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Israeli Law in Judea and Samaria: Areas B and C

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Abstract

In September 1995 the State of Israel signed the Oslo II Accords with the Palestine Liberation Organization, in which Judea, Samaria, and the Gaza Strip were divided into three areas: A, B, and C. Each of these areas has different administrative and security arrangements. These areas are typically separated, to a large extent, according to the degree of responsibility given to the Palestinian Authority, which was established by this agreement for the territories in question. Even today, after more than half a century in which the Israeli Supreme Court hears Judea and Samaria cases, it has not yet found a strong normative source on which to base its authority and continues to indicate the two shaky sources of authority that did not satisfy it back in the 1970s: the consent of the parties and the definition of military rule as ostensibly acting according to Israeli law. The Supreme Court is aware of the cloud hanging over its authority to hear Yesha cases, but in its view, "the humanitarian consideration must prevail in this case over the legal-technical consideration," and therefore it hears those cases.

Keywords: Oslo Accords, the West Bank, Judea and Samaria, the Gaza strip, Israeli supreme court.

1. Introduction

In September 1995, the State of Israel signed the Oslo II Accords with the Palestine Liberation Organization, in which Judea, Samaria, and the Gaza Strip were divided into three areas: A, B, and C. Each of these areas has different administrative and security arrangements. These areas are typically separated, to a large extent, according to the degree of responsibility given to the Palestinian Authority, which was established by this agreement for the territories in question.

Area B refers to zones in which governmental authority is divided between the Palestinian Authority and the State of Israel – the civilian domains are under the authority of the Palestinian Authority. In contrast, the military and security domains are under Israeli rule. These areas include 440 rural communities, all of which are Palestinian, including nature reserves. The area occupies about 22% of Judea and Samaria.

In Areas B and C, the Palestinian Authority has no responsibility. Israel has civilian and security authority over them. The agreement stipulated that the division of areas would take place within five years, but in practice, it has remained as such ever since.

In the summer of 2005, Israel implemented its disengagement plan, withdrawing all its forces from the Gaza Strip and evacuating all the Jewish residents of Area C in the Gaza Strip.

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Since then, the entirety of Area C has been in Judea and Samaria, constituting about 60% of the territory. Area C in Judea and Samaria is contiguous, and Areas A and B are enclosed within it. In contrast, during the period when Israeli communities were living in the Gaza Strip, Area C was enclaved within Area A. Area C today includes over 100 settlements in which over 400,000 Israeli residents live, about 500 Palestinian communities (located wholly or partially in Area C) in which live between 230,000 and 300,000 Palestinians, Area C also comprises IDF's roads, bases and firing zones, nature reserves (managed by the Nature and Parks Authority) and uninhabited areas.

Areas B and C are governed by two different legal systems. By the Judea and Samaria Regulations, large parts of Israeli law are applied to Israeli residents of Area C, alongside special legislation by the military commander. The Palestinian residents living in these territories themselves are subject to Jordanian law, Palestinian law, and the legislation of the military governor that applies to them. In Kav LaOved (Worker's Hotline) (2007) case, it was ruled that in certain cases Israeli law will also apply to Palestinians working in the settlements.

2. Legislative differences between Israel and Judea and Samaria

The legislation in Judea and Samaria is substantially different from the existing legislation on the other side of the Green Line, and the laws enacted in the Israeli Knesset do not automatically apply to these territories (Eyal, 2023).

The residents of Judea and Samaria face a lack of clarity regarding the law that applies to them, and a situation has arisen in which different residents of the same area and citizens of the same country are subject to different laws.

First, the criminal law – the penal code and the criminal procedure were applied in Judea and Samaria by Major General's order, and therefore residents of Israel living in Judea and Samaria are bound by these laws. Laws that carry criminal penalties and were not applied by special order, such as the asbestos law mentioned below, do not apply in Judea and Samaria, nor are Israeli residents bound by them in Judea and Samaria.

Residents of the territories who are not residents of Israel are subject to Major General orders and pre-1967 Jordanian law.

Second, civil law is divided into two: the areas of Israeli settlement and the rest of the territory within the settlement areas were applied by the Major General orders of the Regulations of the Local Councils (1981) and the Regulations of the Regional Councils (1979), which apply a significant part of the laws applicable in Israeli law and which have been adapted to the area (sometimes called "enclaves' law").

