

Fake Justice

**The Responsibility Israel's High Court Justices
Bear for the Demolition of Palestinian Homes
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- Executive Summary -

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In early September 2018, after years of legal proceedings, the justices of Israel's High Court of Justice (HCJ) determined there was no legal obstacle to demolishing the structures in the community of Khan al-Ahmar – located about two kilometers south of the settlement of Kfar Adumim – as construction in the compound was “unlawful.”

The ruling's determination that the destruction of the community is no more than an issue of “law enforcement” accurately reflects how Israel has framed its policy regarding Palestinian construction in the West Bank for years. On the declarative level, Israeli authorities consider the demolition of Palestinian homes in the West Bank as no more than a matter of illegal construction, as if Israel does not have long-term goals in the West Bank and as if the matter does not have far-reaching implications for the human rights of hundreds of thousands of individuals, including their ability to subsist, make a living and manage their own routine.

The Supreme Court has fully embraced this point of view. In thousands of rulings and decisions handed down over the years on the demolition of Palestinian homes in the West Bank, the justices have regarded Israeli planning policy as lawful and legitimate, nearly always focusing only on the technical issue of whether the petitioners had building permits. Time and time again, the justices have ignored the intent underlying the Israeli policy and the fact that, in practice, this policy imposes a virtually blanket prohibition on Palestinian construction. They have also ignored the policy's consequences for Palestinians: the barest – sometimes positively appalling – living conditions, being compelled to build homes without permits, and absolute uncertainty as to the future.

A. Planning policy in the West Bank

The planning apparatus Israel has instituted in the West Bank serves its policy of promoting and expanding Israeli takeover of land across the West Bank. When planning for Palestinians, the Israeli Civil Administration endeavors to obstruct development, minimize the size of communities

and increase construction density, with a view to keeping as many land reserves as possible for the benefit of Israeli interests, first and foremost for the expansion of settlements. Yet when planning for settlements, whose very establishment is unlawful in the first place, the Civil Administration's actions are the very reverse: planning reflects settlements' present and future needs, aiming to include as much land as possible in the outline plan so as to take over as many land resources as possible. Such planning leads to wasteful infrastructure development, loss of natural countryside and relinquishing open areas.

Israel achieves this end by several means. First, it prohibits Palestinian construction on some 60% of Area C, equal to roughly 36% of the entire West Bank. It does so by applying a variety of legal definitions to vast areas (with classifications occasionally overlapping): “state land” (approx. 35% of Area C), “military training zones” (approx. 30% of Area C), or settlement jurisdictions (approx. 16% of Area C). These classifications are used to significantly reduce the area available for Palestinian development.

Second, Israel has changed the Jordanian Planning Law that applies in the West Bank, replacing many of its provisions with those of a military order which transferred all planning authority in the West Bank to the Civil Administration's Supreme Planning Council and eliminated Palestinian representation on planning committees. Consequently, the Civil Administration became the sole and exclusive authority for planning and development in the West Bank, for Palestinian communities and settlements alike.

Third, Israel takes advantage of its exclusive power over the planning apparatus to prevent virtually all Palestinian development and to increase construction density even on the remaining 40% of land where it does not a priori prohibit Palestinian construction. In October 2018, at a meeting at the Knesset, the head of the Civil Administration said that, in accordance with instructions from government officials, there is currently no planning for Palestinians.

However, in order to uphold the appearance of a properly functioning planning apparatus, the state argues that plans for Palestinian communities must adhere to the outline plans the British Mandate authorities drafted back in the 1940s – which defined land-use zoning for the entire West Bank – even though those plans are light years away from reflecting the current needs of the population. Admittedly, the Civil Administration has drafted hundreds of Special Outline Plans for Palestinian communities. Yet, while the declared objective was replacing the Mandate-era plans, the new plans were also designed to curtail construction. They are no more than demarcation plans, basically drawing a line around the perimeter of the village's built-up area on the basis of aerial photographs.

