quoted in Lustick, *Arabs in the Jewish State*, p. 59.

7. Quoted in Lustick, p. 60.

provisions a custodian was appointed to manage this property.<sup>8</sup> The Development Authority (Transfer of Property) Law (also of 1950) established a development authority which was permitted to buy the lands placed by the earlier law under the control of the custodian of absentee property.<sup>9</sup> Lands so acquired may not be alienated.<sup>10</sup> The Development Authority has eight members from the Jewish National Fund and seven representatives of the state of Israel.<sup>11</sup>

The Israeli Absentee Property Law defined an absentee as, among others, someone who departed to a state which is in a state of war with Israel.<sup>12</sup> The military order on the same object (Military Order 58, passed in 1967 by the military commander of the West Bank), defines an absentee as someone who was not in the area of the West Bank at the time of the 1967 war.<sup>13</sup> This definition renders even a Palestinian who in June

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8. *Laws of the State of Israel*, 4:68.

9. *Ibid.*, p. 151.

10. Article 1 of The Basic Law: Israel Lands, published in *Laws of the State of Israel* vol. 14, prohibits any form of the alienation of the lands, in the ownership of the state of Israel, the Development Authority, or the Jewish National Fund.

11. See Lustick, *Arabs in the Jewish State*, p. 107.

12. "Absentee" is defined in the Absentee Property Law as follows:

1. A person who, at any time during the period between the 16th Kislev, 5708 [29th November, 1947] and the day on which a declaration is published, under section 9(d) of the Law and Administration Ordinance, 5708-1948), that the state of emergency declared by the Provisional Council of State on the 10th Iyar, 5708 [1948] has ceased to exist, was a legal owner of any property situated in the area of Israel or enjoyed or held it, whether by himself or through another, and who, at any time during the said period--
  - i. was a national or citizen of the Lebanon, Egypt, Syria, Saudi-Arabia, Trans- Jordan, Iraq or the Yemen, or
  - ii. was in one of these countries or in any part of Palestine outside the area of Israel, or
  - iii. was a Palestinian citizen and left his ordinary place of residence in Palestine
    - a. for a place outside Palestine before the 27th Av, 5703 [1st September, 1948]; or
    - b. for a place in Palestine held at the time by forces which sought to prevent the establishment of the State of Israel or which fought against it after its establishment;
2. A body of persons which, at any time during the period specified in paragraph (1), was a legal owner of any property situated in the area of Israel or enjoyed or held such property, whether by itself or through another, and all the members, partners, shareholders, directors or managers of which are absentees within the meaning of paragraph (1), or the management of the business of which is otherwise decisively controlled by such absentees, or all the capital of which is in the hands of such absentees.

13. Property of an absentee is defined in Military Order 58 as follows:

The property whose legal owner or possessor according to the law, has left the area [of the West Bank] before the specified date [June 7th, 1967] on the specified date or after the specified date and left the property in the area. But the property which is in the possession of someone other than the owner shall not be considered property of an absentee unless its owner or possessor were together

1967 was resident in the United States, for example (which is not a country in a state of war with Israel), an absentee. This definition, however, has not been strictly applied as yet.

The control of the military authorities over the land registers and their successful penetration of Arab society in the West Bank helped them identify which property is (according to the order) "abandoned" property. However even when the owner of the property has not left the area (and therefore his property does not qualify according to the order to be placed under the control of the custodian of absentee property) and a Jewish settlement is in need of it to establish or develop, the custodian can still acquire possession over it and enter into transactions with third parties who are either individuals or Israeli development companies, in one such incident with which the author is familiar, involving land registered in the name of an Arab who lives in the West Bank, the custodian sold over seventy dunums of land to private Israelis who were living in a settlement adjacent to this land and who wanted to enlarge their settlement. When the owner objected, the custodian invoked article 10 of order 58, which authorizes transactions done in good faith between the custodian of absentee properties and third parties, which the custodian carried out believing the property to be absentee property.

The tribunal which is authorized under the existing orders to hear appeals against decisions by the custodian of absentee property is the Objections Committee, constituted by order 172. It is composed of Israeli officers and is headed by a senior legal advisor of the Israeli Land Authority - who obviously is an interested party.<sup>14</sup>

The head office of the custodian of absentee property is in West Jerusalem. Its full title is the office of the Administrator of Lands of Israel: Custodian of Abandoned and Government Property in the Area of Judea and Samria. As the title implies, the custody of absentee lands in the West Bank is administered by the Israel Lands Administration (whose director ex-officio is the Israeli Minister of Agriculture). The Israeli Lands

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absent from the area.

14. From an as yet unpublished study of Meron Benveisti, *The West Bank and Gaza Data Base Project Pilot Study Report*, 1982, p. 34.



Administration which supervises the use of 93 percent of Israel's land area, has effective responsibility for the supervision of land acquisition and use in the West Bank.<sup>15</sup>

The Jerusalem head office acts through offices in each of the major West Bank towns. Those employed in these offices (Arabs and Jews) are constantly on the look out for more lands to acquire under the pretext of abandoned property. They are aided in this effort by the legal and administrative changes that have rendered the approval of the custodian necessary for most transactions in land. This includes such operations as registration of land which has not been included in the settlement of disputes operations - an operation which does not involve any transfer of land. It also includes registration of land in the name of the heirs of deceased owners, the obvious objective here being to identify any share which a nonresident is acquiring to enable the custodian to lay his hands on it. The administrative network of the offices of the custodian also serves as a useful vehicle for identifying and arranging for the acquisition of land which is used by settlers, under the pretext that it is "state land" (as will be explained below).

It is clear from the working of Military Order 58 (and in particular the provision on transactions made in good faith), from the treatment by Israel in the past of the property of "absentees," and from the practice in the West Bank at present, that it is not the intention of Israel to hold the property of absentees in trust pending the solution of the conflict. The custodian is transferring property of absentees to third parties for use in a long-term, permanent manner.

### *Acquisition Through Administrative Means*

#### **Military Jurisdiction**

The extent and position of lands to be acquired by the military authorities in the West Bank has varied with time. But the policy of the military authority to acquire maximum control over the West Bank and its population has been pursued since the early days of the occupation. The large degree of control acquired by the military government over the years

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15. Ian Lustick, "Israel and the West Bank after Elon Moreh: The Mechanics of de Facto Annexation," *The Middle East Journal* (Autumm 1981), 35(4):566.

has served well the policy of the present government, which now has been in office for five and one-half years, and whose declared aim is to acquire control over West Bank land and encourage extensive Jewish settlement there. Several changes in the West Bank administrative system have been effected in order to facilitate the legal acquisition of land for Jewish settlement.

Israel has held a consistent position towards what it regards as the legal status of the West Bank. It never accepted the position held by most of the countries of the world, namely that in 1967, as a result of belligerent action, the West Bank, which until then was part of the Hashemite Kingdom of Jordan, was occupied by force and that therefore the Hague and Geneva conventions applicable to occupied territories should determine the behavior of Israel - the occupying power - towards it. Israel has argued that the West Bank was not an internationally recognized part of Jordan, and that therefore in 1967 it did not occupy land over which another country had sovereignty.<sup>16</sup>

However, Israel's policies towards the inhabitants of its newly acquired territories were closely observed by the rest of the world. Israel could not afford to be indifferent to this international interest. The image it had projected was that of a small beleaguered state surrounded by a sea of antagonistic nations, from whom all it wanted was acceptance so it could live in peace with its neighbors. It also had the image of a country which respected human rights and observed and lived by the principles of the rule of law. With world opinion in mind, Israel devised a compromise: without giving in on the principle, namely that it was not an occupier of another people's lands, it made it known that despite the fact that legally speaking it did not consider itself bound to observe the Geneva Convention, it would apply the humanitarian standards laid out in international conventions. A concerted public relations campaign was waged to show that this was in fact the case. Not only was Israel preserving the local laws and institutions that were in place before the occupation, as well as preserving public order, but

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16. For the Israeli position on the status of the West Bank, see Yehuda Blum, "The Mission Reversioner: Reflections on the Status of Judea and Samaria," *Israel Law Review* (1968) 3:279. One response to the claims made there is by S.V. Malison, "The Application of International Law in Occupied Territory," pp. 55-64 in I. Abu-Lughod, ed., *Palestinian Rights, Affirmation and Denial* (Wilmette, Ill.: Medina Press, 1982).

it was also developing, modernizing, and economically benefiting the society over which it was now ruling.

Meanwhile, the military commander was carrying on many very significant changes in the local Jordanian law that was in force in the area, but the military orders were not made available to the general public and were not (until much later) brought to the attention of interested observers. The cases which came before the Israeli High Court challenging orders made by the military commander that changed Jordanian law were published and publicized. The arguments of the High Court seemed very convincing and discouraged further probes into the legislative activities of the military commander. In one such case, for example, *The Christian Society for the Holy Places v. The Minister of Defense*, the justices of the Israeli High Court were not in agreement. The dispute was whether - even if the change were to benefit the local population - the area commander could, under international law, carry it out. The dissenting judge, Justice Haim Cohn, argued that he couldn't. But the majority decided in favor of the change. Other similar changes that are customarily pointed out by apologists of Israeli actions on the West Bank when they are charged that in violation of international law Israel has changed the local law, are, for example, the change which allows women to vote in municipal elections, the change in the criminal law whereby flogging was one legal punishment of certain offenses, and the introduction of comprehensive and third party insurance.<sup>17</sup> Changes in traffic law, customs law, and tax law are also used to justify Israeli action - these, they claim, have become necessary because of the new situation whereby the West Bank and Israel have no borders and therefore standardization in these areas is inevitable.

For at least the first ten years of the occupation, these arguments convinced most outside observers, who unfortunately did not make a closer investigation of the legal situation in existence on the West Bank. In fact, as the Israeli apologists were pointing to these few and minor changes and were boasting that they were necessary if Israel were to succeed in its good work of modernization of Arab society in the West Bank, many hundreds of changes (now amounting to 1,26 military orders) were being issued by

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17. These changes are pointed out in Meir Shamgar, *Military Government in the Territories Administered by Israel 1967-1980*, vol. 1, *The Legal Aspects* (Jerusalem: The Hebrew University, 1982), p. 54.

the area commander, with very specific objectives in mind.<sup>18</sup>

Article 64 of the Geneva Convention, Relative to the Protection of Civilians Persons in Time of War, permits the occupying power to carry out (among others) those changes necessary for the occupier's security.<sup>19</sup> Consistent with Israel's announced policy towards the West Bank of observing the humanitarian provisions of the Geneva and Hague conventions, the attempt has all along been to justify (whenever possible) legislative (as well as other administrative) actions as being necessitated by security. This has necessitated an expansion of the interpretation of "security" to include what cannot normally be justifiable on security grounds. However the Ministry of Defense (which is ultimately responsible for the military government in the West Bank) is the undisputed arbiter of what is necessitated by security. The Israeli High Court, which has been hailed as an effective safeguard against arbitrary actions of the military because it hears appeals on such matters, refuses to consider whether an action is or is not justifiable on security grounds.<sup>20</sup> It is enough for the military authority to declare that its action is necessary for security and this would be the end of the matter.

Even so, it was no easy challenge that the military command had to face to bring about the situation which is now in existence in the West Bank. On the one hand, it had to keep the semblance of the local law continuing to be the law in force, and the local Arab courts the courts that rule according to that law - it could not impose an alternative system that would violate basic accepted principles of the rule of law, such as the right of an appeal from administrative decisions. On the other hand, it had to implement a government policy whereby in no case could a Palestinian state, or the infrastructure and institutions of such a future state, be allowed to arise. Nor could the whole of the area be returned to Jordan. The military also had to facilitate the settlement of large numbers of Jews in the area with all that such activity requires: the acquisition of lands, the

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18. For a detailed survey of these military orders see R. Shehadeh and J. Kuttab, *The West Bank and the Rule of Law* (New York: International Commission of Jurists and Law in the Service of Man, 1980).

19. See Pictet's *Commentary* (Geneva: International Com. of the Red Cross, 1958), pp. 334035.

20. The only exception was the Elon Moreh case, which is discussed later.

establishment of infrastructure, and the stifling of any Arab protests, so that areas of conflict could be reduced, and future development of Jewish settlements made easier. This challenge was met in stages.

In the first stage, the military issued orders which put all aspects of life in the West Bank under the military authorities' control (using as pretexts security and the necessity of preserving public order and ensuring the continuation of normal life, as required by section 64 of the Geneva Convention). All powers previously in the hands of the Jordanian government's officers and departments were acquired and concentrated in the hands of the military commander, or his delegates. Also, it was required that a permit be obtained from the military authority for carrying out any vital needs such as starting a business, importing, exporting, traveling, buying or selling lands, etc. Orders such as Proclamation No. 3 (later replaced by Military Order 378) were passed, which established military courts and enabled the soldiers to carry out various actions and issue a number of restrictive orders. Military Order 378 has been amended thirty-seven times, each of these amendments increasing the powers of the military and closing any loopholes which could possibly be used by lawyers defending so-called security offenders. The order also usurped control over many of those matters previously within the jurisdiction of the local courts, giving jurisdiction to the military court either exclusively or concurrently with the local civilian court.

In this first stage, changes in local law were effected whereby any decision which the military needed to take to carry out activities not justifiable under international law could not be appealed to the local court. Changes, for example, were made to the Land Expropriation Law, whereby the owner of expropriated land could not resort to the local court and whereby the necessity to publish the authority's intention to expropriate was done away with.<sup>21</sup> Similar changes were made to the Town Planning Law,<sup>22</sup> and others. The general right of courts to hear cases against administrative decisions of the executive branch of government, which Jordanian law preserved, was also restricted. According to Military Order 164, only if the military authority gave its permission could an aggrieved party take up a case to the local court against a decision of the military, or any of its branches or employees. Instead, appeal was allowed to the Israeli

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21. Military Orders 108 and 321; see *West Bank and the Rule of Law*, pp. 107-9.

22. *Ibid.*, pp. 117-18.

High Court, which, as explained above, restricted itself by refusing to question the security justification of an action if security was claimed by the respondent as the justification for the action appealed against.

The policy of the Labor party towards the West Bank was not as clearly defined as that of the Likud, which has for the past five and one-half years been in control. Labor agreed with the Likud that they would not support the establishment of the Palestinian state. They also agreed that complete withdrawal from the West Bank was not possible. They supported and carried out Jewish settlement in the West Bank, but restricted these to certain areas (primarily around Jerusalem and in the Jordan valley) and avoided areas where there were large concentrations of Arabs. The Likud, however, have declared their intention to settle Jews anywhere in the West Bank - their targets seem to be around areas with a large Arab population, in order to limit and stifle the growth of the Arab communities and perhaps to force them into a certain direction in times of hostility under the pretext of self-defense or the necessities of war.<sup>23</sup>

Given the Labor position it was sufficient to use security to justify its policies of acquisition, to acquire lands generally in remote areas. The first areas to be acquired were those military camps and positions which the Jordanian army had occupied. Military Order 59 gave the military authority the power to acquire any government property, exactly as Order 58 gave the custodian of absentee property the power to acquire property which he believed was "abandoned" property. In fact many of the first settlements began in military camps. The military camp was then removed and the settlement remained and grew.