In the rest of the territory outside the boundaries of Israeli settlement, Jordanian law from 1967 applies simultaneously as well as security legislation and sometimes even Ottoman law and international law according to the case and context.

In addition, it should be noted that there is a lack of legal clarity regarding the status of the territory, which creates many problems in defining the laws that apply to it, as mentioned and clarified in the Levy Committee report (2012).

Therefore, the special legal situation of Judea and Samaria effectively creates class differences between citizens who are residents of the territories and citizens who are residents of Israel, between settlers on one side of the Green Line and settlers on the other side. Moreover, unlike Israel's sovereign territory, where there are up-to-date, accessible, and expedient government legislative databases, in Judea and Samaria the only official database available on the MAG (Military Advocate General) Corps website is unorganized, inconvenient to use, and makes it difficult to find relevant current legislation. This fact constitutes an additional gap and creates

an added difficulty for residents of Judea and Samaria in searching for and locating the laws that apply to them in the area. This violates two basic principles of the principle of the rule of law, according to which the law must be open and equal to all. To illustrate the existing gaps, we will cite several examples

3. Planning and construction

Israeli land law and planning and building laws do not apply in Judea and Samaria and the existing laws are comprised of Ottoman, Mandate, Jordanian, and Israeli security legislation (Schwartz, Galily & Weidong, 2019).

The aforementioned Levy Committee report discusses the subject of planning and construction in Judea and Samaria in detail, addressing various issues and gaps between the legal situation in Israel and Judea and Samaria, including problems in approving access roads to communities, irregularities in appeals committees, problems in access to land registration (extracts), etc.

Property Tax – This is an annual tax levied on vacant land that is not agricultural and is collected for vacant land for which less than 30% of the building rights have been utilized. The purpose of this law is to encourage landowners to improve the land in their possession and build on it instead of leaving it empty. Amendment No. 45 to the Land Betterment Tax Law, which took effect from January 1, 2000, canceled its collection, and in its place, a purchase tax was established, which was also canceled with the government's approval of the Arrangements Law, and its application is retroactive from August 1, 2007. Therefore, there is no payment of property tax and/or sale in Israel on vacant land.

The situation in Judea and Samaria: There is a parallel payment to property tax unique to the area, and it is called "Local Real Estate Tax (Arnona) on building land". The authority to impose this tax is by Section 76(b) of the Local Councils Regulations.

This tax is a fee for vacant lots ("building land". This is land that is not agricultural land, not occupied land or building land), and it is paid to the local authority. Tax rates are set in the Arnona Order and vary from authority to authority. In February 2016, a bill was introduced to abolish this discriminatory tax. In the past, two petitions were filed with the High Court of Justice demanding the cancellation of this tax on the grounds of inequality in payments between residents of the territories and the rest of Israel, but these petitions were rejected because there were several differences between the taxes (2001).

Betterment Levy – originates in the Planning and Building Law, of 1965. The betterment levy is a mandatory payment required of a landowner or a lessee for generations, by the local committee and applies to a landowner whose rights have been improved due to the approval of a plan, the granting of an easement or deviating use, etc. (1981).

The situation in Judea and Samaria: Planning and building matters are regulated by the Jordanian Town, Village, and Building Planning Law (Temporary Law No. 79) of 1966 according to the principle of observance of laws. In 1967, Order No. 418 was issued regarding the planning of towns, villages, and buildings, in which adjustment provisions were established. Local councils in the area do not usually charge any levy or tax for improvements incurred due to plan approval, easement, or deviating use.

It should be noted that the state of property rights in land in Judea and Samaria is often different from those existing in Israel. A significant portion of landholders in Judea and Samaria have only the status of "licensee/entitled to use the land," especially in areas under military occupation, and therefore there is no justification for imposing the levy on them.

In addition, it should be pointed out that the betterment levy is money transferred to the local authority, and the economic damage caused in Judea and Samaria due to the failure to collect the levy is absorbed by the local and regional authorities.

4. Education

The Compulsory Education Law is a social law with many economic implications. It allows and requires parents to educate their children free of charge, from age 3 to age 18, and its goal is to give all children in Israel the opportunity to receive quality education free of charge.

