Mentality of Annexation:

Changes in the Interpretation of the Laws Regarding Occupation

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Main Points

In recent years, the Attorney General and the State Prosecutor's Office have made dramatic changes in their positions on a number of issues regarding Israel's control over the occupied territories (OT). These changes are part of the government's effort to apply the standards of Israel's democracy to settlements located in territory that is subject to belligerent Israeli occupation, where the Palestinian population lives without democracy and equal rights. These changes are contrary to previous positions of the legal echelon and the Supreme Court, and they magnify the legal question surrounding Israel's control of the OT in terms of international law.

Among other things, the Attorney General stated that:

- It is permissible to expropriate Palestinian land in cases where the Israeli takeover was carried out "in good faith."
- It is permissible to confiscate land for the purpose of access to a settlement.
- Abandoned property may be used for settlement purposes.
- It is permitted to "liquidate" the abandoned property without judicial process.
- It is permissible to expropriate protected tenancy of the Hebron Municipality on public land, even without a judicial process.
- Legislative changes were made to facilitate the demolition and deportation of Palestinian communities in Area C.
- All government-sponsored bills should include a clause specifying their applicability to the OT

These changes mark another step in the policy of de facto annexation of the OT to Israel, and they are intended to "normalize" the settlements and make them part of Israel, even without declaring so.

Introduction

The justice system has always played a role in promoting settlements. However, since the election of Netanyahu, we have seen a growing trend of attempts to **normalize the settlements** and to change the rules in order to facilitate their development, thereby creating a sense that the settlements are part of Israel for all intents and purposes.

The gradual changes were evident in policy, discourse, and legal interpretation. For instance, in March 2011, the government notified the High Court of Justice of a change in policy

towards illegal outposts such that the outposts would be authorized wherever possible. Since then, over 30 outposts have undergone authorization procedures.

During that time, the government appointed the Edmond Levy Committee to provide a negative counterweight to the Sasson Report on illegal outposts and to offer legal tools to help develop the settlements and outposts.

Changes in the legal discourse also began to appear. While in the past, one could find in the state's responses references to unregistered, privately-owned Palestinian land as private land, today it is typically referred to as property "located outside of the state-land line".

As part of the coalition agreement of the current government, an outpost regulation team was set up to provide legal solutions to legitimize what is illegal in the settlements. Pinchas Wallerstein was recently appointed as the head of the regulation team. Wallerstein was head of the Binyamin Regional Council and was responsible for the establishment of dozens of illegal outposts and involved in large-scale illegal construction.

Justice Minister Ayelet Shaked appointed Attorney Amir Fisher, who represented the right-wing Regavim association in many petitions, as a special external adviser whose role is to review all of the state's responses to settlement issues, and to make comments and changes. Appointing a political advisor to intervene in the professional considerations of the State Attorney's Office is an unprecedented step, the results of which are reflected in the state's responses. As the Justice Minister proudly stated, the reactions regarding the settlements are "different than they used to be."

The Knesset enacted the Regulation Law, also known as the "Expropriation Law," intended to legitimize the land grab that was carried out in many outposts and settlements. But it seems that in the past year, after Avichai Mandelblit was appointed Attorney General, there have been far-reaching changes in the legal positions of the justice system and the mechanisms of law enforcement in Israel.

The following are some of the changes in Israeli legal interpretation in recent months.

1. Use of the "market regulation" doctrine to expropriate Palestinian land - actual implementation of the principles of the "Regulation Law"

The doctrine of "market regulation" is a legal arrangement that, in certain cases, allows the person who purchased property without the owner's consent due to an honest error (e.g. a property sold by a thief so that the buyer had no reason to suspect that the seller is not the owner) to prevent the return of the property to its owner and to pay him monetary compensation. The idea is to prevent a situation in which the chain of transfers of an asset could collapse at any moment, if it so happens that someone disagreed with the transfer along the way, possibly causing great harm to the market activity and trade in property.

In mid-November 2017, the state notified the High Court of Justice of its intention to expropriate 45 dunams of land from Palestinians in the Ofra area in order to approve a building plan that would legalize parts of the settlement. The legal justification given in the state's response to the High Court of Justice is the use of the "market regulation" doctrine set

out in Section 5 of the Order Concerning Government Property. It states that in certain cases, when a transaction is made between the Custodian of Government and Abandoned Property in the Civil Administration and any other party, the transaction will not be disqualified and will remain valid (i.e. the land is expropriated with the obligation to compensate the owner). In other words, there is no obligation to evacuate the invaders and return the land to its owners.