Second were areas that were requisitioned for military purposes. The only justification given in order acquiring lands in this way is simply that the land is needed for "vital and immediate military requirements." The military government offered payment for the use of the land. Many settlements also started in areas requisitioned initially for military purposes.

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23. On the settlement policies in general, see W.W. Harris, *Taking Root: Israeli Settlement in the West Bank, the Golan and Gaza-Sinia, 1967-1980* (Chichester and New York: Wiley, 1980).

Third were areas which were closed by the military authority for use as training grounds, firing ranges, and as general "security" zones.

The fourth, and until 1980 the most extensively used method for acquiring lands for Jewish settlement, was expropriation for public purposes. One figure given for the areas acquired in this way is 1.5 million dunums.<sup>24</sup>

### *Reclassification and Registration of Lands*

The second stage of the use of administrative methods to acquire possession of West Bank lands for Israeli settlements can be traced to 1979. It was occasioned by a number of events, the most important of which was the case in the Israeli High Court concerning the settlement Elon Moreh. This decision, in which the High Court gave a favorable verdict to the Arab owners of the land who brought the action, did not have the effect of reducing Jewish acquisition of Arab lands, but only of bringing about a change in the tactics used by the military authorities to acquire those Arab lands.

Several events and legal changes and interpretations of the status of West Bank lands are facilitating the implementation of this new policy of land acquisition. First, a comprehensive survey of the ownership and registration status of all West Bank lands was begun in December 1979 by the Office of the Custodian of Absentee Property, under the direction of Mrs. Plia Albeck, who was seconded to the military government by the Justice Ministry.<sup>25</sup> Arab employees in the various land registries in the West Bank were put to work on this project. The survey was completed in the spring of 1981.

The survey discovered that approximately one-third of all West Bank land had become registered, after all disputes over ownership were settled according to the Settlement of Land Disputes Law of 1952. The land settlement operations were begun by the British in the early 1920s, and were continued by the Jordanian government. In 1967 they were discontinued by Military Order 192, and requests by West Bankers to

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24. Benvenisti, *West Bank and Gaza Data Base*, p. 31. Benvenisti cautions that this figure seems outdated, but it is not possible to arrive at a better approximation in view of the restriction on inspecting land registers.

25. Lustick, "Israel and the West Bank after Elon Moreh," p. 568.

complete these operations, especially in the areas where all the stages except the final registration were completed (such as in the area near the Arab town of Betunia near Ramallah) were denied. Otherwise, lands in the West Bank are registered mainly in the tax offices where surveys were carried out for the purpose of levying tax on the land. Owners generally understated the area of land which they owned to minimize the tax to be paid on their holdings.

Other landowners possess Turkish certificates of registration or have acquired their possession through devolution, purchase (which is not always registered), and use.

With the availability of opportunities for work in Israeli factories, many Palestinians who had previously cultivated their lands left to seek employment as laborers in Israel. Restrictions which the authorities have placed on drilling of artesian wells and the marketing and exportation of agricultural products have also fostered this trend.<sup>26</sup>

The law governing land holdings in the West Bank continues to be the Ottoman Land Code, with Jordanian and Israeli amendments and additions. The theoretical basis of the Land Code, however, continues to apply.<sup>27</sup>

According to the Land Code, all lands in the West Bank are classified into the following five categories. First, there are *wakf* lands, which are lands that are dedicated to a pious purpose. Then there is *mulk* land: lands initially given out by the Ottoman conqueror of the area (who considered himself the owner by conquest of all the lands he occupied) to the Muslim residents, and the *khuraj* lands handed over to non-Muslims. A Jordanian law of 1953 declared all *miri* land falling within municipal areas as transferred to *mulk* lands.

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26. Only two permits for drilling artesian wells have been granted since 1967.

27. For a more detailed discussion of this see R. Shehadeh, "The Land Law of Palestine", *Journal of Palestine Studies*, Winter 1982. See also Shehadeh, "Legal Status of the Occupied Lands," (in Arabic) in *Political Quarterly*, vol. 2, editor Hamadi Essid, published in Paris.



Then there are the *miri*, *matruk*, and *mawat* lands, which the Israeli policy now in force considers to be "state lands". *Miri* lands are lands which the Ottoman *Emir* did not allow to be dedicated as *wakf*, nor did he distribute them as *mulk*. It is land whose *raqabeh* (or absolute ownership) continued to reside with him, but whose use he allowed for the public according to certain conditions. The theoretical basis of this conforms to the theoretical basis of other systems of land law, such as for example English land law. There also, all the land came to the ownership of the crown with the Norman invasion, when it was acquired by conquest. The crown gave out, in accordance with different rules, the land for the people to use. But "no land is without a lord," and the ultimate lord is the crown. However this only provides the theoretical basis. In practice the only lands which are in the actual ownership and possession of the crown in England are those areas which are classified as crownhold. The rest are in the actual ownership and possession of their registered owner or user, as the case may be.

The theoretical basis of the Palestinian land law was never altered, but the actual implications of this basis has been subjected to several amendments during the Turkish, British, and Jordanian regimes. Jordanian Law no. 49 of 1953, for example, removed all the restrictions previously existing on the extent of the use which the possessor of *miri* land could make of the land, thus removing any practical difference that used to exist between the powers of the owner of *mulk* land and *miri* land. Some differences, however, continue to exist in the way both types devolve upon the death of the owner. The present Israeli policy is to consider this category of land as "state land," confusing the theoretical with the actual.

Another category of land which is also considered as "state land" by the military authorities is *matruk* land. This category (as the name in Arabic implies) is land which has been left for public purposes such as the building of roads, cemeteries etc. The third is *mawat* land-considered as dead land because it lay further from the village "than the human voice could be heard" (in the words of the Ottoman Land Code).

The Ottoman system, and all later governments until 1967, acknowledged that the land surrounding the village was for the use of the villagers either as common pastures or for future development. The inhabitants of the village did not have any need to register their lands. They knew amongst themselves which of the village lands belonged to which families and which were owned in common (*mashaa*).

The Israeli policy has been to make the maximum use of the lack of specific legal documentation attesting to the villagers' ownership of their land - a fact for which the latter cannot be blamed, as the process by which registration is acquired has been stopped, as explained above.

### *The Elon Moreh Decision*

This was the first instance when (because of the special circumstances of the case, such as the conflicting affidavits about the security necessity of the settlement and the Gush Emunim's statement that the settlement was for ideological grounds) the court did question the motives and professional judgements of those entrusted with the security of the state. The decision handed down was that security in this case did not justify the requisition of privately owned land for the purpose of building a Jewish settlement. The Court also decided that the Hague Convention of 1907 was binding on Israel's governance of the territories it occupied in 1967. The two limitations which the decision placed on future resort to the Court in cases of land requisition or possession by military authorities for Jewish settlements were the following: first, the High Court was not prepared to intervene in any disputations over the ownership status of land; second, only seizures of privately owned land could be prevented or reversed through recourse to the High Court.

### *Multiple Justice Systems*

Some of the earlier changes to Jordanian laws which were carried out by the military authority to increase the powers of the military and abolish the right of appeal against military actions to the local courts have already been discussed. Specific changes have also been made to the laws and military orders in force in the West Bank which have been invoked to achieve the acquisition of large areas of lands for Jewish settlement.

The Israeli policy in this regard has been guided by three principles. The first is to centralize within the military establishment and tribunals administered by the military all matters relevant to the settlement of the West Bank by Jews. The second is to preserve the semblance of legality in all activities of acquiring lands for the purpose of Israeli settlements such that, for example, a right of appeal to the actions of the military is

available, although that appeal is to a military tribunal. The third is to organize the legal and administrative machinery by which land acquired in such a way as not to allow objections by Arabs to hamper the quick and efficient execution of the settlement activities.

With these as the guiding principles, three systems of justice have been established in the West Bank.<sup>28</sup> The first is the system which is concerned primarily (with a few minor exceptions) with the Arab inhabitants of the West Bank. This system is what has been left after the numerous changes which have been made to the Jordanian system of courts throughout the fifteen years of occupation. It applies the Jordanian law as amended and added to by the 1,026 military orders which are now in force in the West Bank. It has been restricted to hearing cases which involve matters affecting only the members of the Arab community - cases that have no bearing on the Jews living in the area or on the policies of the military government as regards the area. Even within the confines in which it operates, this system has no independence, as its judges are appointed by the military.

The second system of justice is that of the Jewish settlements.<sup>29</sup> Municipal courts have been established and are empowered to hear cases on matters which arise within the area of the Jewish settlements, as laid out in the regulations made by the military authorities, which are identical to the laws of local and regional councils that exist in Israel. Israeli courts also have acquired jurisdiction in some cases which involve Jewish settlers living outside the area of Israel and the military courts have jurisdiction over other matters. Rabbinical courts have been established in the West Bank to look into matters of personal status involving Jews. On the whole and with very minor exceptions, Jewish settlers are subject to their own courts, to military courts, and to Israeli courts.

The third system, which concerns us most here, is the system which is established and administered by the military authority. Included in this system are the military courts which have jurisdiction over all the matters covered by the expanded definition of security applied by Israel. These are

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28. The second edition of *The West Bank and the Rule of Law* will have a detailed discussion of this.

29. See generally on this R. Shehadeh, "Legal System of Israeli Settlements," *Review of the International Commission of Jurists* (December 1981), 27; also by the same author, "An Analysis of the Legal Structure of Israeli Settlements in the West Bank," in I. Abu- Lughod, ed., *Palestinian Rights: Affirmation and Denial*.

provided for under the Emergency (Defense) Regulations of 1945 and in the various military orders on "security matters," the most important of which is Order 378. Other tribunals which are included in this system are the Objection Committees, established by virtue of Military Order 172, which now have jurisdiction over twenty-six different matters, as provided by Military Order 1019. These committees are what the Israelis claim to be the appeal committees. Their purpose is to preserve, on the face of it, the right of appeal for the party aggrieved, while placing the power to decide on that appeal in the hands of Israeli military officials. It is this board that hears appeals on expropriation orders, orders declaring land to be abandoned property, and orders declaring land to be "state land." Other bodies included in this system are the Compensation Board, which hears cases for compensation for damage caused by the activities of the Israeli army, and the special board which, by an amendment to the Jordanian Town Planning Law of 1966 (by Military Order 604), hears appeals to decisions taken by the Higher Town Planning Authority, which is now composed entirely of Israeli officials.

Under these existing conditions, the military authority has carried out surveys of all lands in the West Bank and has prepared new town and regional plans. This has been done to determine the ownership and registration of land in the West Bank, and to plan the present and future position and development of Jewish settlement and Arab population centers there. These new plans demarcate the position of the Arab towns and villages and restricts their ability to grow, they also provide areas into which only Jewish settlements may develop. At present, when the right of the municipalities and village councils to grant building licenses has been restricted, and the only body authorized to give building permits in areas outside municipal areas is the Higher Town Planning Board, which is composed entirely of Israeli officials whose primary concern is with the Jewish settlements, it is clear that the control over the future spatial development of the Arabs and Jews in the West Bank is almost entirely in the hands of the Israeli authorities.

The main category of land now being usurped by the military authorities for the purpose of establishing and enlarging Jewish settlements in the West Bank is what is called state land. The reasons why the Israeli definition of state land is not justifiable according to the land law in force

in the West Bank has been explained above. It was also explained above that the High Court of Justice has ruled in the Elon Moreh case that it will not look into disputes over ownership of property. The present practice, which has been used extensively over the past three years for occupying Arab lands in the West Bank, is for the military authority, or its branch, the Custodian of Absentee Property, to announce its claim over an area of land. The new rules provide that such a claim may be made orally. They also provide that whenever it is not possible to ascertain who may have claims over the land (the subject of the order) it suffices if the *mukhtar* of the village is informed of the claim. Whether the *mukhtar* (who is very often cooperating with the authorities) informs those who claim ownership of the land or not is not the concern of the authorities or of the objection committee. One month is allowed for the submission of an appeal against the order declaring the land state land. With the appeal must be submitted documents upon which the appellant bases his appeal, as well as survey maps of the whole area guaranteed by a certified surveyor.

It is very often the case that thousands of dunums are affected by such orders. The expense and time involved in preparing the documents that must be appended to the appeal can be exorbitant. When the case comes before the objection committee, the burden of proof that the land is in the ownership of the appellant falls on him. This has become the case after Military Order 59 was amended in 1969 by Order 364, which states as follows:

If the person responsible [defined by the order as anyone whom the area commander appoints] signifies by a written certificate signed by him that any property is state property, that property shall be so considered as long as the opposite of this has not been proven."

To lift the burden of proof, the committee does not accept certificates of registration from the tax department nor any other documents attesting that the land was bought from a third party. The burden of proof in most categories of land can only be lifted if the appellant can prove actual continuous use of the land for the past ten consecutive years. To appreciate the difficulty of meeting this standard of proof, it must be borne in mind that many lands are not arable, that permits to drill artesian wells are almost never granted, and that dependence on the unpredictable rainy season does not always render it economical to cultivate the land. Added to this is the inherent bias of the committee and the conception which its members hold as to what constitutes cultivation, who refuse to regard

anything less than a programmed consistent cultivation of the land as constituting use of it. The result is that most of the cases brought before the objection committee end in the rejection of Arab claims. However, the Arab who loses his land does have an avenue for appeal open to him, but if he doesn't choose to use it, this can be held against him in the future as indicating that he did not believe he had a strong enough title—otherwise he would have used all the legal channels available to him. If he does resort to the committee, he may incur heavy financial losses, in addition to the possible loss of his land, and he will be providing the authorities with the opportunity to present the record as secure in favor of the Jewish acquisition of the property, as the matter was subject to appeal and the appeal tribunal did in fact make a decision in favor of Jewish acquisition after it heard all the evidence.

This method of acquiring Arab lands for Jewish settlement and the system in which it operates continue to be used to date. It has proved to be an efficient and effective method. The likelihood is that it will continue to be in use until enough lands have been acquired to carry out the proposed enlargement of the Jewish population in the West Bank.