The situation in Judea and Samaria: The Compulsory Education Law was applied in Judea and Samaria by an appendix order to the bylaws of the local councils, and hence, only in the areas of settlement and in an individual local manner. Therefore, there may be differences in the application of the law in various places, for example: in Beitar Illit, an order was issued ordering all application of the law from the age of 3, while in a list of other localities, an order was issued ordering the application of the law from the age of 4. Thus, the law is not automatically applied but requires individual application. It appears that without specific application of the law in the order, Localities to which the order has not been applied in detail will not be subject to the aforementioned government decision, and there is concern that they will be left behind without a binding law until an order is issued in their regard.

The Long School Day and Enrichment Studies Law (2015) – The law determines the number of study hours on weekdays and thus enables the provision of higher-quality education. The law stipulates that the long school day program will be implemented in schools gradually until final application in the 2018 school year.

The situation in Judea and Samaria: Only after applying the law in Israel will the Major General be required to issue an order and apply it explicitly, which may take many months and sometimes even more than a year. Students in the area may find themselves with different rights and fewer hours of study than their peers studying in the rest of Israel.

5. Health law

Pharmacists Regulations (Preparations) of 1986 – Regulations about health preparations, their import, marketing, and more. Regulation No.4 states that: "No person shall market a registered preparation that is not pre-packaged at the manufacturing plant, except with the approval of the Director and under conditions prescribed; Approval can be general or for a specific preparation."

This means prohibiting any marketing of any registered medical preparation that is not pre-packaged in the factory that manufactures it unless special approval is given by the Director General of the Ministry of Health (who is responsible for the drugs).

The situation in Judea and Samaria: The Local Councils Regulations (Health Law), Section 4(b) (2) of Appendix 5, states that the above regulation will not apply in the area. This means that it is possible to market a medical product that is not pre-packaged in the manufacturing plant, which puts the safety factor for public health at risk.

6. The judicial system

An overview of the legal system in Judea and Samaria and the unique characteristics of the region. We shall not go into all the complexity and the various laws that apply to the matter of jurisdiction in every case.

Local Affairs Court – Article D of the Courts Law [Combined Version], 5744-1984 – defines the issues and powers of the Local Affairs Courts. The local courts were authorized to hear local matters and offenses according to defined laws such as the Municipalities Ordinance, the Local Councils Ordinance, the Planning and Building Law, the Business Licensing Law, and more. The judges of the local court are judges of the magistrate's court who have been authorized to do so by the Administration of Courts.

The situation in Judea and Samaria – the substantive jurisdiction of the Local Affairs Court was determined in Section 126 of the Regulations of the Local Councils (Judea and Samaria) and is quite a bit different from the "Israeli" one. First, judges (like the courts themselves) receive their appointments by order of a Major General and not by the appointment of the Administration of Courts. This fact creates several problems:

A situation has arisen in which there is only a limited number of judges "authorized" to hear in the local courts in Judea and Samaria, and sometimes even cause unreasonable situations, such as the one that occurred in the framework of the ruling in penal case 22/07, where a case was forced to move from Ma'ale Adumim to Jerusalem due to two judges who disqualified themselves. From there the case was moved to Ramle and due to lack of authority was returned to Jerusalem, all before a substantive hearing was held.

In addition, the Judea and Samaria Local Affairs Court was authorized by Section 138 of the Code to adjudicate as a juvenile court and as a small claims court. This means that the ideas behind the establishment of unique courts in Israel, in which judges become more professionalized, streamline proceedings, and increase protection of defendants and other users of the legal system - are flawed.

In addition, the Major General is the commander of the region and the legislative sovereign responsible for all laws, including the appointment of judges, and so, for example, when a judge draws the commander's attention to a deficiency, it may take many years before the issue is examined substantively. Thus, for example, as happened in the ruling in which the judge noted that the Major General must amend the bylaws and explicitly add authority to hear administrative petitions, this has never been done and petitions are still submitted to the Jerusalem District Court or the High Court of Justice according to the context.

