



**Lawyers for Palestinian Human Rights' briefing on Israel's
Supreme Court strikes down the 'Land Regularisation' Law but
fails to condemn illegal settlements and their expansion**



About Lawyers for Palestinian Human Rights (LPHR)

LPHR is a lawyer-based charity in the UK that works on projects to protect and promote Palestinian human rights. We distinctly provide a legal and human rights perspective on issues affecting Palestinians. Our trustees include leading human rights lawyers, Sir Geoffrey Bindman QC and Tessa Gregory.

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1. On 9 June 2020 the Israeli Supreme Court struck down a law passed in 2017 that provided for the expropriation of private Palestinian land in the occupied West Bank. The ruling, HCJ 1308/17, Silwad Municipality, et al. v. The Knesset, et. al (petition accepted 9 June 2020) (joined by the court with HCJ 2055/17, The Head of Ein Yabrud Village v. The Knesset), held that the law [disproportionately violates Palestinians' rights to property, equality and dignity](#).
2. While a welcome relief against a particularly offensive law that would justify further expropriation of Palestinian land, the judgment is made on a narrow basis that fails to recognise either the underlying illegality of settlements or to be clear on the inappropriateness of the Israeli state passing and reviewing legislation to apply to the occupied West Bank. Before addressing the judgment and its limitations in more detail, a brief history of the Regularisation Law will be provided.

What is the 'Regularisation Law' and why has it been challenged?

3. Passed by the Israeli Knesset (legislature) in February 2017, the 'Land Regularisation Law' – also variously referred to as the 'Expropriation Law,' 'Regulation Law' 'Land-grab Law' or simply the 'Theft Law' – provided for the expropriation of private Palestinian land in the Occupied West Bank where Israeli housing had been built. It mainly relates to communities known as 'outposts' that had been built by Israeli settlers without prior authorisation from the Israeli state.
4. Both settlements and settlement outposts are unlawful under international criminal, humanitarian and human rights law, as reaffirmed by [UN Security Council resolution 2334](#) and discussed in depth in [our March 2017 post](#). In brief, expanding settlements entails transferring Israeli citizens to occupied territory, which the government promotes by providing incentives and subsidies. This violates Article 8(2)(b)(vii) of the Rome Statute of the International Criminal Court and Article 49 of the Fourth Geneva Convention. Further, settlements are inherently discriminatory and result in widespread, pervasive and systemic human rights violations against Palestinians. This includes: the right to self-determination, which is one of the most basic principles of international human rights law; social and economic rights to education, water, housing and property; and civil and political rights including those relating to equality and non-discrimination.
5. The Regularisation Law was therefore deeply concerning as a means of adding to the settlement enterprise by formalising the expropriation of land settled without authorisation. It served to deepen the violation of the fundamental right to self-



determination, since legislation passed by a parliament elected only by Israeli citizens would determine property rights for Palestinians living under occupation, who have no vote in the relevant elections.

6. Almost immediately after the legislation was passed, 17 municipalities in the West Bank, together with Adalah, the Jerusalem Legal Aid Centre, and Al Mezan, petitioned the Supreme Court to strike it down. A second petition against the law was filed by Yesh Din and 12 human rights groups along with 23 heads of Palestinian villages and four landowners.
7. In November 2017, the Israeli Attorney General, Avichai Mandelblit, submitted a written response to the attempt to strike down the Regularisation law. He refused to defend the law, calling it unconstitutional, 'sweeping and harmful' for prioritising the needs of settlers over the rights of land owners in the area, and disproportionate. However, the basis for this refusal was fundamentally flawed, as explained at the time [by Adalah and Al Mezan](#) and in [our December 2017 post](#). While opposing the specific law, the Attorney General maintained that it was worthy to 'validate' constructions by Israel on private Palestinian land and stressed that Israel had other means at its disposal to achieve this aim, which should be used instead.
8. While this legal challenge was ongoing, on 16 December 2018, the Israeli Cabinet unanimously supported further legislation known as 'Regulation Law 2' or the 'Young Settlement Bill, which [continued the trajectory of the 'Regularisation Law'](#). Once again, Attorney General Mandelblit criticised the specificities of this law, but not the substantive aim of settlement expansion. Further, just before this further item of legislation was passed, Mandelblit [held a discussion](#) about the implementation of a principle known as 'market regulation,' which assumes it is legitimate to expropriate land where this is understood to have been taken in good faith. As will be seen below, a similar principle has resurfaced in the judgment on the Regularisation Law.