When that stage is reached, there are many pointers that the same tactics used in Israel after 1948 will also be used in the West Bank.<sup>30</sup> The property of absentees is already being leased for long terms by individual and corporate Israelis. The Jewish National Fund and the Israel Land Authority will assume control over what has been acquired as "state land" and will render these lands inalienable, as is the case with 93 percent of the lands in Israel. As to other lands, which are registered in the names of Palestinians with a clear and undisputable title in the land registers, if the Jewish settlements should have need of them and assuming the Palestinians have been allowed to continue to live in the West Bank, the claim could be made that whatever areas of them are needed for the Jewish settlements must be expropriated for public purpose. Whereas a substantial proportion of the West Bank public lands would then be Jewish (assuming the present government's settlement plans are successful), this claim would be justifiable in legal terms.

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30. For a general discussion of these tactics, see Lustick, *Arabs in the Jewish State* chapter 2.

The Israeli methods and plans for acquisition of land holdings are understandable within the context of the solution which the present Israeli government is offering for the West Bank situation: namely to offer the Arab "inhabitants" there autonomy over their persons but not over land.

Should the time come, however, when Israel is held accountable before the international public according to the rules of international law, then the properties held, for example, by the Custodian on the justification that their owners are not there to manage them, would have to be returned. Similarly, the land which, according to Israeli interpretation, is state land would have to be returned from those who have acquired ownership over it, because under the Hague rules, an occupying state cannot make permanent use of them.

Clearly Israel is not leaving the door open to any such eventuality. All the lands that are being acquired are being given to private users who are encouraged to make permanent use of them, the obvious and declared aim being to create a *de facto* situation with which no future Israeli government will have the political power to interfere. The situation that Israel now is creating leaves both Arabs and Israelis few options for the future.

## PART IV

### **Restrictions on the Use of Land by Palestinians\***

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In the previous part, the methods by which land in the West Bank is being acquired have been described. The aim of this chapter is to describe the land use plans that have been drawn up and promulgated for the West Bank in order to show how restrictions are being imposed on the use of land that has not yet been acquired.

The declared objective of the master plan of the World Zionist Organisation, 1983-1986,<sup>1</sup> is "to disperse maximally large Jewish populations in areas of high settlement priority, using small national inputs and in a relatively short period by using the settlement potential of the West Bank and to achieve the incorporation (of the West Bank) into the (Israeli) national system."

Meron Benvenisti, in his study of the plan, writes that the criteria established to determine priorities of settlement regions are "interconnection between existing Jewish areas for the creation of settlement continuity" and "separation to restrict uncontrolled Arab settlement and the prevention of Arab settlement blocs"; "scarcity refers to areas devoid of Jewish settlement". In these criteria "pure planning and political planning elements are included" (sic).

Meron Benvenisti has observed from his study of the plan that the Israeli planners do not pretend to use professional, objective planning criteria. They are proud of their partisan approach. He writes: "A quantitative point system was introduced to identify priority areas. The high priority areas encompass the central massif of the West Bank in such a way

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\*. From Occupiers Law, Israel and the West Bank, Raja Shehadeh, Institute of Palestine Studies, Washington D.C. 1988 pp. 50-59

1. Benvenisti, Meron: "The West Bank Data Base Project: A Survey of Israel's Policies", American Enterprise Institute for Public Policy Research, Washington DC and London, 1984.



as to encircle the populated Arab areas... The extension of the high priority Jewish settlement area to the Northwest of the West Bank as far as the armistice line is explained thus (in the master plan); 'An area along the Green line from Reihan to east of Tul Karm and east of Elkanah [is] liable to become an Arab settlement block, therefore separation through settlement activity and legislation (to restrict Arab building) is necessary and imperative'. Arab populated areas are considered 'problematic' for settlement because 'the chances for land acquisition are small and there is continuous Arab settlement or intensive agricultural cultivation...!'"

Palestinian population and Palestinian land use are regarded as constraints. Palestinian areas are encircled in the first stage and are then penetrated and fragmented.

The plan is based on the work of high-level officials of the Israeli government and the West Bank military government and of planning experts. It bears the official stamp of the Israeli government. According to Benvenisti, "it cannot be viewed as other than the official land use plan for the West Bank". This is confirmed by the fact that regional and road plans (which will be described below) made by the planning departments in the West Bank apply the principles contained in the World Zionist Organisation's master plan.

The Israeli military authorities, having amended the Jordanian planning law, now have a free hand to draw up and implement regional and road plans for the West Bank.

The Jordanian planning law of 1966 contains procedures for the participation of various local institutions, such as the Engineers' Union, in its operations. It imposed a hierarchical structure of local district and national planning committees. Military Order 418 abolished all local participation in the planning operations. All planning powers were vested in the Higher Planning Committee composed of Israeli officers only and appointed by the Area Commander. The Order also restricted the licensing powers of municipalities. In place of the village planning committee, there is now a military committee, the Higher Planning Committee, which was given extensive powers to suspend any plan or licence, to assume all power vested in any local committee and to exempt any person from the need to obtain a planning licence.

Thus, all the powers for land use planning in the West Bank are in the hands of officers appointed by the military authorities. Examination of their plans reveals clearly that the objectives which they serve are not to benefit the Palestinian population or to ensure the security of the army. They follow the principles laid down in the master plan referred to above. As such, they exceed Israel's powers as an occupier under international law.

Two plans have already been published by the military Planning Department. They are Plan 1/82 known as the RJ5 (Region Jerusalem 5) of 1982 and the road plan for the entire West Bank referred to as road plan No. 50, of 1983.

### *Plan No. 1/82*

The outline plan No. 1/82 is a statutory outline scheme for an area of 275,000 dunums bordering on Jerusalem, including the towns of Bethlehem and Ramallah. This plan determines the use of the land outside the municipalities and villages within the area it covers. The boundaries of these population centres have been fixed by the plan. Some villages have been left out altogether. The areas surrounding the Palestinian towns and villages are designated either as agricultural areas in which building is almost entirely prohibited or special areas comprising approximately 35% of the area which are not defined by the plan but which are implicitly for the expansion of Jewish settlements. Natural reserves and areas for future planning are also designated.

Although the plan is said to be an amendment to a British mandate plan, that plan had no statutory effect. In any event it cannot be used as the basis for planning the region, 50 years later, without fully taking into consideration the natural expansion of the Palestinian population in the area.

As it now stands, there are many legal objections that can be made to the plan. Contrary to the planning law, the local population was not consulted at any stage of the preparation of the plan. The articles of the law which require the planning department to take several steps and make specific surveys to determine the best interest of the population when preparing a plan were not complied with. The Israeli officials justify their failure to consult the local population and not to comply with the law by

claiming that plan 1/82 is merely an amendment of an earlier mandate plan, the RJ5. Such a claim is unfounded.

According to the regulations published with the plan, no building licence may be given until the applicant submits final proof of his ownership of the land for which a licence is requested. Such a request is not in accordance with the planning law.

The plan restricts building in areas designated as agricultural areas which surround the Palestinian population centres. Building on agricultural land is greatly restricted to one house per plot, provided that the area for building is not more than 150 square meters. An owner of a large plot intending to construct more than one house may not partition the land. Article 8 in Chapter 3 of the Regulations appended to the plan prohibits partition of land in an agricultural area if the partition is intended to alter the rights to build in the area. The Higher Town Planning Council, however, has retained discretion for itself to allow use of agricultural land for non-agricultural purposes. In view of the constitution of this council, such authorization is more likely to be given to the Jewish settlers than to the Palestinian population.

Article 10 in Chapter 4 imposes a general prohibition on building except if authorization is given by the Higher Town Planning Council until an outline scheme is approved for the area in which licence to build is sought.

Two new kinds of land are introduced by this plan: "land for future development" and "special areas". The first is described in Article 3, Chapter 4 as lands which are either for use as agricultural land or for any other use which the Higher Town Planning Council approves. "Special areas" are described as areas of land "the use of which shall be determined by the Higher Town Planning Council."

It is quite clear that the plan imposes great restrictions on land use, leaving wide discretionary powers with the Higher Town Planning Council which it is likely the Council will exercise in a manner that is prejudicial to the development of the Palestinians and more favourable to the development of the settlements. As it is, large areas have been marked out on the plan as pertaining to Jewish settlement and this is out of proportion with the number of settlers inhabiting the area as compared to the Palestinians there.

The legal steps that were followed to produce and publish the plan are not in accordance with the Jordanian planning law. After its publication in 1982, the public was invited to submit objections to the plan to a special military committee that was set up for this purpose. No decisions have yet been given concerning these objections but the plan has already been put into effect and licences are being granted in accordance with it.

### *Road Plan No. 50*

The roads that existed in the West Bank in 1967 ran from the north to the south along the centre of the region with access roads running laterally away from this central backbone. Some 93% of these roads were paved. In 1970, the Israeli government started creating east-west links with the Jordan valley. The trans- Judea and trans-Samaria roads were created for which thousand of dunums of Palestinian land were expropriated. The Likud government abandoned the north- south strategy and stressed integration of the West Bank road system into the Israeli system. Many roads connecting the settlements to each other and to Israel were built, but road plan number 50 is the first comprehensive road plan to be published since 1967.

The apparent objectives of this plan are:

- to connect the settlements to each other and to Israel,
- to avoid Arab towns and villages,
- to create access roads for the Jewish settlements to the main Israeli metropolitan areas of Tel Aviv and Jerusalem.

The plan is clearly designed to serve Israel's local, regional and national interests, while Palestinian transportation needs are ignored or are served as a by- product of Israeli interests. The plan is also intended to restrict Arab development by restricting building along a width of 100-150 meters on each side of the road. Care has not been taken with regard to the amount of damage the path the roads will take will cause to existing agricultural land, irrigation schemes and other Palestinian installations.

The loss and damage, for example, which the proposed 80 km. road No. 57, extending from the Palestinian town of Tulkarim to Jiftlik will cause is estimated as follows:

- 3,500 dunums of vegetable farms, 1,200 dunums of olive groves and 350 dunums of citrus groves will be destroyed.

- the Fara'a irrigation scheme which is 14 kms. long will also be destroyed. The scheme irrigates an area of 25,000 dunums.

- 15 artesian wells, 15 irrigation ponds, four tree nurseries and three vegetable nurseries will have to be re-located. Amongst these is the biggest nursery in the area.

When the High Court of Justice heard a petition against the road scheme, the military authorities justified the scheme on the grounds that it is designed to benefit the local populations.

The military considerations, by virtue of which the authorities had defended the scheme in an earlier case before the same court, were not argued. The Court expressed its surprise at this. Justice Barak said in his judgment: "It was expected that also in this case before us, the emphasis would be on the defence consideration which completes the civilian consideration. Yet, this military consideration was not mentioned before us. This is a strange situation." Still, Justice Barak found that the scheme was, in fact, for the benefit of the local population. The Court decided unanimously not to accept the petition challenging the road scheme.

Such a finding is unusual in view of the fact that a road network already exists in the area. The existing roads run through the villages. The level of traffic does not justify the erection of a parallel network of roads especially in view of the damage the network will cause.<sup>2</sup>

### *Town Planning*

The road and regional plans relate to land use outside the towns and villages. Within the municipal boundaries the Palestinians have not been allowed to carry out their own planning.

The dismissal of Palestinian mayors and their replacement by Israeli mayors in most of the major towns was explained as being due to political causes. In fact, there are convincing indications that the appointment of Israeli mayors was intended primarily to serve the interests of Israeli planning within Palestinian towns.

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2. For a full analysis of the legality of the road plan and its probable effects see "Israeli Proposed Road Plan for the West Bank - A Question for the International Court of Justice" by Aziz Shehadeh, Fuad Shehadeh and Raja Shehadeh, reprinted by Law in the Service of Man, Ramallah, 1984.

In Hebron, for example, where a Jewish settlement has been established, the existence of an Israeli mayor is a great asset to the development of the settlement. Before his dismissal, the Palestinian mayor, Mustafa Natshe, had taken proceedings in the High Court of Justice to challenge the expansionist activities of the Jewish settlement inside his town. When the Israeli mayor took over, he promptly withdrew the case from the Court. On 21 May 1984, the boundaries of the town were changed to allow more areas to be given to the nearby settlement of Kiryat Arba. The Israeli mayor has also been granting licences for the settlers inside the town to proceed with the enlargement of their settlement and, in some cases, has withdrawn licences that had been granted to Arab residents by the previous mayor. In one case,<sup>3</sup> he even took criminal proceedings against a Palestinian who had built a house on the basis of a licence given to him by the previous mayor. These proceedings were not successful, but, as a result of other administrative proceedings taken against him, the Palestinian was compelled to pull down the house.

On 5 May 1983, the Israeli mayor moved the bus station and transferred the old site to the Jewish settlers. In the other West Bank towns, town plans are being designed by Israeli planners while the Palestinian planning boards are presided over by Israeli officials. The Jewish Council's planning committee members are elected by the settlers.

The situation then is that the planning authority composed of Israeli officials has created regional plans for the use of land outside the municipal boundaries and Israeli mayors of Arab towns are proceeding to create town plans to suit the purpose of Jewish settlement.

### *Discriminatory Practices by the Planning Department*

The discrimination by the planning authority against the Palestinians is not only in the general planning of the use of the land in the West Bank. Discrimination is also evident in the areas which are designated within the plans as Palestinian zones. When a Palestinian institution applies for building permits within an area zoned for the purposes of the applying institute, the planning authority uses its wide powers to discriminate against the institution.

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3. Criminal case No. 1351/83.

Birzeit University, for example, is in the course of expanding its new campus within the area which has been designated since 1975 as a University zone. In November 1983, it applied for a licence to build a Fine Arts Building. At the date of writing, September 1984, the permit has still not been granted. In February, it applied for approval of its enlarged University zone and again no licence has been granted. Licences are, however, granted for other Palestinians more favoured by the authorities and whose building conflicts with that planned by the University.

When a Palestinian farmer in May 1984 constructed a fence illegally within the approved university zone of Birzeit University, causing a public nuisance, no action was taken for five months to remove the fence despite repeated complaints and appeals by the University. However, action is taken promptly against Palestinians who violate the planning law if the illegal structure lies in the area of the expansion of a Jewish settlement.

The restrictions that have been placed on land use are clearly intended to complement and bring to fruition the process of acquisition of land described in Chapter One.

The concentration of the Palestinians in the West Bank in restricted isolated ghettos seems to be the over-riding aim. What is apparent is that no provision has been made to take into account the natural increase of the local population in the West Bank. The Palestinians will just have to suffer the consequences of over-crowding in the areas to which they have been restricted.