7. Environmental law

The Packaging Regulation Law of 2011 – The purpose of the law, as outlined in the objectives of the law, is to reduce the amount of waste generated from packaging, prevent its burial, and encourage the reuse of packaging. The law promulgates regulations regarding the treatment of packaging using "green" methods and prohibits the burial of packaging in landfills out of an understanding of the damage inherent in the environmental quality due to failure to properly treat this waste.

The situation in Judea and Samaria: The law was applied by order as an appendix to the bylaws of the local councils and was subject to several changes. According to the law, it is forbidden to bury packaging waste only if it falls into one of the following categories: the waste was created in the local authority or "outside the area" (i.e., even if it was created abroad, the main thing is that it was not created in Judea and Samaria), the waste was created by a settler, the waste is packaging waste separated from various types of waste. This means that packaging waste that was not produced in the council territory or Israel and was not produced by an Israeli citizen can be buried in Judea and Samaria and even in a regional council.

The Clean Air Law of 2008 – According to the law, its purpose is to improve air quality, prevent and reduce air pollution, inter alia by establishing prohibitions and obligations by

the precautionary principle, all to protect human life, health, and quality of life in addition to protecting the environment, natural resources, ecosystems and biodiversity, for the benefit of the public and future generations while considering their needs. The law came into force on January 1, 2011.

The law uses various tools to prevent air pollution, such as: setting maximum values for air pollutants in the environment, consolidating air monitoring systems into a uniform system as well as issuing orderly publication of monitoring data to the public, and forecasting publications. The law empowers the Minister of Environmental Protection to order the establishment of monitoring systems and their operation for various entities. Hence, local authorities have also the power to act to reduce the pollution caused in their areas. The minister has also the authority to instruct pollution-affected localities to prepare and implement a plan to reduce pollution within their areas, as well as enforce the obligation of large factories to obtain emission permits as a condition for their continued activity. These emission permits will be based on the best available technologies that can be implemented.

The situation in Judea and Samaria – This law does not apply in Judea and Samaria (both inside and outside the settlements) since the order was not applied. There is old legislation in the area, such as Cleanliness Order 1160 of the year 1986, which prohibits air pollution in general and without the details and adjustments required for control and enforcement. This means that in Judea and Samaria, there is very limited protection regarding air pollution by old legislation that is not adapted to Israeli legislation and does not allow for sufficient enforcement (The Research and Information Center of the Israeli Parliament, 2014) (Schwartz, 2010).

The Prevention of Asbestos Hazards and Harmful Dust Law of 2011 – The purpose of the law is to prevent, reduce, and treat environmental and health hazards caused by asbestos. Thus, according to Israeli law, a contractor engaged in the dismantling and removal of an asbestos structure is required to undergo special certification. There are detailed rules that apply to public buildings whose roofs are covered with asbestos, it is forbidden to break and trade in asbestos, and more.

The situation in Judea and Samaria: There is no prohibition on any asbestos trade and there is no obligation to dismantle broken asbestos roofs. The danger exists and most councils made sure to dismantle the asbestos structures on their own, understanding the danger involved. In conversations and meetings of Green Now Organization representatives with a representative of the Attorney General of Judea and Samaria, the Organization was promised several times that an order would be issued to regulate the matter over two years ago.

8. Summary of legislative differences

As illustrated, the legislative differences that exist between Israel's sovereign territory and Judea and Samaria create a gap between the rights and obligations of Israeli residents and residents of Judea and Samaria and create a status of first-class citizens and second-class citizens. The same applies to health, planning and building matters, environmental matters, and other areas.

It is worth mentioning that only a few examples were presented, and as noted, there are additional gaps, both in the aforementioned areas as well as in other areas where legislation is lacking or there is no regulating legislation at all in Judea and Samaria - such as a law regulating the treatment of electronic waste. It is also worth remembering that the gap is even larger outside the boundaries of settlement. The democratic legislative process in sovereign Israel is substantially different from the procedure for issuing an order by a military commander. Therefore, comprehensive legislation must be adjusted to equalize the situation of residents of Judea and

Samaria with that of residents of Israel to prevent discrimination, preserve basic rights, maintain order, and protect animals and the environment.