The judgment against the Regularisation Law

9. As the judgment is not currently available in English to our knowledge, this blog post is based on available materials produced by [Adalah](#) and [Hagai El-Ad](#), including summaries / analysis and translated quotations. The Supreme Court determined that the legislation should be struck down for the following reasons:
 - i) The applicable laws in the West Bank are the laws of 'belligerent occupation' along with international human rights law. 'The law of the State of Israel does not apply in the region' and as a consequence, the military commander in the West Bank is not sovereign but has only temporary authority in the area. To some extent, this is an important recognition that distinguishes the current situation from the formal annexation currently planned by Israel. However, there are real limitations to the argument, as discussed below.



ii) The Knesset's enactment of laws relating to Palestinians in the West Bank 'contradicts the principle of territorial sovereignty.' Since for decades the Israeli government has taken the view that 'the military commander has legislative powers in the area' it would be very difficult to change this basic norm. As a consequence, 'considerable difficulties' were raised by the issue of whether the Knesset could enact laws that are directly applicable in the region.

However, this 'difficult' issue was not fully addressed head on, with the ruling stating that there was no need to resolve 'the question of the Knesset's authority to pass a law that directly applies to the area' and that it was not the first time legislation with direct application had been passed.

iii) The Palestinians are 'protected persons' as defined in Article 4 of the Fourth Geneva Convention (that is, those who are 'in the hands of a Party to the conflict or Occupying Power of which they are not nationals') and as such have a special status. The Israeli government had argued that the needs of the settler population should also be taken into account with regards to the military commander's duty to ensure the local population's needs, and that 'this population should not be distinguished from the Palestinian population subject to the same land regime.' The court rejected this argument, stating that the Palestinian population should be distinguished, and that the law 'disproportionately' violated their rights to property, equality and dignity upheld as protected persons. In particular, the law '[would only apply to Israelis expropriating Palestinian land, and not vice versa or even Palestinians expropriating Palestinian land,](#)' thus breaching equality and non-discrimination law, as well as the right to property.

The right decision for the wrong reasons?

10. The decision by Israel's Supreme Court to strike down the expropriation law is important, as, were the law to remain in operation, it would have further legitimated the expropriation of private land in a particularly extreme way. However, there are real concerns about the limited basis of the ruling and the implication that this may have for future settlement expansion.
11. The court's judgment was strongly based on the concept of disproportionality, thereby tacitly accepting that the purpose of settlement expansion is a legitimate one, but one which could be achieved in other, less intrusive ways. As put by [Hagai El-Ad](#), '[t]he ruling epitomises the Supreme Court's position that finds no fault with Israel taking over almost every inch of Palestinian land in the West Bank and allocating it to settlements.' Therefore, according to the court, the problem is not settlement expansion itself but doing this in a way that interferes too obviously with equality rights.
12. Not only does the judgment accept settlement expansion as a legitimate aim, it also specifically refers to alternative ways that it could be carried out, including:



i) Activation of Article 5 of the Order Regarding Government Property (Judea and Samaria) (Order Number 59). Judea and Samaria is the Israeli government term referring to the occupied West Bank excluding East Jerusalem, and this Order provides that deals made 'in good faith' between the supervisor and another individual will remain valid provided that the supervisor thought it was government property at the time, even if, in fact, it was not. As [reported and analysed by Adalah](#) in December 2019, the 'good faith' argument has been manipulated by the Israeli state in a series of cases to retrospectively legalise confiscation of Palestinian land that had been transferred to a quasi-governmental organisation.

ii) The use of the statute of limitations applicable in the area. This argument focuses on Article 78 of the Ottoman Land Law of 7 Ramadan 1274 (21.4.1858), which allows a person that has held land for ten consecutive and uninterrupted years to demand transfer of proprietary rights from the states where a series of requirements are met. It also referred to section 20 of the Ottoman Land law and 'similar to Israeli law, situations of construction and planting in other lands.'