In July 1986\*,<sup>4</sup> the Jordanian Antiquities Law was amended by Military Orders to facilitate control over land use. In keeping with the amended law, building licences must be approved by the Antiquities Department even if there is no evidence of archaeological remains on the land in question. The Antiquities Department thus has extensive powers in determining what constitutes an antiquity and in preventing the cultivation or other use of land around it within a radius determined by the department itself. The department is not required to prove that there are artifacts in the area it declares off limits, even though technological advances in seismography and other fields have made such tests routine. In making its decision, the department relies on the recommendations of the Advisory

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\*. What follows is from the update of Occupiers Law, 1988

Committee created by Military Order 1167 and composed of the Head of the Civilian Administration and other Israeli officials. A second aspect of the change is that jurisdiction over violations of the law has been transferred from the local Palestinian courts to the military courts.<sup>4</sup>

Restrictions on the use of private lands for archaeological reasons often precede expropriation in Palestine, where almost every dunum can be said to have archaeological significance. In Jericho, for example, the Antiquities Department prevented a farmer from cultivating his 38 dunums of land, contending that cultivation would harm the mosaic floor of an ancient synagogue which occupied several square meters at one corner of the parcel. Preservation of the historic patrimony was clearly not the motivating factor, however; the mosaic floor had been carefully maintained by the farmer since its discovery in 1945 and had been open to the public throughout the period of Jordanian rule, as Moshe Dayan noted with surprise when he visited the site in 1967. Soon after the injunction prohibiting cultivation of the entire plot was served on the farmer, a group of settlers began squatting on the land.

A second means of restricting land use that has increased over the past few years relates to zoning measures, or, more precisely, the withholding of building permits in Arab areas. Although Palestinian villages and small towns (those without municipal councils) have officially been encouraged to make town plans and have in many cases employed Israeli and Palestinian experts for this purpose, none of these plans has been approved since 1985 on the grounds that no final statutory plan of the area has yet been made. In the absence of approved planning documents, all individual building licences outside municipal boundaries (small towns and villages by definition lie outside municipal boundaries) must be approved by the military planning authorities. Since January 1987, no building licence

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4. The same process is followed in imposing all official illegalities in the West Bank, whatever the issue. First the Jordanian law is amended by a military order, which is preface by the claim that it is being passed in the interests of the local population and because the security of the Israeli army demands. Next, the jurisdiction of the local courts is suspended, and the military courts is given jurisdiction.



in these areas has been granted for Palestinian residents of the West Bank.<sup>5</sup> The freeze apparently reflects changes within the Planning Department, where a number of Israeli and Palestinian employees were dismissed on bribery charges following an Israeli police investigation in mid-1986. This investigation seems to have been prompted by settlers' complaints that Palestinian building activity was increasing and would affect future enlargement of Jewish settlements.

The difficulty on obtaining permits had led many Palestinians with a pressing need to build to go ahead anyway. In consequence, the planning authorities have been demolishing hundreds of homes in various parts of the West Bank on the grounds that they were built without licences. The law is selectively applied. Several years ago, I brought to the attention of the department a case involving an illegal three-story building that was standing in the way of the proposed development of the new campus of Birzeit University, so that the University could not proceed with its projects. The authorities did not respond.

Meanwhile, although Palestinian projects were at a standstill, 274 statutory plans for areas of Jewish settlement had been processed as of mid-1987. Of these, at this writing 86 had been approved, 110 had been disputed, and 78 were still awaiting approval.<sup>6</sup>

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5. At the end of 1987, in an apparent effort to induce the Palestinians to end the uprising that had begun in early December, military commanders announced that, as part of a plan to improve the living situation of the Palestinians, they intended to grant thousands of building permits.

6. Meron Benvenisti, The West Bank Data Base Project, 1987 Report, Jerusalem Post, 1987 p. 35.

## PART V

### **"The Operation of De Facto Annexation"\***

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The previous chapters described Israel's policy of acquiring the land, the aim of which, as has been explained, is to annex the West Bank without its Palestinian inhabitants.

Even according to the most optimistic projections, it is not expected that the Jewish inhabitants in the West Bank will equal or outnumber the Palestinians for several decades. Therefore, barring the possibility of forceful mass expulsion, Israel must create a legal relationship with the West Bank pending full *de jure* annexation.

Among the legal problems that arise in this interim period are the following:

- How to apply Israeli law to the Jewish settlements in the West Bank while the area has not been annexed and is not under Israeli sovereignty. Related to this problem are the problems of which courts are to apply this law and which government departments are to execute it, and how to ensure that only the Jewish settlers will be subject to these laws, courts and government departments.

- How to avoid applying the Israeli law and legal system to the Palestinian inhabitants.

- How to reconcile this peculiar legal state of affairs with the requirements of international law.

In this part, the solution which Israel has worked out for these problems in the course of its administration of the West Bank over the past 17 years will be discussed in relation to the executive.

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\*. From Occupied Law, Israel and the West Bank, Raja Shehadeh, Institute of Palestine Studies, Washington D.C., 1988 pp. 63-75.

## *The Executive*

The law that applied to the West Bank when Israel occupied it in 1967 was Jordanian law. The Jordanian courts had sole jurisdiction over all residents of the West Bank in civil and criminal matters. This Jordanian law has undergone many changes in the course of the occupation through the military orders which amended and added to it.

Although Jewish settlements of the West Bank started in 1968, by 1979 the number of Jews living in the West Bank was only 10,000.<sup>1</sup> These settlers were all Israeli citizens (or were entitled to be so under the Israeli law of return). Therefore, in terms of the law in force in the West Bank, they were considered as foreigners. When civil disputes arose in the West Bank, the courts which had jurisdiction (with few exceptions) were the local courts which apply the Jordanian law as amended by the Military Orders. In criminal matters, the Military Orders stated that the military courts should have concurrent jurisdiction with the local Jordanian courts to hear any criminal matter. The choice as to which court a criminal suit should be heard in, was reserved to the Area Commander. The Jewish settlers were therefore immune from the local courts in criminal matters but not in civil suits.

The practice of the government towards the Jewish settlers was preferential and violations of the law were overlooked to facilitate the settlers' life in a legal situation which did not always work to their best interest. As long as the status quo was continuing, the Israeli settlement policy could continue without the need to define the legal situation more clearly. With the prospect of negotiations for the Camp David plan, this need became urgent, not because settlement in the West Bank was being prejudiced, but because Israel wanted to prejudice the outcome of the proposed negotiations with the Palestinians.

What had been implied, but not stated, was now being declared publicly. In March 1979, Prime Minister Begin said: "The Jewish inhabitants of Judea and Samaria and Gaza will be subject to the laws of Israel".\*

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1. Benvenisti, Meron, *The West Bank Data Base Project: A Survey of Israel's Policies*, American Enterprise Institute for Public Policy Research, Washington and London, 1984, p. 61.

\*. Prime Minister Begin's autonomy proposals quoted in "*The West Bank Data Base Project: A Survey of Israel's Policies*", Meron Benvenisti, 1984, p.39.

Between 1979 and 1981, simultaneously with the autonomy talks, the following legal and physical measures were taken by the military government in the West Bank to forestall the outcome of the talks: survey of unregistered lands, the approval of the new definition of state land, and the first declarations by Military Order of land as "state" land; massive deployment of Israeli forces and construction of infrastructures; massive settlement; transfer of responsibility over water resources from the military government to the national water company, Mekorot; re-organisation of the function of the military government administration; cancellation of development budgets and interconnection of utility grids (water, electricity, roads); creation of Jewish regional and local councils; and creation of a civilian administration.

But how was the Begin government proposing to overcome the legal difficulty of applying Israeli law to the Jewish settlers in the West Bank without exposing itself to the charge of annexing the settlements?

The answer to this was found in the use of two legal devices: The first was for Israel to extend some of its laws outside its own territories extra-territorially, and the second was to distinguish Jewish settlements from Palestinian population centres by giving them a different and distinct legal status so that legislation which applies to the local government units under the Jordanian law will not apply to them.

As to the extra-territoriality, this was achieved through applying to the Jewish settlers emergency and regular laws passed by the Israeli parliament (the Knesset) either directly or by way of Military Orders.

Under the Israeli Law and Administration Ordinance of 1948, the Prime Minister or any other Minister has the power to make emergency regulations "as may be expedient in the interests of the defence of the state, public security and the maintenance of supplies and essential services" (section 9(a)) following a public declaration that a state of emergency exists.

Immediately following the 1967 war, the Minister of Justice introduced regulations entitled Emergency Regulations (Areas held by the Defence Army of Israel - Criminal Jurisdiction and Legal Assistance),

1967. The validity of these Regulations has been extended annually and later bi-annually by the Israeli Knesset.

These Regulations enable a court in Israel to try any person for any act or omission which occurred in any region (defined in Regulation I as "any of the areas held by the Defence Army of Israel") and which would constitute an offence under Israeli law if it were committed in Israel. But Regulation 2(c) excluded from this provision persons who at the time of the act or omission were residents of the region.

Most of the West Bank settlers are residents of Israel, as well as having another residence in the West Bank. So, in practice, an Israeli West Bank settler could under these Regulations be tried for his criminal action in Israeli courts. However, as to those who reside only in the occupied territory, the High Court of Justice ruled in 1972 that Israeli courts have no jurisdiction over acts committed by such settlers in the occupied territories since, as residents of the region, they were specifically excluded from the effect of the provision by Regulation 2. In 1975, an amendment was introduced to extend the jurisdiction of the Israeli courts to these settlers.

An amendment to the Israeli Income Tax Ordinance in 1980 provided that any income of settlers produced or received in the West Bank was to be treated as though its source were Israel, and an amendment to the Emergency Regulations in 1984 extended the power of the taxing authorities to collect the taxes in the 'region'<sup>2</sup>, thus avoiding an explicit reference to the settlements.

Similarly, under Emergency Regulations 6B of 1984, a list of nine Israeli laws (which can be added to by an Administrative Order) were made applicable to settlers by extending the meaning of 'Israeli resident' to include 'any person whose place of residence is in the region and who is an Israeli citizen or entitled to acquire Israeli citizenship pursuant to the Law of Return, 1950'.

**The nine Israeli laws are:**

Entry into Israel Law, 1952  
Defence Services Law, 1959

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2. Emergency Regulations, 1984, para. 3A.

Chamber of Advocates Law, 1961  
Income Tax Ordinance  
Population Register Law, 1965  
Emergency Labour Services Law, 1967  
National Insurance Law (Consolidated Version), 1968  
Psychologists Law, 1968  
Emergency Regulations Extension (Registration of Equipment Law, 1981.<sup>3</sup>

The second device was to establish by Military Orders a separate administration for the settlements.

At first, the status of the settlements was ambiguous. Strictly speaking, if the settlers were within the jurisdiction of a Palestinian municipal councils, they were subject to it. In practice, of course, they were not.

As from 1974, 'Religious Councils' were established by Military Orders. Their responsibility was to administer certain named settlements, for example, Kiryat Arba, by Military Order 561 of 1974, which provided that the settlement was to be administered "in accordance with administrative principles which the Military Commander shall declare by internal regulations".

In 1979, only six days before the signing of the Peace Treaty between Israel and Egypt, Military Order 783 established five regional councils in the West Bank and in March 1981, Military Order 892 established local councils for the administration of particular settlements. The jurisdiction of the regional councils covered the whole of the land under Israeli ownership or control, not merely the built-up areas of the settlements.

There are, in fact, three kinds of council:

- (i) Local councils, whose jurisdiction is limited to the planned (not existing) areas of the urban settlements. One council, Kiryat Arba,

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3. For a full analysis of these regulations, see article by Timothy Hillier available from Law in the Service of Man, Ramallah.

has a non- contiguous jurisdictional area which corresponds to all "requisitioned" areas in the vicinity;

- (ii) Regional councils with contiguous areas: the Jordan valley and the Megillot (Dead Sea foreshore) councils. Most of the land has been expropriated, requisitioned or closed or belongs to "absentees". 'Islands' of Arab villages and the town limits of Jericho are left out. The Hof Azza (Gaza) is also a contiguous council;
- (iii) Regional councils with non-contiguous areas. The highlands of the West Bank were divided into four general areas (from north to south: Shomron, Matei Binyamin, Etzion, and Har Hebron). Within three general areas, non-contiguous patches of jurisdictional areas were delineated. These irregular tracts correspond to the "state" land areas and are composed of all "uncultivable and unregistered lands". Most of the areas are inaccessible and are not useful for settlement or for any other land use. Nevertheless, they have been painstakingly demarcated. The map-makers undoubtedly felt that they were defining the areas annexed *de facto* to Israel. Although non-contiguous jurisdictional areas are scattered and meaningless, the overall planning responsibility of the regional councils encompasses the whole of the 'general areas' allotted to them. In those areas there are Palestinian towns and villages with twenty times the inhabitants of the Jewish settlements. The size of this Palestinian population does not hinder the regional councils from defining planning principles and from implementing them with the assistance of the military government. In fact, the general areas of the regional councils are to all intents and purposes a Jewish administrative division of the West Bank, unrelated and separate from the Palestinian sub-district administrative division.<sup>4</sup>

The power and responsibilities of the local councils as defined in the Military Order are identical with those of ordinary Israeli municipalities.<sup>5</sup>

The Jewish regional and local councils enjoy under the law a greater measure of autonomy than the Palestinian village and municipal councils. The Jewish councils are permitted to elect their own leaders, while the mayors heading Palestinian towns are appointed by the Area Commander

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4. Benvenisti, Meron, op. cit., p. 40.

5. Ibid.

and many of them are Israelis.<sup>6</sup>

Jewish councils have also been empowered to exercise wider functions and have more latitude to impose taxes than is the case with the Palestinian councils.

The most significant restriction, which only the Palestinian councils suffer from, is the need to request permission from the military authorities to borrow money and to accept money that is offered as a gift or a loan. The power to refuse or grant such permits is used as a punishment or reward by the authorities against the municipalities and villages.

Jewish councils, on the other hand, receive state services. The budgetary allocations for such services are incorporated in the general budgets of the Israeli civilian ministries. "Standards are identical with those applied in Israel", writes Meron Benvenisti.<sup>7</sup> "In education, welfare and religious services, the standards applied to the Jewish councils are more generous than in Israel, especially as far as employment of teachers and officials is concerned".<sup>8</sup>

### *The Military*

The heads of the Jewish councils in the West Bank are well connected with the Israeli centres of power. They form a strong lobby through the Council of Jewish Settlements in Judea and Samaria. They are involved in all high-level decisions on infrastructure and on legal, economic, security and land and water matters in the West Bank. They have responsibility over the planning schemes of the West Bank. In fact, the main office of the West

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6. Palestinian mayors of several towns in the West Bank, including Ramallah, Birah, Halhoul, and Hebron, have been deported. The mayors of most West Bank towns, including the mayors of all the above mentioned towns and in addition Nablus, Beit Jalla and Jenin, have been dismissed. These dismissals were carried out under the general power of the Area Commander by virtue of Military Order No. 537 of 17 March 1974. Heads of village councils have also been removed and others appointed in their place. Jordanian law, The Mukhtar Law of 1958, stipulates that the village leader shall be elected by all male residents in the area who are over 18 years of age.