9. Israeli High Court of Justice Authority in Judea and Samaria

With the influx of petitions against the military rule to the High Court of Justice, the need arose to determine whether the Israeli court has jurisdiction to hear them (Berlinger, 2024). It is reasonable to assume that if the State Attorney's Office had claimed this lack of authority, its claim would have been accepted (Negbi, 1981; Zilber, 2021). But the State Attorney's Office did not argue this, and in the early 1970s, the de-facto High Court of Justice ruled that the decisions of the military government were subject to judicial review (The Almaksada Affair, 1972; Israel Electric Corporation affair, 1972; Almasaulia affair, 1983). This decision is a novelty and a legal and historical precedent since Israel was the first and only country in the world in which its military government was subordinated to the authority and supervision of its Supreme Court (Adler, 2010). This decision of the court passed without much public scrutiny, mainly because the government did not oppose it, and over the years became a 'fait accompli'.

10. The first period – Discussion without authority

The first Supreme Court ruling published regarding Judea and Samaria was in March 1972 in the Almaksadeh case (Kretzmer, 2023), in which the issue of the High Court's jurisdiction was not mentioned. The issue of authority was ignored on the assumption that the authority exists. The court knew that its jurisdiction in the matter raised serious legal difficulties, and therefore consciously and deliberately refrained from discussing the issue.

In the rulings handed down after the Almaksadeh affair, the court no longer completely ignored the issue of authority, but still avoided substantive discussion of it, devoting only a few lines to it. This is the case, for example, in the Israel Electricity Corporation case, in which the court based its jurisdiction on the fact that state representatives did not claim the absence of such authority. This anchor raises two fundamental problems.

First, the parties' non-objection (as opposed to the consent of the parties) can confer jurisdiction on the court only in a specific case. It cannot confer jurisdiction on other cases in the future. This problem was addressed by the Honourable Justice Witkon (who presided over all the main petitions regarding Judea and Samaria in the 1970s) (The Abu Helou Case, 1972).

Second, a bigger problem, especially today, is that relying on the consent of the parties as a source of authority ostensibly contradicts Israeli law (Amir, 2006), meaning that even if the parties agree that the court will hear a particular case, the court does not acquire jurisdiction and is forbidden to hear the case, unless there is explicit authorization to do so by law. The court did not deal with this problem (Einhorn, 2013).

In conclusion, during the first years of Israel's control over Judea and Samaria, the Supreme Court began to look for a constitutional anchor for its authority to hear cases from these territories and indicated the consent of the parties as a possible source of authority. The court was aware of the problematic nature of this source and therefore explicitly refrained from ruling due to its lack of authority to hear cases from Judea and Samaria (The Kawasmeh Case, 1980). In some cases, the court deliberately ignored the question of authority, and in some of the cases, he decided that it would hear the petition despite the issue of authority. In practice, not a single case is known in which the court refrained from hearing a case due to a lack of jurisdiction stemming from the fact that it is a case from the Judea and Samaria area. The reality in which the court hears cases without being able to pinpoint a source of authority was a source of discomfort for it. Therefore, it

sought a stronger constitutional anchor to consolidate its authority, and for this purpose, it turned to administrative law.

11. The second period – Administrative hearing authority

In the second period, the court continued to note that the state's representatives did not claim a lack of authority, but added another argument: members of the military government in Judea and Samaria are part of the executive branch of the State of Israel, and, as such, their decisions are subject to the supervision and review of the court (Dinstein, 1972, 1974, 1980). The normative anchor for this argument was found by the Supreme Court in the Courts Law (1957).

At first glance, it seems that this is a solid normative anchor: the law (now the Basic Law) explicitly states that the High Court of Justice may criticize the decisions of anybody or a person playing a public role. Despite this, for many years, the court refrained from relying fully on this anchor and refrained from clearly stating that it is permitted to hear cases from Judea and Samaria.

The court refers to the court's Law but does not rule according to it, but rather "assumes" that it has authority and hears the case without questioning the authority. The court did not explain why it took this path, but it seems to be because this legislative anchor is also legally shaky.

The court's jurisdiction under the Section of the Courts Law applies only to persons "performing public functions by law," that is, persons acting by Israeli law (Interpretation Law, 1981). Military rule in Judea and Samaria does not operate according to Israeli law, but according to military law (security legislation) established by the military legislature in those areas (Proclamation, 1967)]. This was even stated explicitly years later by the Supreme Court (Amir case, 1999; M.R.M. case, 2005).