The state's response is based on a summary of a hearing held by the Attorney General in December 2017, in which he actually approved the application of the section to certain cases in which the Civil Administration had, in good faith, appropriated land that it did not own and transferred it to the use of the settlers. In fact, the Attorney General order allows for the expropriation of Palestinian land for the benefit of the settlements, which is forbidden by international humanitarian law and is considered by the Israeli legal system to be a red line that cannot be crossed. Although the Attorney General limits the expropriation to cases in which there was an allocation by the Civil Administration (CA), it also includes, for instance, cases of illegally built houses, i.e. without building permits and contrary to the master plans that are in force. The issue of the CA acting in good faith is questionable, as it is clear that the CA has been negligent in its task of finding out the status of the private lands it has allocated. Therefore, according to the position of the Attorney General, negligence and good faith can coexist.

It should be noted that the Regulation Law enacted by the Knesset does, in effect, stipulate that private land that settlers invaded will not be returned, but will be expropriated from the owners in return for compensation. In the Attorney General's response to the High Court of Justice that was filed in objection to the law, he states that the law is unconstitutional and should be disqualified. In the present opinion on "market regulation" it turns out that the principle underlying the expropriation law is acceptable to him, the only question being under what conditions it is permissible to apply it.

Click here to read Mendelblit's summary of the discussion expressing the guiding legal opinion on the market regulation [Hebrew].

Click here to read the state's response to the plan in Ofra - to implement the expropriation according to the market regulation [Hebrew].

2. Legal opinion permits expropriation of Palestinian land for paving an access road to the settlement (the case of Harasha)

On November 15, 2017 the Attorney General published a legal opinion allowing the expropriation of Palestinian land for the access road to the Harasha outpost, west of Ramallah. The Attorney General links his decision to a recent ruling by the High Court of Justice, written by Judge Salim Joubran in response to a petition by landowners from Silwad together with Yesh Din, submitted against the intention to use their lands, some of which are considered "abandoned properties." Justice Joubran stated that the settlers living in the OT could be viewed as part of the local population of the area. Contrary to the consistent ruling

of the HCJ since the 1970s, he ruled that it was permissible to temporarily, and in certain cases, infringe on Palestinians' property rights even in the absence of a security need. The infringement is intended only to advance the interests of the settlers.
In his opinion regarding the access road to the Harasha outpost, the Attorney General limited the use of expropriation to settlers only in certain cases, and determined that any such expropriation must be approved by him. Despite this, the breach of the consistent principle prohibiting the use of private Palestinian property for the purpose of the settlement project—originating in the verdict of Elon Moreh in 1979—opens the door to extensive expropriations in all the OT and to the establishment of settlements on private Palestinian land.

Click here for the opinion of the Attorney General regarding the expropriation in Haresha [Hebrew], click here.

Click here for further details and analysis.

3. The Use of Absentee Property

In August 2016, an ad was published in the newspapers announcing the intention of the Civil Administration to use land belonging to Palestinians who are considered absentees (living abroad) for the purpose of establishing a temporary site for the evacuees of Amona. The plan referred to the a legal opinion of the General Attorney which determined that it is permissible to make temporary use of abandoned properties and allocate them to the evacuees of Amona.

By law, abandoned properties are assets whose owners are abroad and under the Order Regarding Abandoned Property, the government serves as trustee for them until the owner returns. Thus, the Custodian must manage the properties in a manner consistent with the owner's interests.

It is important to note that the opinion that allowed the temporary use of properties whose owners are abroad for the benefit of the evacuees of Amona is contrary to the policy and legal interpretation of the authority to manage abandoned properties as it was designed since 1967. Even the so-called "mother of settlements," the late Attorney Plia Albeck, who served as director of the civil department of the State Prosecutor's Office for many years, determined that absentee property **"cannot be used to establish Jewish settlements"** (from her lecture to the Israel Bar Association, 1985). This was also the opinion of the Assistant Attorney General to the Civil Administration from September 1997:

> *"The Custodian is only a trustee who protects the property, lest it be harmed while the owner is absent from the area ... The essence of an 'abandoned property' as private property, of which the Custodian's possession is temporary and for the purpose of protecting the property only, entails a much more sweeping prohibition:* ***[The Custodian] ought not to make any transaction with respect to the property which would contravene the said duty of preservation, and in particular his obligation to return the property***

> ***to the owners upon his return to the area"*** [Emphasis in original]. (Quoted in the State Comptroller's Report, 56a, p. 220).

To read the legal opinion on the use of abandoned properties (as received from the Attorney General) [Hebrew] - click here.