7. Benvenisti, Meron, op. cit., p. 41.

8. For a fuller comparison between the Jordanian municipality law and the Regulations for the administration of local councils, see article by the present author in *The Review*, International Commission of Jurists, No. 27 of 1981, Geneva.



Bank Planning Department is located in the Jewish settlement Maaleh Adumim.

Both the fact that the Jewish councils do not rely on the military for their budgets and that they have better contacts with the Israeli power centres gives them powers independent of the military government. "No wonder", writes Benvenisti<sup>9</sup>, "the military government has abdicated its powers and authority not only on matters concerning the life of the settlements but also on all matters pertaining to the territories except military, political, administrative and development control of the Arab population".

The military government in the West Bank which exercises absolute control over the Palestinians is set up in the following manner:

*"Each branch is headed by any army officer who is responsible for the activity of the civilian offices functioning under him. The number and titles of the offices correspond basically to those of the Israeli government ministries. Each office is headed by a staff officer who is a civilian representative of the relevant Israeli ministry."*<sup>10</sup>

The following principle agreed by the Israeli government on 11 October 1968 continues to apply:

*"The Area Commander is the exclusive formal authority within the area. He is the legislator, he is the head of the executive and he appoints local officials and local judges."*<sup>11</sup>

There have been internal administrative changes within the military government during the 17 years of the occupation. The most important of these changes was the introduction of the civilian administration by Military Order 947 in November 1981.

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9. Benvenisti, Meron, op. cit., p. 41.

10. Singer, Joel, The Establishment of a Civil Administration in the Areas Administered by Israel, in Israel Yearbook on Human Rights, Vol. 12, 1982, p. 274.

11. Ibid., p. 275.

## *The Civilian Administration*

### *Overview of Military Order No. 947*

Military Order No. 947<sup>12</sup> declares the establishment of a civilian administration to be headed by a person whose nationality is not specified, who holds the title "Head of the Civilian Administration", and who is appointed by the Area Commander.

Military Order No. 947 has two main and closely related effects. The first is to institutionalise the already existing separation of the civilian from the military functions in the military government of the West Bank and formally establishing a new structure of civilian government which is empowered to function within the limits determined by the Order. The second is to make it possible to elevate the status of a large number of Military Orders and other legislative enactments promulgated by the Area Commander from the status of temporary security enactments to the level of permanent laws. This is achieved in the following ways:

Section 2 of the Order states that the Civilian Administration is established to "administer the civilian affairs in the region in accordance with the directives of this Order, for the well-being and good of the population, and in order to supply and implement the public services and taking into consideration the need to maintain an orderly administration and public order in the region".

To enable the Head of the Civilian Administration to carry out his duties, Article 3 of the Order states that he shall be delegated with the following powers:

- all powers determined by the law except those specified by the laws listed in schedule 1 of the Order.
- all powers determined by the Security (also called Military) Orders listed in schedule 2 of the Order,

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12. See "Civilian Administration in the Occupied West Bank", 1982, by the present author and Kuttub, Jonathan for a fuller analysis of Military Order 947.

.Sub-section (b) of the same article, literally translated, states that "with respect to this article, acts of legislation that were issued by virtue of the law after the determining date (which was defined in earlier orders as 6 June 1967) shall be regarded as part of the law and not as security legislation".

Article 4 empowers the Head of the Civilian Administration to proclaim subsidiary legislation based upon the laws and Security Orders according to which he is empowered to act. He is also empowered by Article 5 to delegate his authority and appoint officials within the Civilian Administration to execute the law and Security Orders. Article 5(c) further authorises him to delegate his powers to issue subsidiary legislation to such appointees.

### *Relationship between Israeli Civilian and Military Administrations*

The Civilian Administration was established by the Military Commander of the West Bank. It was created by a Military Order and its Head is appointed by the Area Commander. All the powers the Head of the Civilian Administration enjoys are delegated to him by the Area Commander and he exercises them in his name and on his behalf. They can be increased or decreased as the Commander wishes. Baruch Hollander, the legal advisor to the Military Government at the time of issuance of the Order, confirms the above in his explanatory memorandum attached to the Order. Hollander writes in paragraph five of his memorandum that the Commander still legislates in civil and military matters. The entire Civilian Administration structure is, therefore, subsidiary to the Area Commander and accountable to him. Effective authority and the source of power remains with the Area Commander. This is later confirmed by Military Order No. 950 promulgated on 16 January 1982, which adds a paragraph to Order No. 947 stating that "in order to remove any doubt there is nothing in the provisions of this Order (Order No. 947) which restricts or abrogates any of the privileges or rights vested in the Commander of the Israeli army in the Area or in any of those appointed by him". This relationship between the Civilian Administration and the Military Command is consistent with the present Israeli government's interpretations of its obligations under the Camp David Accords, which in its view calls only for the "withdrawal" but not the "abolition" of the military government. The Military Command, in that view, continues to be the direct source of authority for any "self-governing administrative council" in the Area. The "Civilian" administration is situated within the military headquarters at Beit Eil. Entrance to this

military zone is restricted. Only Palestinians who are summoned or succeed in getting an appointment may enter into the compound. Strict security measures and searches are carried out at the door.

### *Powers retained by the Military Commander*

By virtue of Article 3(a) of the Order, the Area Commander transferred to the Head of the Civilian Administration those powers and authorities acquired by virtue of the Military Orders listed in Schedule 2 of the Order and retained all powers not specifically transferred to the Civilian Administration. These residual powers continue to be held by the Area Commander in his own right (and not merely in his capacity as the source for all powers exercised by the Civilian Administration). They include the following:

- (i) Powers acquired by virtue of the laws and regulations listed in Schedule 1 of the Order, most notably the extensive powers granted under the Jordanian and British Defence Emergency Regulations of 1935 and 1945 respectively.
- (ii) The powers in all the Military Orders not listed in Schedule 1 of the Order and not amending Jordanian law.
- (iii) The legislative power to issue new Military Orders and create new laws.

By specifying the limits of the power delegated to the Head of the Civilian Administration, however, the Order implies that all powers not transferred to the Civilian Administration are non-civilian and are, therefore, military and security related. It is worth noting that Israel has always insisted that it continues to handle matters relating to "security" in the West Bank and that such "security" matters are from its standpoint not negotiable. The significance of Order No. 947 is that it provides more insight into what Israel means by security. Are all the residual powers and authority not given to the Civilian Administration to remain with Israel and should the autonomy negotiations be restricted only to the authority given to the Civilian Administration under Military Order No. 947? If so, then the scope of the negotiable powers has been determined in advance. In addition, the mechanism has been created to implement any concessions (unilateral or negotiated) Israel is willing to make, without necessitating any fundamental

alterations in the system of government in the West Bank as a result of implementing the Camp David autonomy scheme. This impression is reinforced by the official release and publication of "Israel's Proposals in the Autonomy Negotiations" by the Prime Minister's Office on 31 January 1982. In fact, the Military Government's Civilian Administration established by Order No. 947 possesses broader powers in certain spheres, such as residence and identity card matters, than those proposed to be delegated to a Palestinian self-governing authority. Of course, it might be argued that Israeli autonomy proposals to date represent only a negotiating position, but the passage of time and repeated government declarations that no more concessions can be made and unilateral actions like Order No. 947 make this view less and less tenable.\*

The Head of the Civilian Administration is empowered to administer a corpus of laws and Military Orders through the making of appointments and the issuing of licences and permits. The requirement to obtain some of these licences existed in Jordanian law. Other requirements were added by means of Military Orders issued by Israel to enhance its regulatory power in the Area.

One hundred and seventy Military Orders appear in Schedule 2 of the Order which the Head of the Civilian Administration is charged with administering. Some of these Orders enable the regulation and control of economic life in the West Bank, including imports, exports, prices, finance and banks; others regulate taxes, customs and duties; others regulate control over land and water, as well as electricity, telephone and postal services; some deal with specific areas that have come to be totally incorporated into the Israel system, such as tourism, roads, and insurance; others deal with licensing of professionals and regulating civil service appointments; a number concern supervision of plays, films, publications, and textbooks. The Military Orders establishing Objection Committees and delegating judicial powers appear in that schedule, as well as the Military Orders establishing regional councils for Jewish settlements.

A few Military Orders in Schedule 2 deal with quasi-police functions, such as regulating the use of explosives, the carrying of identity cards, the guarding of holy places, and the forcing of shops or businesses

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\*. For the text of "Israel's Proposals in the Autonomy Negotiations", see the *Jerusalem Post*, 1 February 1983, pp. 1 and 2.

to remain open. The rest treat a variety of other subjects, such as parks, game protection, animal diseases, and littering.

Many of these Military Orders were used in the past to set up the legislative structure consistent with Israeli policy objectives in the West Bank. It should be noted that the Head of the Civilian Administration or his delegates will have no power to alter or amend that structure but merely to administer it. He and his delegates will, however, have substantial latitude to exercise their discretion in granting or withholding licences or permits by virtue of these laws and Military Orders. Thus, a clear distinction is created between legislative powers to create structures and set broad policies (which remain within the exclusive domain of the military government) and the administrative authority to dispense patronage selectively within that framework. This latter authority may be delegated to a greater or lesser degree to local Palestinians willing to work within that structure.

### *Delegation of powers*

Article 5 of the Order authorises the Head of the Civilian Administration:

- (i) to make appointments in the Civilian Administration,
- (ii) to delegate to such appointees the authorities given to him by virtue of the law or the security regulations, and
- (iii) to delegate to others the authority to create secondary legislation (rules and regulations) based on the law and the Military Orders he is charged with administering.

This last power, to delegate rule-making authority, is ordinarily not implicit in grants of power. The fact that it was given to the Head of the Civilian Administration would favour the decentralisation of Israeli administration in the West Bank.

This right to delegate secondary legislative powers applies to all the powers falling within the Civilian Administrator's jurisdiction, whether they are given to him by virtue of Jordanian law or Military Orders. It must be remembered, however, that under the Order in question, the Head of the Civilian Administration has no primary legislative power at all and that he may pass only secondary legislation within the strict framework of existing

laws and Military Orders within his jurisdiction. He has only the limited power of transferring a selected number of the Civilian Administration functions to appointed\* representatives of the local Palestinians. In doing so, he will not be transferring to them any primary legislative or policy-making functions.

This arrangement also enables the military government to delegate to those among the local population who are willing to cooperate, patronage powers to issue or withhold permits and licences required by the laws or the Military Orders administered by the Civilian Administration. For example, officers of the Civilian Administration have begun to require the local population to obtain the endorsement of "Village League" functionaries before requests for certain permits or applications for public sector jobs can be considered. The Village Leagues, whose officers are appointed by the military government, have been set up as an alternative to the elected municipality councils. They presently hold no legal power in the spheres mentioned above and merely act as intermediaries. If, under this Order, the Head of the Civilian Administration delegates to them some of his powers, they will become the direct authority to which local Palestinians must turn.

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\*. or, under the Camp David autonomy plan, elected.

## PART VI

### The Legislative Stages of the Israeli Military Occupation\*

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The 1,200 military orders that are reviewed here provide a good source for the study of Israel's changing policies in the occupied West Bank. These military enactments, referred to as 'proclamations' in the first day of the occupation and then as 'military orders', were passed by the Area Commander of the Israeli army, who acquired, according to Proclamation No. 2, issued the day the Israeli army entered the West Bank, 'all legislative powers'. To this day, this absolute power to legislate has not been circumscribed. The one-man parliament continues to produce amendments and additions to the Jordanian law in force when the Israeli army conquered the West Bank, without any process of consultation at any level with the local Palestinian inhabitants.

Until 1982, this significant body of law remained unavailable both to the general public and to practising lawyers. There was a general belief prevalent amongst those following events in the Occupied Territories that, by and large, Israel complied with international law in the conduct of its occupation. Few bothered to study the military orders to assess the truth of this general impression.

In the preface to *The West Bank and the Rule of Law*, one of the earliest publications to review the military orders passed before 1980<sup>1</sup>, Niall MacDermot, Secretary-General of the International Commission of Jurists, wrote:

There have been isolated cases, as in Chile, where one or two decrees of a military government have been treated as secret documents and

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\*. First published in International Law and the Administration of Occupied Territories, two decades of Israeli occupation of the West Bank and Gaza Strip, Edited by Emma Playfair, Clarendon Press, Oxford, 1992.

1. R. Shehadeh and J. Kuttab, *The West Bank and the Rule of Law* (Geneva, 1980).



not published. However, this is the first case to come to the attention of the International Commission of Jurists where the entire legislation of a territory is not published in an official gazette available to the general public.<sup>2</sup>

In 1982, fifteen years after the beginning of the Israeli occupation, the military orders were finally published in their totality. Many of the secondary regulations as well as a number of orders made by virtue of the published orders, still remain unavailable. However, enough is available to enable the jurist to attempt to trace the changing policies that the Israeli government has sought to enforce in the territories it has occupied since 1967.

What is attempted in this paper is a general survey of the 1,213 military orders issued up to 3 December 1987, the time of writing. In topic and thrust, these orders illustrate four legislative stages. The more significant legal changes that occurred in each stage are identified and described. No attempt is made here to examine the consistency of these orders with international law, and only the orders applicable to the West Bank (excluding East Jerusalem) are reviewed here.

### *I. The First Legislative Stage*

The first legislative stage, from 1967 to 1971, is perhaps the most significant. The roughly 400 military orders issued during these four and a half years laid the foundation for the occupation. The orders were not published and were not available even to lawyers.

Perhaps the single most empowering order issued by the area commander, by which the commander assumed all legislative, executive, and judicial powers, is Proclamation No. 2. This order was issued on the first day that the Israeli army occupied the West Bank. Having assumed the power to legislate without consultation in any form with the people to whom the legislation would apply, the Israeli commander became very prolific. Over forty orders of major importance had already been issued before the end of the first month of occupation.

The orders issued during the first legislative stage extended military jurisdiction over diverse facets of life in the territories. The military

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2. Ibid. 7.

government was given full control of all transactions in immovable property (MO 25), the use of water and other natural resources (MOs 58, 59, and 92), the power to expropriate land (MOs 108 and 321), and the authority to operate banks (MOs 9, 45, and 255). In addition, the orders made illegal the import and export of agricultural products to and from the West Bank without military permission (MOs 47 and 49). Drivers' licences (MO 215), travel permits, and licences to practise a variety of professions (MOs 260, 324, and 437) also came to require the approval of the military authorities. Moreover, during this period the system of control through identity cards was initiated (MO 297) as was control over the municipal councils (MO 194) and over the village councils (MO 191). The system of military rule thus seems designed to give Israel full control of the Palestinians in the Occupied Territories.