The figures clearly illustrate the results of this policy:

- **Applications for building permits**

According to Civil Administration figures, from January 2000 to mid-2016, Palestinians filed 5,475 applications for building permits. Only 226 (about 4%) were granted.

- **Demolition orders**

Over the years, the Civil Administration has issued thousands of demolition orders for Palestinian structures. According to Civil Administration figures, 16,796 demolition orders were issued from 1988 to 2017; 3,483 (about 20%) were carried out; and 3,081 (about 18%) are under legal proceedings. Up to 1995, the Civil Administration issued fewer than 100 demolition orders a year. However, since 1995 – the year the Interim Agreement was signed – the numbers have risen steadily. From 2009 to 2016, the Civil Administration annually issued an average of 1,000 demolition orders.

- **Demolitions**

According to B'Tselem figures, from 2006 (the year B'Tselem began recording home demolitions) through 2018, Israel demolished at least 1,401 Palestinian residential units in the West Bank (not including East Jerusalem), causing at least 6,207 people – including at least 3,134 minors – to lose their homes. In Palestinian communities unrecognized by the state, many of which are facing the threat of expulsion, Israel

repeatedly demolishes homes. From 2006 through 2018, Israel demolished the homes of at least 1,014 people living in these communities – including 485 minors – more than once.

Planning for Israeli settlements is the inverse image of the situation in Palestinian communities. With the single exception of the settlements in the city of Hebron, all settlements have been established in open areas. In addition, generous, highly detailed outline plans have been prepared for nearly all settlements, replacing the outdated British Mandate-era plans in force there. The new plans include new zoning that is consistent with the needs of modern communities. They include land for public use, green space, and land for expansion and development, far beyond what is necessary based on the rate of normal population growth. The Civil Administration also built a new network of roads to link the various settlements to one another – and the settlements to the other side of the Green Line (the boundary between Israel's sovereign territory and the West Bank) – that restrict and confine Palestinian development.

B. HCJ Rulings: Complete validation of the planning apparatus

Over the years, Palestinians have filed hundreds of petitions with the HCJ, seeking to overturn demolition orders by the Civil Administration. In most cases, the HCJ has issued interim injunctions prohibiting the state to demolish the structures pending a ruling. However, there is a high price to pay for this fossilized state. The Court often issues orders nisi that not only prohibit demolition by Israel, but also do not allow residents to build homes or public buildings, connect to infrastructure or make repairs – even essential ones – to existing buildings, consigning Palestinians to a prolonged state of limbo and uncertainty as to their future.

Many petitions were denied by the justices, who rejected all arguments of principle regarding the planning policy Israel implements in the West Bank. Sometimes the Court did not even address the arguments. Other petitions were withdrawn by the petitioners, sometimes after the state said it

does not plan to implement the demolition orders at this point in time and pledged to give the petitioners advance notice should it change its position. However, to the best of B'Tselem's knowledge, there has not been a single case in which the justices granted a petition Palestinians filed against the demolition of their home.

1. Agreeing to the dispossession of Palestinians across vast areas of the West Bank

The justices have seen nothing wrong with West Bank land being declared "state land" or "training zones." Despite hearing arguments that challenged the lawfulness of these proceedings, in each and every case, the Court has accepted the state's argument that the Palestinian construction is unlawful and that the structures must, therefore, be demolished.

The Supreme Court has always accepted the state's position whereby the Palestinians, unlike the settlers, are not allowed to build on "state land." In petitions in which the state alleges that the construction in question is on land declared a "military training zone," the Court does not even address the actual issue of declaring the place a closed area. Nor does it examine whether the designation was just or lawful, even when the petitioners explicitly raise these arguments. Instead, the hearings in these cases are confined to the question of whether the petitioners are in fact "permanent residents" of the firing zone. Under the military orders, only that status would allow them to be there. In all cases decided to date, the justices accepted the state's argument that the petitioners are not "permanent residents" and approved demolition of their homes.