For more details, see here

4. Dissolution of joint ownership of abandoned properties

Following the decision to use abandoned properties for the evacuees of Amona, it turned out that most of the abandoned plots had several owners, that is, there was a joint ownership of several people in each plot, and only some of the owners were absentees while the rest lived in the OT. This means that in order to make use of part of the plot (the "abandoned" part, which is managed by the Custodian), a judicial process of dissolving a joint ownership is required before deciding which part of the plot belongs to each of the owners.

In order to overcome this legal obstacle, the Attorney General determined in an opinion on December 29, 2016 that in the special case of the use of abandoned property for the benefit of the evacuees of Amona, the Civil Administration is permitted to **force** an involuntarily disassociation, in a one-sided manner and without the agreement of the other partners, and to seize part of a plot based on its choosing (and not the court's). The reason for this is *"based on a strong public need to maintain public order and safety in the region under unique and exceptional circumstances"* (the opinion, Section 5).
To read the legal opinion regarding the dissolution of the partnership in abandoned properties [Hebrew] – click here.

5. Examination of the Cypriot Model - compensation instead of return

In addition to the above, the Prime Minister announced the establishment of a team to examine the possibility of establishing a special land tribunal—similar to what was done in the dispute between Cyprus and northern Cyprus (the latter under Turkish control) — in order to compensate the owners of land on which homes were built, instead of returning the land to them. It is important to note that in the case of Northern Cyprus, compensation was paid to owners who were abroad, whereas here the tribunal is meant to allow the use of land in return for compensation to owners who are *physically present* in the territories but who were forcibly removed from their land.

6. Expropriation of protected tenancy of the Hebron Municipality and allocation of land to settlers

In October 2017, the subcommittee of the Higher Planning Council approved a request for a building permit for the construction of three buildings with 31 housing units for settlers in the heart of Hebron. The land is considered state land (owned by Jews prior to 1948), which was leased to the City of Hebron in protected tenancy for the construction and operation of a

central bus station in Hebron. In the 1980s, the IDF seized the land for security needs and built a military base on it, and the central station moved to another location.
Now it turns out that in the summer of 2016 the Civil Administration gave the Housing Ministry permission to plan the new settler neighborhood on the ground. In a hearing on the building permit, the representative to the Attorney General said: **"Our position, which is based on the position of the Deputy Attorney General, is that the protected right [of the Hebron municipality] is over."** This position is contrary to the position of the state to this day.

In 2007, the Judea and Samaria Legal Advisor was asked about this issue, and stated that the protected tenancy of the Hebron Municipality is still valid: "... This protected tenancy was never ended by a judicial order, as required by Jordanian law, and in light of the position of the Justice Ministry today, it is doubtful whether it will be possible to end it in the foreseeable future." In other words, once the security need is over and the military base moves elsewhere, the land is supposed to return to the Hebron Municipality. However, the Attorney General's current position that the land can be allocated to the settlement is actually a type of expropriation of the land from the Hebron Municipality for the use of a settlement.

For more details, click here.

7. Legislative changes to evacuate Palestinians from Area C

In the last year or two there has been a dramatic rise in house demolitions and the evacuation of Palestinians from their homes in Area C. As part of the increased enforcement against illegal construction by Palestinians, several legislative changes have been made to circumvent the route of appeal and hearing and to facilitate the demolition.

A. Delimitation Orders for Palestinians - In 2003, in order to deal with the phenomenon of the illegal Israeli outposts, the Commander of the Central Command signed an "Order Regarding Unauthorized Buildings" allowing for the evacuation of an entire outpost without the need for demolition orders on each structure. In the original wording of the order, it was explicitly stated (in section 6 b) that it did not apply to "persons registered in the population registry of the area", i.e., does not apply to the Palestinian residents. However, on November 22, 2015, the Commander of the Central Command signed an amendment to the order that erases the reservation and applies it to the Palestinian population, as well, so that the amended order enables the evacuation of an entire community of Palestinians without the need for demolition orders for each structure.

On November 1, 2017, the first order to demarcate a specific Palestinian community was made. The Commander of the Central Command signed two orders to evacuate three Palestinian communities in Area C (Ein al-Hilweh and Umm Jamal in the northern Jordan Valley, and Jabal al-Baba in the Al-Ezariya area – within the plan of "E1"). According to the order, the area demarcated must be evacuated from each person and property within eight days, and it is forbidden to enter and stay there.