True, it can be argued that an occupier may be entitled to issue certain orders dealing with the security of the occupier's troops. But even these often exceeded reasonable limits in safeguarding the Israeli army. The most important order issued during this period concerning what the military called security was Proclamation No. 3 (later replaced by MO 378). This order established the military courts and the 'security' offences which only the newly established military courts had jurisdiction to try. This, together with other orders issued during this first stage, legalized far-reaching restrictions on the basic rights of Palestinians living under Israeli rule. MO 101 made the 'congregation of ten people or more in a place where a speech is heard on a political subject ... or who are gathered for the purpose of deliberating on such a subject' punishable by 10 years in prison. It also, along with MO 50, imposed a complete ban on printed material unless special permission is obtained from the military to print, import, or distribute. Proclamation No. 3 authorized arrests without warrant and detention for as many as 18 days, renewable, without charge or trial. The order also empowered Israeli soldiers to conduct searches of homes without search warrants.

The restructuring of the judicial system contributed significantly to enabling the military authority to assume full and unchallenged control over all aspects of Palestinian life inside the Occupied Territories, including those matters which did not pertain to security such as industry, agriculture, and development.

The following are some of the ways in which this was achieved:

1. Cancelling the Court of Cassation which, under the Jordanian system, is the highest court of appeal.

2. Removing the independence of the judiciary by giving the military the power to appoint, dismiss, and promote all judges and prosecutors in the civilian courts (MO 129).

3. Removing from the jurisdiction of the civilian courts many of the matters over which they previously had jurisdiction, such as appeals against tax assessments, land expropriation, and refusal of permits for certain economic enterprises.

4. Giving jurisdiction to the newly established military courts over all criminal matters, concurrently with the civilian courts. The decision as to whether a criminal case is to be heard by the civilian or the military courts is made by the area commander.

5. Conferring immunity upon civil servants working in the military and/or civilian government of the Occupied Territories.

The Jordanian law in force provided the citizen with the right to appeal administrative decisions to the High Court of Justice. This right was seriously circumscribed by MO 164, issued on 3 November 1967, which declared that no local court could hear any case against any of the employees or agents of the State of Israel, the Israeli army, or any authorities established by them, unless special permission was obtained from the military authority.

Although it has often been said by Israeli apologists that the Israeli High Court of Justice has been made available to hear appeals against decisions of Israeli officials, it is evident from the record of the court that the Israeli court has only on very rare and exceptional occasions been willing to overturn a decision made by the military authority or any of its employees and has in any case not accepted to substitute its own opinion on the wide range of matters described as security matters over the opinion of the security apparatus.<sup>3</sup> Its effectiveness as an administrative court for the Occupied Territories has not therefore been apparent.

In addition to restructuring the judicial system, thereby reducing the ability of the courts to review the actions of the executive, the military administration also relieved itself of the duty to be accountable to the

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3. See Chs. 2 and 6. of International Law and the Administration of Occupied Territories.

taxpayers regarding taxes collected. According to the Jordanian Constitution, the government must publish the budget, which then becomes a public document. However, despite its legal obligation to do so, the Israeli military government has failed to comply.

As the occupation continued, public funds were being created for which the government levied new taxes. Some of these were established by military orders issued during the period under consideration, such as MO 103. The fund created by virtue of this order was to be used to develop the economy of the area. At least three other funds were created after 1971. These were:

1. 'The Fund of the Development of the Area', established by MO 974.

2. 'The Fund for Agricultural Products', established by MO 1051 to compensate farmers, *inter alia*, for providing agricultural products for industry.

3. 'The Deduction Fund', in which the Israeli government claims to deposit the money deducted from the salaries of workers working in Israel for benefits they do not enjoy.<sup>4</sup> The military government never accounted to the Palestinians as to how the money deposited into these funds was spent.

Relations between the West Bank (excluding East Jerusalem) and Israel were also legislated for during this period. A review of the orders pertaining to this issue reveals that Israel was not following a clearly defined policy. While, on the one hand, the orders which its military government issued treated the West Bank as a separate juridical area, other orders resulted in a *de facto* annexation of the area to Israel. These two sets of orders, all issued during the period under consideration, are reviewed below.

### ***Military Orders Rendering the Territories a Separate Juridical Area***

Proclamation No. 2, issued on 7 June 1967, describes the area to which the order applies in both Arabic and Hebrew versions as 'the West Bank' and declares, in Article 2, that the laws which were in force up to 7 June 1967 shall remain in force to the extent that they do not contravene

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4. On the Deduction Fund, see also Chs. 12 and 13.

Proclamation No. 2 or any other order issued by the military, or any changes that are brought about as a consequence of the introduction of military rule in the area.

There is in this order a clear recognition by the occupier of the occupation of an area which has separate legal status and therefore different laws to those which apply within the State of Israel. These laws were to apply until and unless amended by military legislation. Israeli law came to apply outright only in the area which was officially annexed, namely East Jerusalem and its environs.

Many of the military orders that followed this early order are also based on a recognition of the distinctness of the Occupied Territories as a separate juridical area. Thus, MO 39 (later replaced by MO 412), for example, began the restructuring of a judicial system separate from both Jordan and Israel and under the control of the military administration, as will be described below. MO 384 dealt with the conflict of law problem in the execution of judgements between two separate juridical areas, namely Israel and the Occupied Territories, and stated how judgments made in the courts of each can be executed in the other area.

MO 47, as amended, regarding transport of agricultural products, prohibited the transport into or out of the West Bank of any plant or animal products (except for canned goods) without a permit from the military authority.

MOs 397 and 398 created separate West Bank Companies and Trademarks Registration Departments. The orders also declared that all registrations that had taken place before 7 June 1967 will only be recognized if re-registered. The recognition of the separateness of the area from both Jordan and Israel is again very clear here.

Shortly after the beginning of the occupation, the newly acquired areas were made accessible to Israelis and tourists visiting Israel. However following the policy of treating the areas as separate from Israel, despite their accessibility, MO 65 was issued which, in effect, required a work-permit for non-residents of the Occupied Territories (including Israelis) intending to take employment there.

Perhaps the most graphic indicator that the occupied areas were to be treated as a separate unit from Israel was MO 5 (later replaced by MO 34)

which declared the whole of the West Bank a closed military area, exit and entry to be according to orders and conditions stipulated by the military. The later orders restricting imports and exports into and out of the area are based on this order.

The above are only a few examples of military orders that illustrate the legal separateness of the areas conquered in 1967 from Israel itself; many more could be mentioned. The orders cited above are among the fundamental orders that dealt with the establishment of the basic structures of Israel rule over the Occupied Territories.

### *Military Orders Rendering the Territories de facto Annexed to Israel*

A number of military orders that have contributed to this process were issued during the period under consideration. Many more were issued after 1971. I shall describe here some of the earlier orders.

1. The preamble of MO 103 issued on 27 August 1967 reads as follows: Whereas there is a need to take measures to ensure regular trade in the area [of the West Bank] and to facilitate for the inhabitants the marketing of their products through free trade in order to improve their economy in general and in particular to establish a fund for developing the economy of the area, and whereas this order is necessary in order to ensure export, vital services, and regular rule in the area, I order as follows ...

Article 1 of the order imposes customs duties on goods brought into the area of the West Bank from all other areas except Israel. The determination of these duties is left to 'the person responsible' who is appointed by the area commander. To the extent that goods brought into the West Bank from Israel were not considered as brought in from a foreign country, the two juridical areas were treated as one.

2. MO 31 vested all powers arising from the Jordanian laws and regulations relating to customs duties, fees and taxes, and all powers of delegation and appointment given by them, in the Israeli officer appointed for this purpose by the area commander. Seven orders were issued by the person appointed under MO 31 between July and September of 1967. The most important of these declared the imposition of fees on locally produced goods which are listed in the appendix to the first order. The order also

required all producers to submit to the officer responsible a form showing all relevant details about their place of work and the goods produced there. Except for this requirement to submit information, the continuation of the work was not made conditional upon obtaining any other approval of the military officer appointed under MO 31. This of course was later changed. At this early stage, the Israeli administration was more concerned with getting 'normal' life to continue and to defeat the Palestinian boycott which had started as a form of protest against the occupation.

3. MO 59 vested all government immovable properties in the hands of what the order called 'the Custodian of Public Property'. Later on (by MO 364) the definition of public property was expanded to include any property of which the owner fails to convince a military committee (according to the rules of evidence they determine) that it is private property. By virtue of this order, over 30 per cent of the land in the Occupied Territories was eventually registered in the Israeli Lands Authority as Israeli public land.<sup>5</sup>

4. MO 92 vested the powers defined in all Jordanian laws dealing with water in the hands of an Israeli officer appointed by the area commander. Using these powers, the officer assumed full control over water resources and connected the West Bank with the Israeli water grid. Thus 'public' land and water were considered as belonging to Israel, thereby denying the separateness of the two areas. After 1979, responsibility over water resources was transferred from the military government to the national water company, Mekorot.

It has already been mentioned that the first legislative stage was the most significant period, when the foundations of the occupation were laid. But it was also the period when Israeli policy towards the newly conquered territories was still in flux. Perhaps the best indicator of this is the clear admission of the applicability of the Fourth Geneva Convention of 1949 to the Occupied Territories which was made in Article 35 of Proclamation No. 3. This article stated that the military court and its officers 'must apply the provisions of the Geneva Convention of 13 August 1949 Regarding the Protection of Civilians in Time of War as to all which pertains to legal proceedings'.<sup>6</sup>

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5. On the legality of this step and those pertaining to water, see Ch. 14. of International Law and the Administration of Occupied Territories.

6. For the full text of this article, see Ch. 2, text at n. 126. of International Law and the Administration of Occupied Territories.

Military Proclamation No. 3 was issued on 7 June 1967. Four months later, on 22 October, the same military commander issued MO 144 which repealed Article 35. Since then Israel has refused to accept that it is bound to apply the provisions of the Fourth Geneva Convention to the territories it conquered in 1967.

Although the policy of settling Jews in the conquered areas began during the first legislative stage, it was still not so extensive as to require the changes in the land law that characterized the second legislative stage, when large areas of land began to be expropriated. These changes will be described below.

## *II. The Second Legislative Stage*

The second legislative stage, from 1971 to 1979, placed particular emphasis on facilitating Jewish settlement in the West Bank. We have already seen how, during the first stage, several orders were issued which enabled the military authorities to take possession of land through expropriation and through seizure of the land as absentee and state property.

This process continued during the second stage. More amendments were made to the land law to enable the acquisition of land by non-Jordanians through means other than expropriation and seizure. MO 419, for example, enabled the area commander to give special dispensation to certain foreign bodies, on a list that he draws up, to purchase immovable property even if they do not fulfil the requirements of the Jordanian law concerning the acquisition of land by foreign bodies. MO 569 created 'a department for special transactions in land' for the registration of land for Jewish settlement. MOs 811 and 846 extended the validity of irrevocable powers of attorney from 5 to 15 years, thus validating purchases made to Jews outside the area. The Area Commander thus showed himself willing to amend by military orders any Jordanian law that had restricted sale of land to non-Jordanians. He was also willing to make those amendments in the law that would enable, as well as facilitate, the clandestine sale of Palestinian land to Jews.<sup>7</sup>

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7. Raja Shehadeh, *Occupier's Law: Israel and the West Bank*, rev. edn. (Washington, DC, 1988), 39-41.



Large areas of land were being acquired using the means provided through the changes in the land law made during the first and second stages. What was needed now was the power to determine the use of land acquired for Jewish settlement without Palestinian interference and to restrict the Palestinians from using the land that was left. MO 418 was issued on 23 March 1971 to fulfil these twin objectives.

Consisting only of 9 articles, the effect this order had on the Jordanian Planning Law of 1966 was devastating. The Jordanian law contains procedures for the participation in its operation of various local institutions, such as the Engineers' Union. It imposes a hierarchical structure of local, district, and national planning committees. MO 418 abolished all local participation in the planning operations outside of municipal boundaries. Within municipal boundaries, the order restricted the licensing powers of municipalities. All planning powers were vested in the Higher Planning Committee composed of Israeli officers only and appointed by the Area Commander. The powers of the District Committee as well as the Local Committee were transferred to the Higher Planning Council which was also empowered to appoint what the order calls 'Special Planning Committees' and to determine their powers. Article 7 of the order also gave wide-ranging powers to the Higher Planning Council which included the power to:

1. Cancel or amend or suspend for any period the effect of any regulation or permit.
2. Assume any of the powers of the other planning councils.
3. Issue any licence which the other planning councils are empowered to issue or to amend or cancel.
4. Exempt any person from the duty of obtaining any licence which is required by the law.<sup>8</sup>

With the land made available to Jews in the West Bank and zoning plans completed for some settlements, the number of settlers began to increase. But if their settlements were to prosper they could not be made subject to the same restrictive laws concerning local government. Jewish settlements could never be made subject to the extensively amended Jordanian law applicable to Village Councils or Municipal Councils and be

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8. For a more detailed examination of the effects of military orders on the planning process, see Ch. 8. of International Law and the Administration of Occupied Territories.

expected to prosper. They had to have a status separate from that available to their Palestinian neighbours, so that those restrictions placed on the local government units of the Palestinians would not be applicable to them.

The first order relating to the administration of Jewish settlements pertained to Kiryat Arba, one of the earliest settlements, established in 1968 near the Palestinian town of Hebron. This order declared that the settlement was to be administered 'in accordance with administrative principles which the Military Commander shall declare by internal regulations'.

Then, on 25 March 1979, MO 783 was issued. This order declared the establishment of four Jewish regional councils. The jurisdiction of these councils covered the whole of the land under Israeli ownership or control, not merely the built-up area of the settlements. The order announced that the administration of these regional councils shall be in whatever way the area commander shall declare in 'regulations'. The date of this order was significant. It was issued only a few days before the signing of the Camp David Agreement. Although the principle that Jewish councils would not be administered in accordance with the law in force in the area was established, it was only during the next legislative stage that the 'regulations' according to which the settlements were to be administered were issued.

### *III. The Third Legislative Stage*

The third legislative stage extended from the signing of the Egyptian- Israeli peace treaty in 1979 to 1981. It was characterized by a greater influx of Israeli citizens into the West Bank than in any previous stage. The military orders issued during this period served the following objectives:

1. Organizing the administration of Jewish settlements to make it consistent with the local government in Israel; i.e. extending Israeli regulations regarding regional and local councils to the settlements of the West Bank. MO 892 established local councils for the administration of particular settlements. The powers and responsibilities of the local councils are identical with those of Israeli municipalities. Thus, through the guise of a military order, the Israeli Municipalities Law was extended to the Occupied Territories and made to apply only to the Jewish settlements. The

Palestinian municipalities continued to be subject to the amended Jordanian Municipalities Law.

2. Tightening the links between Israeli citizens living in the Occupied Territories and Israel by extending Israeli law to the Jewish settlers and excluding them from the jurisdiction of the West Bank courts.