Despite the great problem in relying on an "administrative source," the Court sees it as a slightly stronger normative source than the source of "consent of the parties," and therefore in the second half of the 1970s it mainly emphasized it (the Alon Moreh Case, 1979). At the same time, throughout the 1970s, the court continued to refrain from explicitly stating that it indeed had the authority to hear those cases, and even most of the justices seriously and openly questioned the question of authority, and in the Alon Moreh case, one of the judges explicitly stated that this authority does not exist at all.

A change in this trend came in the 1980s.

12. The third period – Acquiring authority by inertia

In the third period, the Supreme Court upholds the words of the Sages that since "a year in it" it is "done to him as a permit" (Babylonian Talmud), and turned the "assumption" into "containment" and the doubt and "need of review" into "there is no doubt."

The High Court clearly states that it has jurisdiction to hear Yesha (Judea and Samaria) cases, but does not give a legal reason for the change in its approach. The Court does not explain why an issue that was "initially left in need of review" suddenly became a "no doubt" issue.

Although it notes that "over the years, the status of the military government has become clearer," it does not clarify what this new clarity is regarding the status of the military government in Judea and Samaria, and how this grants the High Court of Justice authority to hear Judea and Samaria cases. Ostensibly, the only thing that has changed during this period is the time, when the very fact that the High Court of Justice has heard Yesha cases for more than a

decade, was supposedly enough to grant jurisdiction. From a critical perspective, it can be said that since the court searched, unsuccessfully, for a stable constitutional anchor for its authority, it decided that the authority was vested in it "by inertia," and its validity continues to be debated to this day. As it has done in other cases where there was a dispute over its authority, the High Court used the "phased method" (or "salami method"). In the early years, the Supreme Court heard cases from Judea and Samaria without deciding the question of authority. These are usually low-profile cases, the decision of which is in favor of the state. After several years in which the public has become accustomed to the High Court of Justice discussing the same issues, the Court clearly states that it has the authority to hear them, relying on past cases that it has already heard. It then opens the possibility of deciding on "high-profile" issues with broad political and social implications, such as evacuating settlements, as opposed to expelling Palestinian terrorists from their houses (Scharf, 2023; Berlinger, 2016).

13. Conclusion

Even today, after more than half a century in which the Israeli Supreme Court hears Judea and Samaria cases, it has not yet found a strong normative source on which to base its authority and continues to indicate the two shaky sources of authority that did not satisfy it back in the 1970s: the consent of the parties and the definition of military rule as ostensibly acting according to Israeli law. The Supreme Court is aware of the cloud hanging over its authority to hear Yesha cases, but in its view, "the humanitarian consideration must prevail in this case over the legal-technical consideration," and therefore it hears those cases.

It should be reminded that even if the court should have the authority to review what is happening in Judea and Samaria, without going into the question of its scope, the authority has not yet been determined by the legislature and has not yet been determined using "judicial legislation". How the authority is acquired, which is not based on stable legal sources, has opened the doors of the High Court wide without a guard at its doors to set up a border and barrier to some of the cases that wish to enter its gates, in doing so, it created political, social and legal "hazards". Legislation granting the High Court of Justice the authority to hear Judea and Samaria cases will, on the one hand, give the Court legitimacy to hear those cases, and on the other hand, will enable the erection of barriers of "justiciability" and "standing (locus standi) right" at the gates of entry to the High Court.

The responsibility for the fact that the Israeli High Court of Justice hears thousands of Judea and Samaria cases each year, without a clear source of authority, lies with the three branches of government: the court that acquired jurisdiction without a clear legal source (and contrary to its rulings in other cases), the government whose representatives did not claim the lack of jurisdiction of the High Court of Justice and agreed (tacitly) that the court hear Yesha cases, and the Knesset, which did not regulate this important issue in law. After more than 50 years in which the High Court of Justice has heard tens of thousands of cases from Judea and Samaria, there is no political feasibility that the High Court will retract its authority position. The government can set the course about the courts operating in Judea and Samaria but cannot determine the jurisdiction of the High Court. Changing the current situation and regulating the powers of the High Court of Justice regarding Judea and Samaria is an action that lands on the Knesset's doorstep.

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