This order effectively allows the **forcible transfer of a protected population**, which is prohibited under international law and is even considered a "war crime" under the jurisdiction of the International Court of Justice in The Hague. The order, signed by the military commander in the area, deals explicitly with civil matters of planning and construction,

which are supposed to be under the authority of the Civil Administration, and to be conducted according to civil criteria. With respect to the legality of the buildings, it is necessary to examine each structure as to whether it can be authorized, the degree of harm done by its non-authorization, and the possibility for any effected person to exercise the right to argue their case.

B. Intensifying the confiscation of mobile homes of Palestinians – A letter from the Association for Civil Rights in Israel (ACRI) to the Legal Advisor for Judea and Samaria dated November 8, 2017, states: "At a meeting of the Knesset Foreign Affairs and Defense Committee on June 27, 2017 Marco Ben Shabat, the director of the Civil Administration's supervision unit, said that **the CA's warehouses contained 500 mobile homes that were confiscated from Palestinians**. According to him, all it takes to dismantle and seize the mobile unit is the affidavit of the inspection unit employee. Beyond that, there is no other administrative, legal or procedural recourse. Mr. Ben Shabat further stated that the use of the confiscation orders is intended to prevent petitions to the High Court of Justice against orders issued for violations of the planning and building laws, due to the burden that the plethora of petitions creates on legal counsel."

The administrative confiscation regulations were amended following the Sasson Report to deal with the outposts and determined that new caravans could be confiscated within 30 days from their placement. On November 13, 2015, the regulations were amended so that new caravans could be confiscated within 60 days of their placement, which gave the Civil Administration more time to confiscate Palestinian housing units. In the process of confiscation, there is no opportunity for a hearing or an appeal, and as the director of the monitoring unit testified, it is intended to circumvent the hearing and the High Court of Justice, while severely infringing on the basic rights of the residents.

8. The Attorney General's directive regarding the applicability of government bills to the Occupied Territories

According to a publication in Haaretz, on December 31, 2017, the Attorney General issued a directive to all of his deputies, mandating that all government-sponsored bills include a clause specifying whether or not they would also apply to the OT. A similar directive was distributed by Ministers Ayelet Shaket and Yariv Levin in May 2017 as a new procedure for the work of the Ministerial Committee for Legislation. The Knesset Committee discussed a further similar proposal for a change in the Knesset's articles of association, but in the end, due to lack of authority, it made do with just a declarative decision.

All of the guidelines and statements are vaguely worded, leaving open multiple options:

1. The application of Knesset laws to the Occupied Territories – This would in fact be a declaration that the Knesset considers the OT to be under Israel's sovereignty, i.e. annexation.

2. Legislation by means of military orders ("security legislation") – Any Knesset law that would be passed would have a parallel law issued by the GOC Central Command, which would be part of the legislation of the military government in the OT. Through this method, the State of Israel can claim that such laws do not constitute an annexation;

however, the reality on the ground will in fact be the application of Israeli laws in the Occupied Territories. In addition, it must be borne in mind that under international humanitarian law, the occupying power may not change existing legislation except for the benefit of the protected local population, or for security purposes (Hague Regulations, Article 43).

3. The application of the law to Israelis and not to the territory itself – In a letter by Ministers Shaked and Levin, the move is explained as a correction to the "430,000 Israelis" who live in the West Bank. This explanation indicates another possibility, that the laws will not apply to the OT, but only to Israelis who are living within them (i.e. settlers living in the West Bank). In this case, Israel would try to argue that this is not an annexation because the law does not apply to the territory itself; however, here too, it will entail creating a separate system of laws for members of a different nation, an act which constitutes one of the components of apartheid .

All of these initiatives (not to mention others, such as the Likud Central Committee's unanimous decision to support annexation of large swaths of the West Bank) attest to a mentality of annexation. This trend involves treating the OT as if they were territories under Israeli sovereign control, but without officially declaring them as such. And yet, there is no intention to treat their Palestinian inhabitants as equal to Israelis living there. Therefore, the government's policy is increasingly exposing the one-state reality in which we live, and the similarity between Israeli control of the OT and an apartheid state.

Summary

These new positions of the State Attorney's Office and of the Attorney General are the product of close to nine years of right-wing rule under Netanyahu, especially in the past two years under the current government with Ayelet Shaked serving as Justice Minister. The government is creating the atmosphere, exerting pressure and expressing the expectation that the Attorney General will supply the goods that will allow it to expand the settlements, expropriate land, and reduce Palestinian presence in Area C.

These changes are liable to implicate Israel and those acting on its behalf in the OT with flagrant violations of international law. This is part of an ongoing process of de facto annexation of the West Bank and of creating **the reality of a bi-national state** in which the Palestinians live under a discriminatory regime without rights. This reality is immoral, and distances us from the prospect of a peaceful solution of two states for two peoples.