Under the Israeli Law and Administration Ordinance of 1948, the Prime Minister or any other Minister has the power to make emergency regulations 'as may be expedient in the interests of the defence of the state, public security and the maintenance of supplies and essential services',<sup>9</sup> following a public declaration that a state of emergency exists.

Immediately following the 1967 war, the Minister of Justice introduced regulations entitled Emergency Regulations (Areas held by the Defence Army of Israel-Criminal Jurisdiction and Legal Assistance) 1967. The validity of these Regulations has been extended annually and later bi-annually by the Israeli Knesset. These regulations enable a court in Israel to try any person for any act or omission which occurred in any region (defined in Regulation 1 as 'any of the areas held by the Defence Army of Israel') and which would constitute an offence under Israeli law if it were committed in Israel.<sup>10</sup>

This has meant that Israeli courts acquired jurisdiction to try Israelis residing in the Occupied Territories for criminal offences committed within Israeli settlements or elsewhere in the Occupied Territories. This is in addition to the competence of special military courts established in the Occupied Territories to try Israel settlers for such offences.

In civil matters, Israeli courts have ruled that they have jurisdiction if any bond to Israel can be found. As to service of documents, regulations made in 1969 provided that service of documents in the Occupied Territories is effected in the same manner as in Israel, i.e. either by mail or by hand.<sup>11</sup>

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9. Section 9(a).

10. On the relevant provisions of international law, see Ch. 7. of International Law and the Administration of Occupied Territories.

11. See 'Service of Documents to the Administered Territories', amending the Civil Procedure Regulations of 1963. For a more complete discussion of the judiciary and the Israeli settlements, see M. Drori, 'The Israeli Settlements in Judea and Samaria: Legal Aspects', in D.J. Elazar (ed), *Judea*,

An amendment to the Israeli Income Tax ordinance in 1980 provided that any income of settlers produced or received in the West Bank was to be treated as though its source were Israel. Through an 'administrative order', it was possible to extend the applicability of Israeli laws to Israelis living in the West Bank by amending the definition of 'Israeli resident' to include 'any person whose place of residence is in the region and who is an Israeli citizen or entitled to acquire Israeli citizenship pursuant to the Law of Return 1950'.

This process of extending Israeli laws to Israeli citizens living outside the state continued beyond the period under consideration here as will be shown below.

3. Reorganizing the military government in the West Bank and giving some of its functions to the newly established Civilian Administration.

This was achieved mainly through MO 947 which declared the establishment of a 'civilian administration', to be headed by a person whose nationality is not specified, who holds the title 'Head of the Civilian Administration', and who is appointed by the Area Commander.

MO 947 had two main and closely related effects. The first was to institutionalize the already existing separation of the civilian from the military functions in the military government of the West Bank by formally establishing a new structure of civilian government which is empowered to function within the limits determined by the order. The second is to make it possible to elevate the status of a large number of military legislative enactments promulgated by the area commander from the status of temporary security enactments to the level of permanent laws. MO 947 was the most significant military order issued during this third legislative stage.<sup>12</sup>

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*Samaria and Gaza: Views on the Present and Future* (Washington DC; AEI, 1982), 70-9.

12. See Ch. 8 of International Law and the Administration of Occupied Territories for further discussion of MO 947.

#### *IV. The Fourth Legislative Stage*

The fourth legislative stage extends from 1981 to the time of writing, December 1987. Some 260 military orders were issued during this period (from MO 950 to MO 1213).

The military orders issued during these six years have expedited the *de facto* annexation of the West Bank to Israel, the extension of Israeli law to the Jewish settlements, and the legal and administrative separation of Jews and Palestinians in the occupied areas.

Large areas of land continued to be acquired at a faster pace than ever before, through declaring the land as 'state land'. Those lands which could not be acquired by one or other of the methods used during the previous thirteen years were subjected to severe restrictions on use.

Perhaps the most important means of restricting land use which has increased during the fourth legislative stage relates to zoning measures, or, more precisely, the withholding of building permits in Arab areas. Although Palestinian villages and small towns (those without municipal councils) have officially been encouraged to make town plans, none of these plans has been approved since 1985 on the grounds that no final statutory plan of the area has yet been made. In the absence of approved planning documents, all individual building licences outside municipal boundaries (small towns and villages by definition lie outside municipal boundaries) must be approved by the military planning authorities. From January 1987 to the time of writing, no building licence in these areas was granted for Palestinian residents of the West Bank. While Palestinian projects were at a standstill, 274 statutory plans for areas of Jewish settlement had been processed as of mid-1987. Of these, at the time of writing, December 1987, 86 had been approved, 110 had been disputed, and 78 were still awaiting approval.

Another means of restricting land use has been the increase in the number of approvals needed from different departments before any development of the land is permitted. MO 1167, for example, made it necessary to obtain the approval of the Antiquities Department before the Planning Department could consider applications submitted to it for building-licences. Jurisdiction over violations of the Jordanian Anti-quitities Law was transferred from the local Palestinian courts to the military courts.

Even the use of Palestinian land through cultivation was subjected to more restrictions. The Jordanian Nursery Law Number 20 of 1958 was amended by MOs 1002 and 1248 to increase the powers of the military authorities regarding the licensing and regulation of plant nurseries. MO 1915 made it necessary to obtain permission from the military authorities to plant fruit trees or to change the kind of existing fruit trees through grafting. Similar restrictions were placed on the planting of vegetables by MO 1039. The restriction according to the order was on the planting of tomatoes and eggplants, but other vegetables could be added by amending the appendix of the order.

Separate offices were created during this stage, one to administer and oversee the affairs of Jewish 'local and regional authorities', and the other to oversee Palestinian 'village and municipal authorities'. Similarly, there are now two separate departments for land planning, one dealing with the Palestinian sector and the other with the Jewish sector. Israeli Jews head both departments.

The processes which began in the previous stage of expanding the powers of the Jewish local councils continued, as did the tightening of links between Israeli citizens living in the Occupied Territories and Israel. MO 892 established municipal courts in the settlements, and MO 898 amended an earlier order (MO 432) concerning the guarding of settlements, by empowering the guards to carry weapons and giving them added powers of arrest and interrogation of suspects. Also, under Emergency Regulations 6B of 1984, a list of nine Israeli laws were made applicable to settlers by extending the meaning of 'Israeli resident' as described above. These laws are:

1. Entry into Israeli Law 1952.
2. Defence Services Law 1959.
3. Chamber of Advocates Law 1961.
4. Income Tax Ordinance.
5. Population Register Law 1965.
6. Emergency Labour Services Law 1967.
7. National Insurance Law (Consolidated Version) 1968.
8. Psychologists Law 1968.
9. Emergency Regulations Extension (Registration of Equipment) Law 1981.

Other military orders passed during this stage concern the appointment by the military of Israelis (and sometimes Palestinians) to replace Israeli officers acting as mayors in place of the elected Palestinian mayors deposed in 1982. Similarly, for the Chambers of Commerce, new military orders provided for the appointment of Palestinians to replace the elected Palestinians deposed by the military government. One example is an amendment to MO 697 declaring on 30 April 1987 that new members of the Hebron Chamber of Commerce would be appointed.

On the level of increasing the control of the military authority over the daily activities of Palestinians, a number of military orders were passed during this period. These made it necessary to obtain the approval of the military over activities which did not previously require such approval. MO 1149, for example, requires anyone who wishes to trade spare parts or assemble any type of road vehicle to obtain permission from the military. MO 1140 requires all newspapers distributed in the West Bank to publish without payment any notices submitted by the military authorities. Failure to do so could provoke the withdrawal of the newspaper's licence. MO 1141 prohibits Jewish settlements from employing any Palestinian from the Occupied Territories except through the government public employment office. Palestinian workers from the West Bank working in the West Bank are thus now subject to the same bureaucratic requirements and restrictions that would apply if they were working in Israel.

MO 1208 (amending MO 297 concerning identity cards) adds a new provision to Article 11 of the original order whereby a child born to resident parents can be registered in the occupied area if he or she is under 16. A child born outside the area to resident parents can be registered only if he or she is not over 5 years old.

Special attention was paid during this period to stemming the flow of money into the West Bank from organizations Israel considered hostile. MO 952, issued on 20 January 1982, ordered that permission from the military was necessary before any of the following could be carried out:

1. Transactions in a foreign currency to which a resident of the territories is a party, whether the transaction was carried out in the area or outside;
2. Exporting of money from the area to the outside;
3. Bringing in of Israeli money to the area, whether by remittance or otherwise;

4. Any transaction involving property in the area if a resident of a foreign country was a party thereto, and any transaction involving property outside the area if a resident of the area was a party thereto;
5. Possession of foreign currency by a resident of the area.

‘Transaction’ is defined by the order to include sales, purchases, transfer of ownership, loans, trusts, credit, lease, issuance of cheques, grants, release, pensions, admissions and exonerations from debts, or any transaction which will create rights over property or alter or transfer or cancel them whether conditionally or unconditionally, and whether the person carries it out for himself or for another and whether he is acting in his personal capacity or through an attorney.

Regulations have been issued from time to time giving general or specific permits allowing some of the proscribed activities under this order. These have varied according to the policies being pursued by the government.

The other major legislation concerning financial activities is MO 973, dated 9 June 1982, concerning the importation of money into the area. This order prohibits (unless there is a specific or general order to the contrary) the importation of money into the area. Money, as defined by the order, includes local and foreign currency and gold. It should be noted here that the receipt of a permit under this order does not exonerate the recipient of the permit from obtaining the permits required under MO 952. Violation of this order subjects the violator to large fines or to imprisonment of up to five years, or to both punishments.

While attempting to restrict the flow of money reaching Palestinian institutions and individuals, the military has tried to increase its own revenues by introducing new taxes (such as the Value Added Tax) and amending tax laws in existence when the occupation began. The Jordanian Income Tax Law has been amended thirty-two times since the occupation began, most recently by MO 1206 of 13 September 1987, with the result that income taxes paid by Palestinians have increased dramatically through



changes in tax brackets and reductions in exemptions.<sup>13</sup>

Two positive changes occurred as a result of military orders passed during this stage. MO 1133 increased an employee's entitlement under the Jordanian Labour Law to include sick-leave payments. MO 1180, amending the Jordanian Banks Law, made it possible to reopen the West Bank branches of the Cairo- Amman Bank, closed since 1967 by the military authorities.

A review of the orders issued during this stage makes it clear that, after the first thirteen years of the occupation, the military authority became more clear and deliberate than at any time in the past in the policies it pursues in the territories conquered in 1967 and the objectives it aims to achieve. It could perhaps be argued that the processes described above had already been formulated and pursued before 1981. While this may be true, it is clear that at no other stage do the military orders reflect what the occupation was intended to serve with such clarity and deliberation as in this fourth stage. The fact that after 1981 a high proportion of Israelis working at the military and civilian governments were residents of Jewish settlements in the West Bank contributed to the self-confidence and singularity of purpose reflected in the military orders issued during the fourth stage.

MO 1213, dated 3 December 1987, and the last to have been published at the time of writing, declared the Jewish settlers living in the West Bank to be local residents for the purposes of MO 65, which prohibits non-residents from working in the West Bank without permission. MO 1213 as an instrument of law merely confirmed long-standing practice: the Jewish settlers were considered part of the local population when it was convenient to do so, but retained their special status with regard to the Israeli civil rights denied to the Palestinians. The practice of treating citizen-settlers of the occupying power as if they were local residents of the occupied territory stands international law on its head, since it implies that they are part of the 'protected population' whose interests, as distinct from those of the occupier, international law sets out to protect.

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13. On the introduction of VAT, and levying of taxes in the Occupied Territories generally, see Chs. 11 and 12 of International Law and the Administration of Occupied Territories.

It should come as no surprise that MO 1213, with its grave violation of international law, should have been issued. With the settlers now intimately involved in the administration of the Occupied Territories, what best serves the interest of their settlements is no longer a theoretical matter but a straightforward question of self-interest.

Along with the clarity of purpose came a marked sloppiness both in the form of the military orders and in the lack of concern to offer even a formal justification of the orders according to international norms. New military orders continue to be informally produced, even though they are official documents. In the four-page Arabic version of MO 1180, amending the Jordanian Banks Law, for example, there are some forty handwritten insertions, including entire lines added after the order was typed.

Serially numbered military orders have been published since 1982, but at best three months after being issued. Much 'legislation' in the West Bank, however unnumbered military orders that are subsidiary legislation made by virtue of the numbered orders-is either never published or only long afterwards. There are also oral orders and directives of which an individual learns only in encounters with the bureaucracy or the authorities. An example is the prohibition on sending packages over a certain weight through West Bank post offices. No regulation was ever published or announced on the subject, but the prohibition is strictly enforced.

It has already been pointed out that the one-man parliament producing the military orders discussed above is neither accountable to, nor consults with the local population which is subject to these new laws and to changes in the existing law. perhaps, in view of this, neither the content of the orders nor their sloppy production should come as a surprise.

## *V. Conclusion*

The legislative stages reflect the gradual changes in Israel's presentation of its occupation. At first, Israel acknowledged its status as an occupying force and stated that the occupation would continue pending a final settlement, under which land would be exchanged for peace. Then Israel announced that, since the occupied areas were of strategic importance to its defence, land for settlements serving a security interest would be expropriated. Nonetheless, it continued to maintain that land would be exchanged for

peace. With the advent of the Likud Government in 1977, the territories were held to belong to Israel by right, indeed by divine right: there could be no question of expropriating or occupying what was rightfully Israel's. As of that time, land designated by Israel as public, i.e. 'state land', was taken over and given to the only public Israel recognized-the Jewish settlers. The term 'West Bank' fell into disuse and 'Judea' and 'Samaria', the only officially recognized designations, began to be used by the public as neutral terms.<sup>14</sup> The word 'occupation' was also definitively dropped. The territories were 'administered', as were the 1.5 million Palestinian inhabitants.

The Israeli occupation of Palestinian lands has been a legalistic occupation, whereby every new change was accompanied by a military order. This makes the military orders a good source from which the changing thinking of Israeli policy-makers can be studied.

When the time for negotiations between the parties to this long-lasting conflict comes, the legality of these military orders issued by Israel to amend and add to the law that was in force when the occupation began will have to be studied. The majority of these unilateral actions issued by the area commander without consulting the local inhabitants will be found to be in violation of international treaties. What Israeli seems to count on, however, is not that a neutral international arbiter will rule that these orders are consistent with international law, but that, by the time the pressure mounts on Israel to enter into negotiations with their adversaries, the legal changes will have brought about irreversible transformations that will become facts on the ground that cannot be ignored, whatever the state of the law.

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14. See Ch. 1. of International Law and the Administration of Occupied Territories.