2. Acknowledging the planning system as reasonable and lawful

The HCJ justices have found the change Israel made to the Jordanian Planning Law to be lawful and necessary, despite the prohibition set out in international law against the occupying power making changes to local legislation, apart from rare exceptions which do not apply in this case. In making their determination, they ignored the fact that the change has enabled Israel to consolidate

and take over the entire planning apparatus, remove Palestinians from all committees and keep them from taking part in determining their future. This change paved the road for the later establishment of two parallel planning apparatuses: one for Palestinians and another for settlers.

Moreover, the justices determined that the planning system for Palestinians reflects the residents' needs. The judges were perfectly willing to accept that the outdated plans drafted over eighty years ago by the British Mandate still apply in Palestinian villages, but not to Israeli settlements; they determined that the outline plans the Civil Administration drafted for Palestinian communities are reasonable and meet the residents' needs. It mattered not to the justices that the plans are identical, inflexible, do not have any public spaces, and that any future development must be undertaken within the already built-up area of the village. The justices also ruled that the Civil Administration's planning committees consider Palestinians' applications for building permit properly and professionally, despite there being no Palestinian representatives on the committees, and taking no notice of the negligible number of applications granted.

Given this point of departure, the justices examine the petitions as though enforcement of planning and construction laws is the full extent of the issue at hand. They, therefore, deny the petitions as if the matter is no more than an issue of the enforcement of building and construction laws. They demand that petitioners exhaust all the futile proceedings the system offers, and are appalled when petitioners "take the law into their own hands" and – in the absence of any other alternative – build without permits.

3. Implicit validation of Israeli policy

The Court also provides an implicit legal stamp of approval to the Israeli policy. It does so via two primary methods.

A. Obscuring the differences between the various planning apparatuses: In their rulings on construction in Palestinian communities, the justices of the Supreme Court have also cited rulings that dealt with planning for settlements or within Israel proper. They have done so also in the reverse cases: in rulings regarding planning for settlements or within

Israel, the justices cited rulings that dealt with planning for the Palestinian population. Reliance on precedents is characteristic of the Israeli justice system. However, the various planning apparatuses are underpinned by differing values and are designed to safeguard conflicting interests. A system whose object is planning for the benefit of the population – such as the one that applies in settlements and in the Jewish communities in Israel proper – is nothing like an apparatus whose object is to initiate, carry out and legalize the systematic dispossession of the population, like the one in place for Palestinian communities. Jumbling them all together eliminates differences, making a patently illegitimate system seemingly ethical and valid.

B. Selective reference to the provisions of international law: The HCJ also validates the planning apparatus by conveying a message that planning carried out for the Palestinians meets the requirements of international humanitarian law (IHL). This is achieved primarily through citing IHL provisions selectively, so as to create the impression that the Israeli policy is in keeping with IHL, and ignoring other provisions, such as the prohibition on military training or establishing settlements in an occupied area.

Particularly blatant is the justices' disregard of the fact that implementation of the Israeli planning policy involves violating the absolute prohibition on forcible transfer, even though allegations regarding the violation were brought before the Court. The prohibition stands even if people leave their homes not of their own free will, for example due to untenable living conditions the authorities generate by cutting them off from the water and power grids, turning their living area into a military training zone, or repeated demolition of their homes. Violation of this prohibition is a war crime.

C. An illusion of justice

Despite overwhelming differences between the planning apparatus Israel established for the Palestinian population in the West Bank and the one established for the settlers, the HCJ has regarded them as identical. In one of the HCJ

sessions held in 2018 on the matter of the petitions against the demolition of Khan al-Ahmar, Justice Hanan Melcer even said – in reference to the enforcement of planning laws vis-à-vis Palestinians and settlers – “the same law applies to all.”