13. Notably, the 'alternatives' [are based on recommendations by the Attorney General](#), reinforcing the earlier [critique](#) that his opposition to the Regularisation Law was on too narrow a basis to be meaningful, and failed on the broader issue of settlement legality.

The broader context of settlement expansion and threatened annexation

14. These developments take place in the context of Israeli government proposals for formal annexation of parts of the West Bank, scheduled to begin on 1 July 2020 according to [reporting on the agreement](#) signed by Benjamin Netanyahu and Benny Gantz to form a unity government on 20 April 2020. As clearly articulated by LPHR in a recent briefing, these proposals would amount to [a serious breach of a fundamental principle of international law](#), and would intensify an already severe human rights situation for Palestinians in the area. The proposals have met with widespread international opposition, including from the [UN Secretary General](#), [UN High Commissioner for Human Rights](#), and [more than 1,000 Parliamentarians from across Europe](#). In the UK, the government has [condemned the proposals](#) without committing to concrete action should they go ahead, while more the more tangible call to ban the import of settlement goods – [pursuant to specific legal duties owed by all states under international law](#) - has been made [by the Shadow Foreign Secretary](#).

15. Ultimately, the 1 July 2020 date to begin annexation passed without action being taken. However, this is clearly no time for complacency. Whether or not formal annexation goes ahead, settlement expansion continues apace, with [a further 1,900 settlements and tenders for 2,200 units planned from early 2020](#). Serious violations of international humanitarian and human rights law are therefore ongoing, with terrible consequences for the lives and livelihoods of Palestinians.



16. Further, the threat of formal annexation remains a very real one. The stated reason for delaying annexation was not an acceptance of its illegality, or the harm it would cause, but rather stemmed from [the need to first address the coronavirus crisis](#). While there have been recent suggestions that a smaller area may be annexed than originally planned, any annexation of any area would be an unacceptable and serious violation of international law.
17. The impact of the judgment on the Regularisation law for the formal annexation process is not entirely clear. Adalah's analysis notes that the judgment may 'pose legal barriers to annexation laws' because of the points made on sovereignty, the temporary nature of the occupation and the lack of clarity on enacting Israeli laws that apply to Palestinians in the West Bank. It is to be hoped that this is correct, but as noted above, the issue of directly applying Israeli law in the West Bank was not decisively addressed by the court, which just stated that it was 'difficult.' As Adalah go on to note, the Israeli state may seek to circumvent the judgment by new legislation – a 'Basic Law' or an annexation law that limits judicial review – and / or by limiting annexation for now to a few of the larger settlement areas. Therefore, while the judgment is potentially an obstacle to the Israeli state's annexation plans, it may still find a way around the ruling if and when annexation is implemented.

Conclusion

18. From the perspective of international law and human rights, it would have been preferable for the court's judgment on the Regularisation law to make clear that (1) settlements are illegal in their entirety (2) the expansion of settlements and regularisation of outposts is not a legitimate aim to be achieved by less intrusive means, but a furthering of illegality with serious human rights consequences and (3) the imposition of any law made by the Israeli Knesset on the occupied West Bank, where the Palestinian residents have no vote in Knesset elections, is a flagrant breach of the legal right to self-determination and basic democratic principles. In the absence of such clarity, the need for international action in response to the illegality of the settlements, including [a ban on the import of settlement goods and enacting of regulations to prevent companies from operating and trading with settlements](#), is more crucial than ever.

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