## PART VII

### **Burning the Land Records: Unofficial Illegality\* <sup>1</sup>**

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In reviewing the changes affecting the land law and practice of the past few years, it may be useful to distinguish between "officially sanctioned illegality" (the Israeli Military Orders and official acts in violation of international law) and "unofficial illegality" (the acts carried out by overzealous settlers impatient with the rate of "Judaisation" effected through official channels). This second category is officially condemned by the authorities but is in fact tolerated, if not encouraged. Recent years have seen a shift in balance between the two: as the structure achieved by the officially sanctioned illegality has solidified and the transfer of Palestinian lands and resources has slowed, unofficial illegality has been used more often.

#### *1. Officially sanctioned illegality - developments since 1985*

By 1985 about 40 percent of the land on the West Bank had been registered with the Israeli Land Authority for the exclusive and permanent use of Jews. This figure probably approaches the maximum that can be registered through the various officially sanctioned illegal methods - in particular the "state land" classification, through which hundreds of thousands of dunums had been transferred as of 1979. Since 1985, the amount of land thus acquired has not changed significantly. But while only 40 percent of the land has actually been registered for the exclusive use of Jews, the land over which Israel has control approaches 60 percent (including military zones, parks, and land expropriated but not registered). Land acquisition, involving many tens of thousands of dunums, continues through expropriations ostensibly made for military purposes, public works, and various other purposes.

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\*. From the Epilogue of Occupiers Law, Israel and the West Bank, Raja Shehadeh, Institute of Palestine Studies, Washington D.C. 1988. pp. 211-217

The main innovation in land seizure since 1985 is a new set of regulations concerning procedures governing appeals of land acquisition orders. Section 30 of these regulations, issued on 14 June 1987, states that any appeal of an order made by the military concerning land must be submitted to the Objections Committee not more than 45 days after the order has been either delivered or made known to the *mukhtar* of the village in which the land in question lies. The order rarely specifies the extent of the land or its precise location, and it is generally accompanied by a poor photocopy of a crude map in which the designated area is marked with a thick pen and identified by the name given to a wider area. The new regulations for appeal of the order stipulate that the statement of objection must be accompanied by an exact survey map of the disputed area.

As the *mukhtars* retained by the authorities are often not on good terms with the local inhabitants, many landowners never even receive the expropriation order and first learn of it when the bulldozers arrive. Moreover, as the order often involves thousands of dunums, 45 days is not sufficient time to complete the survey needed to start the objection proceedings, and the cost of the survey are often prohibitive. In this practice Israel is at odds with virtually all advanced countries, where the authority declaring an area for seizure is expected to provide the precise surveyor's map of the land in question, not the owners.

The difficulties posed by Section 30 of the new regulations are compounded by Section 16, which allows the Objections Committee "for reasons relating to the security of the Israeli Defence Forces or the security of the public", to hold proceedings either completely or partially *in camera* and to excuse witnesses from identifying themselves. Under such circumstances the decision's fairness becomes even more problematic.

There has also been a change since 1985 in the laws regarding land registration. As noted above, at the time Israel seized the West Bank in 1967, one-third of the land had been registered in accordance with Jordan's Law for Settlement of Disputes over Land and Water. Unregistered land is far more vulnerable to seizure than registered land, and the Israeli authorities discontinued mass public registration of land immediately after the area had been captured (see appendix 1). Although mass public registration had ceased, individuals continued to have the option of going through complex registration procedures themselves in order to secure clear title to the land. Jordanian law had provided for an appeals committee, on which members of the local judiciary sat, to review land registration

cases in which objections had been raised. Military Order 1145 cancelled the participation of local Palestinian judges who traditionally sat on the committee, leaving it composed exclusively of Israeli military personnel. Palestinians' attempts to register their own land when it is coveted by Jews, because it is near settlements, because water is available, or for other reasons can thus be thwarted, the settlers have only to appeal a registration, either directly or through intermediaries, so that the case comes before the exclusively Jewish committee. By the same token, Jewish settlers acquiring land through purchase or other means are able to register it without hindrance, whatever the validity of the Palestinian challenge (on the basis of land boundaries claimed, inadequate title, forgeries, etc.)

## *2. Unofficial Illegality*

The distinction between official and unofficial illegality noted above is particularly meaningful in regard to land acquisition. Irregularities in land transfers began very soon after the occupation but became more widespread in the late 1970s and early 1980s as the settlement movement accelerated. These irregularities take a variety of forms. Palestinian landowners find that their land has changed hands on the basis of forged sales contracts, deeds, or other documents, or through powers of attorney, either forged or obtained for other purposes. In other cases involving lands held by more than one owner, one of the joint owners may have sold his part, voluntarily or as a result of intimidation, and the entire plot may have been registered in the name of the purchaser, including the shares that have not been sold. The Objections Committee routinely decides disputes involving discrepancies with regard to boundaries - not unusual, given the amount of unregistered land - in favour of the Israeli settlers.

Under the law, Palestinian landowners can seek redress for their grievances in the local courts, whose once exclusive jurisdiction over all land issues has now shrunk to encompass mainly private land disputes between Palestinians. Most of these disputes concern registered lands, but if only Palestinians are involved and no settlers, they can also pertain to unregistered land. Despite obstacles - such as interference with the local judiciary in the form of withdrawal of files from the court (sanctioned by Military Order 841; the dependence of the local judiciary on the military government for appointment and promotions; and the lack of Israeli police

co-operation in implementing rulings favourable to the Palestinians - many of the Palestinians protesting forgeries and other frauds had strong cases and sufficient evidence to prove their claims. By 1984, a number of cases had already been decided in favour of the Palestinian landowners, and there was mounting pressure on the police to execute the judgements.

Then, on 20 December 1984, a fire in the Nablus District Court destroyed all the civil case files - some 13,000 to 15,000 in all. There was evidence of arson: the police found that the door of the office housing the files had been broken, gasoline had apparently been used in starting the fire, and only civil case files had been destroyed; the criminal files remained completely intact. In addition, the tracks and prints left on the premises suggested that the break-in had been the work of a group, rather than of one individual.

Although the Nablus courthouse - a solid limestone structure that had served since Mandate times and in which there had never been a fire - is only a few blocks from the local police headquarters,<sup>1</sup> the police responded belatedly to the calls for help. The day after the fire occurred, the Arab Lawyers Committee,<sup>2</sup> representing Palestinian lawyers in the West Bank, issued a press release calling attention to the evidence of arson and noting that the settlers, who had hundreds of land-related cases pending against them, would stand to benefit from the destruction of the civil case files. Some 250 of the files destroyed in the fire had already been heard and decided in favour of the Palestinian owners but had not yet been executed. Since the supporting documents - including title deeds to the land filed as evidence - had been destroyed, the judgements could not be implemented.

Several months later fires broke out in the Magistrates' Courts in Jenin and Bethlehem, destroying civil files there as well. At about the same time, unknown individuals broke into the District Court in Ramallah and shredded civil files housed there. None of these acts was ever properly investigated; none of the perpetrators was apprehended; no arrests were made.

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1. The West Bank police force is part of the Israeli police force. Palestinians were employed in the low ranks until they began resigning in mid-March 1988 during the uprising. Israeli officers hold all the positions of authority.

2. The Arab Lawyers Committee applied to be registered as a bar association, but its application was refused. See below.

In a number of cases of land fraud, however, the victims were not Palestinians but would-be settlers and Israeli and foreign Jewish investors to whom land in the West Bank was being sold at low prices by middlemen and agents. When the purchasers attempted to register the land, it became clear that they had been sold paper plots and that the purchased land had not belonged to the seller.

In contrast to the Palestinian complaints of fraud, which met with official indifference, Israeli complaints eventually elicited a response. A thorough investigation into the land scams was launched by the Frauds Department, the section of the Israeli police that investigates allegations of bribery and corruption of civil servants and government officials. The investigations and trials brought to light the connections of the middlemen, both Israeli and Palestinian, with Israeli ministries, especially the Agriculture Ministry, and the existence of a kind of "land mafia" operating outside the occupier's law with the sanction of some highly placed Israelis. Several Israeli and Palestinian middlemen were found guilty. Their highly publicized trials have reduced the incidence of forgery but have by no means ended it.





## מפקדת אוזר יהודה והשומרון לשכת היועץ המשפטי

סימוכין 539-6250

תאריך 23.8.83

לכבוד

מר ע' שחאה, עו"ד

הרח' הראשי 26

ת"ד 74

רמאללה

א.נ.,

הנדון:-- הסדר מקרקעין.  
מכתבך מיום 27 באוק' 1983.

ראש המינהל האזרחי לאזור יהודה והשומרון ביקשנו להשיב לך בשמו על פנייתך בעניין הליכי הסדר במקרקעין.

כפי שצינת במכתבך, התלה צו בדבר הסדר קרקעות ומים (יהודה והשומרון) (מס' 291), תשכ"ט - 1968 את כל הליכי הסדר הקרקעות באזור יהודה והשומרון. אף נכון הוא שאין ועדת העררים, שהוקמה ופועלת מכח צו מס' 172, מוסמכת לבצע הליכי הסדר.

הסדר קרקעות קובע באופן סופי וקבוע את כל הזכויות במקרקעין באזור שבו הוא נעשה. התליית הליכי הסדר נבעה מן הרצון שלא להגיע בזכויותיהם הקביניות של הנפקדים הרבים, ושל אזרחי ירדן שיש להם קרקעות באזור והשוהים מחוץ לאזור יהודה והשומרון. למרות מאמציו של הממונה על הרכוש הנטוש, ברור שאין בידי כל המסמכים וההוכחות הנדרשים בהליכי הסדר כדי לבסס רישום זכויות על שמו של כל נפקד.

עם זאת, יכול כל אדם המעוניין בכך לרשום את זכויותיו ברישום ראשון על-פי חוק רישום נכסי-דלא ניידי אשר טרם נרשמו, מס' 6 לשנת 1954, והצווים אשר מסדירים את הפעלתו באזור. אומנם תוקפו של רישום כזה אינו כחוקף של הרישום שבקבות הליכי הסדר. אולם דבר זה הוא הכרחי מן הסיבות המנויות לעיל- לא יתכן לקבוע באופן סופי ומוחלט את הזכויות בקרקע תוך התעלמות מטענותיהם וזכויותיהם האפשריות של הנפקדים הרבים מהאזור.

יש לזכור, שהתליית הליכי ההסדר אינה פוגעת בשום אופן באלו שהן זכויות קניות במקרקעין אינם מוסדרים, וכאמור, ניתן בכל עת לגשת לרישומן ברישום ראשון. הכללים המשפטיים הקובעים מתי יש לפרט זכות במקרקעין כלשהם לא היו משתנים גם אלו בנקטו הליכי הסדר.

אחת נימוקים של שמירה על זכויות הנפקדין ועל זכויות אזרחים ירדנים כצד המזרחי של הירדן, שהובילו להוצאתו של צו מס' 291, עוזם קיימים היום. כמי שמופקדים לא רק על רוחח חושבי האזור אלא גם על הגנת זכויותיהם של הנפקדים, איננו יכולים לדש כיום את הליכי ההסדר.

מל"ס  
המשפטי

אקבל

יצחק  
היועץ

*Translation from Hebrew*

*Command of the regions of Judea and Samaria  
Office of the Legal Advisor*

To Advocate A. Shehadeh  
Ramallah

27 December 1983

Dear Sir,

Subject: Registration of lands  
Your letter of 27 Oct. 1983

The head of the Civilian Administration in Judea and Samaria asked me to respond on his behalf to your request regarding the resumption of the land registration.

As you have correctly said in your letter, the order regarding land and water registration (in Judea and Samaria) number 291 of 1968 has suspended the process of land registration in the area of Judea and Samaria. It is also true that there isn't an objection committee which has been established and which functions in accordance with order 172 which has the power to execute registration proceedings.

Land registration determines in a final and conclusive way all rights in land in the area where the resolution of disputes occurs. The suspension of these proceedings has arisen out of the desire not to prejudice the rights of the many absentees and the ownership rights of nationals of Jordan who have lands in the area but reside outside Judea and Samaria. Despite the efforts of the Custodian of Absentee Properties, it is clear that he still does not hold all the documents and evidence that are necessary in the settlement of dispute procedures to establish and determine the rights of everyone of the absentees.

Despite the above, every interested person may make a first registration in accordance with the law for the Registration of Immovable Properties which have not been registered number 6 of 1954 and those orders which organize its application in the region.

It is true that the effect of such a registration is not as strong as the registration which takes place after the settlement of dispute operations. However this is necessary for the reasons given above and because absolute and final rights in land cannot be determined while neglecting claims and possible rights of numerous absentees in the area.

We must also remember that the suspension of land registration does not affect in any way the rights of ownership in these lands which have not been registered. It is possible to submit for first registration at any time. General principles of law determine when it is necessary to detail rights in any land which will not have changed even if registration had taken place.

Those same considerations of safeguarding the interests of absentees and the rights of Jordanian citizens residing in the East Bank and which have led to the issuance of military order 291 continue to exist today. And whereas we are under an obligation not only to guarantee the rights of the residents of the area but also the rights of absentees, we cannot today resume the process of registration of land.

(signed)  
Itzhaq Excel, Brigadier  
Legal Advisor

**THE CIVIL ADMINISTRATION OF THE JUDEA AND SAMARIA AREA**

**Commissioner For Government Property  
Declaration Of Land As Government Property - 16/91**

By power of my authority as commissioner in accordance with the order regarding government property (Judea and Samaria) (no. 59), 1967, and in accordance with article 2C of the same order, I hereby announce that the area specified in the appendix is government property.

Anyone claiming rights to the area specified in the appendix or to part of it is entitled to submit an appeal to the appeals committee next to the military court in accordance with the order regarding the appeals committee (Judea and Samaria area) (no. 172), 1967, within 45 days from the day this declaration was handed to the mukhtar of Artas village, or from the day on which the marking of the plot of land was completed, as stated in the appendix to this declaration.

Anyone interested in additional details or explanations for clarification of the content of this declaration or the appendix may approach the office of the commissioner for government property in the city of Bethlehem Sundays through Thursdays, 09:00-12:00.

Date: The 14th day of the month of March, year 1991.

(signed)  
Chaïke Menahem  
Commissioner for Government  
Property Judea and Samaria Area

**APPENDIX**

Plot of land of an area of about 732 dunums, name of the village Artas in the Bethlehem district whose boundaries will be marked in survey numbers in red on the land.

A map showing the boundaries of the plot of land has been deposited with the controller of government property in the Bethlehem district.

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## About the author

*Raja Shehadeh was born in 1951 in Ramallah. In 1976 he was called to the English Bar and became a member of Lincoln's Inn. Since 1978 he has been in private legal practice in the Occupied Palestinian Territories. In 1979 he founded Al Haq, the West Bank affiliate of the International Commission of Jurists, which he co-directed until 1991. His other books include: Occupiers Law, Israel and the West Bank; The Third Way; and The Sealed Room.*