Yet Israel's planning and construction policy for settlers is the very reverse of that applied to Palestinians. Despite settlers sometimes playing the victim – wolves in sheep's clothing – just looking at the reality on the ground is enough to see the immense gulf between planning for settlers and planning for Palestinians. Since occupying the West Bank over fifty years ago, Israel has built nearly 250 new settlements – whose very establishment is prohibited under international law – and but one Palestinian community. And that one community was built to transfer Bedouins living on land that Israel earmarked for the expansion of a settlement. In other words, even the establishment of this one community was designed to serve Israeli needs. At the same time, Israel has established an apparatus that does not enable Palestinians to obtain building permits, and expends considerable efforts imposing and enforcing rigorous restrictions on any and all construction or development for the Palestinian population.

The gulf between this reality and that described in thousands of HCJ decisions – in which justices wrote about “clean hands” and “exhausting remedies,” accepted each and every argument by the state regarding planning for the Palestinian population, and summed up by allowing the state to demolish the petitioners' homes and consign them to abysmal living conditions – is unfathomable. While the Court does not write the laws, make the policy or implement it, the justices have both the authority and the duty to find Israel's policy unlawful and prohibit the demolition of homes. Instead, time and time again, they have chosen to give the policy their stamp of approval and validate it publicly and legally. In so doing, not only do the Supreme Court justices fail to discharge their duties, they also play a pivotal role in further cementing the occupation and settlement enterprise, and in further dispossessing Palestinians of their land.

It stands to reason that the judges are well-aware, or ought to be, of the judicial foundations they are

cementing in their rulings, and the devastating implications of these rulings, including the violation of the IHL prohibition on forcible transfer. Therefore, they too – along with the prime minister, senior ministers, the chief of staff and other senior military officers – bear personal liability for the commission of such crimes.

For Israel, the chief advantage in maintaining a “planning apparatus” for the Palestinian population is that it lends the system a semblance of being proper and functional, ostensibly operating in accordance with international and Israeli law. This allows the state to argue that Palestinians choose to build “illegally” and choose to take the law into their own hands – as if they even have a choice – thereby justifying home demolitions and the continued planning restrictions. However, the attempt to cloak the planning apparatus in the occupied territory in a guise of propriety is no more than a propaganda ploy. A planning system should reflect residents’ interests and serve their needs. Yet, by definition, the balance of power under an occupying regime is unequal. The officials of the occupation regime do not represent the occupied population, whose people cannot participate in the systems that regulate and govern their lives: neither in the planning and legislative proceedings, nor in issuing the military order, nor in the committee that appoints judges.

It sometimes seems that the state itself has had enough of the effort involved in maintaining the façade. Mapping buildings, going through committee proceedings, writing responses to petitions and so on and so forth, all take precious time, effort and resources, even if Israel does have at its disposal leagues of lawyers, immense financial resources, planning apparatuses to do its bidding and a legal system that willingly devotes itself to the charade. Pitted against this combined powerhouse is a population with little representation and few resources, people who have been living for over half a century under a military regime in which liberty and livelihood are precarious. Nevertheless, the state’s leaders are dissatisfied with the pace and rate of the dispossession, finding it frustrating to have to wait months and years for the courts to reach the outcome the state seeks.

Therefore, in recent years, Israel has stepped up its attempts to bypass – or even cancel – legal proceedings regarding the demolition of Palestinian structures. Israel’s willingness to forgo appearances attests mostly to its confidence that it will not be called to bear significant domestic or international consequences for breaking the law. The lawfulness of the new orders is being debated by the HCJ at this very time. This means that, paradoxically, the Supreme Court is now being asked to consider the cancellation of the façade it has played a major role in generating.

Regardless of whether the justices of the HCJ choose to validate the cancellation of the façade, they have constructed a sturdy edifice to support the legal validation of the dispossession of lands of the Palestinian people. How much care will they take in adding a nice coat of paint to this structure in the days to come? Will they insist on maintaining the façade? Ultimately, that is just a minor question of image. It must not deflect attention from the reality of theft and dispossession that Israel has created, and which the justices continue to enable, excuse and validate.