



INSS Insight No. 894, February 10, 2017

The Regularization Law and the Role of the Legal System

Pnina Sharvit Baruch

The Settlement Regularization in Judea and Samaria Law, 5777 – 2017, known as the Regularization Law for short, was legislated by the Knesset on February 6, 2017, despite the clear statements made by the State Attorney-General that the bill is unconstitutional and that he will not defend it before the High Court of Justice. The bill's supporters are presenting it as "rectifying a disgraceful injustice towards residents of Judea and Samaria." Its opponents are defining the bill as "a law permitting illegal and immoral thievery." Petitions to the High Court of Justice will certainly be filed, and the fate of the bill will be decided in judicial channels. One can assume that, if the High Court of Justice nullifies the bill, harsh criticism will be voiced against the court, which will be presented as acting in an undemocratic manner by being a disruptive force to the Israeli government and to the Israeli parliament in their efforts to implement a policy that reflects the will of the majority. The debate about the Regularization Law and about the role of legal advisors and of the court in determining the fate of this law is an important one that concerns fundamental issues relating to the character and essence of the State of Israel.

Several opinions have already been issued about the legal difficulties posed by the Regularization Law, including a detailed analysis by the legal advisor of the Constitution, Law and Justice Committee of the Knesset. The State Attorney-General also issued a brief one-pager about the draft bill, in which he stated that the enactment of the law might have significant detrimental consequences in the international arena, both politically and legally. According to this document, the illegality of the law is reflected in several aspects:

1. The law contravenes the duty of the military commander of the area of Judea and Samaria to protect the property of the Palestinian population in the area, in that it is an arrangement that constitutes unlawful expropriation of property rights and deprives lawful owners of their lands.
2. International law restricts countries from imposing their laws in relation to lands outside of their jurisdictions. In Judea and Samaria, the legislative authority is in the hands of the commander of the IDF forces in the area.
3. The law prescribes an arrangement that changes intrinsically the legal framework applicable to land in Judea and Samaria, as well as the policy concerning State lands, a policy that derives from that same heightened duty of protecting private property.

4. The law seeks to legalize both retroactively and sweepingly illegal construction.

At issue is a law that deviates entirely from the approach adopted since 1967 of not imposing Israeli legislation directly in the area of Judea and Samaria (the West Bank). The bill is problematic in terms of international law and is expected to trigger harsh responses in the international arena. It may also accelerate the holding of criminal proceedings regarding the settlements by the International Criminal Court, which is already engaged in a preliminary examination of the matter. The bill, in effect, is damaging to Israel's principal defense arguments in such proceedings; i.e., that settlement activity is not regulated by the government, but rather is an independent civilian initiative, and that the settlements do not prejudice the rights of the Palestinian residents in the area.

However, it is important to emphasize that abstaining from imposing Israeli legislation in Judea and Samaria over the years also stemmed from another important consideration—that there is no desire to impose Israeli legislation fully and equitably on all residents of this area. It should be recalled in this context that, following the imposition of Israeli law in East Jerusalem in 1967, all the Palestinian residents there were given the opportunity to apply for Israeli citizenship—an opportunity that they did not take. Furthermore, all residents of East Jerusalem enjoy rights afforded to all residents of Israel and all laws of the State of Israel apply to them, including the constitutional protections of their human rights.

The Regularization Law essentially attempts to have its cake and eat it too. That is, it directly imposes Israeli legislation on the area; however, this legislation fails to grant equal rights to all residents of the area—Jews and Palestinians alike—and instead, it grants rights solely to Jewish residents at the direct expense of the Palestinian residents. The bill's supporters claim that it equalizes the status of the settlers in the area to that of citizens of the State living inside its internationally recognized borders, but clearly, this is a groundless claim. Obviously, it would be impossible to enact Israeli legislation that enables expropriation of land from second-class residents in order to legalize illegal construction by first-class residents, even if these residents had received tacit “green lights” over the years from various official sources.

The problematics posed by this law are not formalistic legal difficulties, but rather, at stake are the most fundamental flaws. The imposition of legislation that is discriminatory and inequitable, which quintessentially legalizes prejudicial actions against one population for the benefit of another, is contrary to the fundamental values underlying the State of Israel as a democratic Jewish state.

In this context, reference must be made to the argument frequently voiced of late, whereby the sole purpose of a democratic regime is to implement the concept of majority rule. According to this approach, as soon as a government is elected by the majority of the people, it should be allowed to implement its policies, or, to use the recent catchphrase, it should be allowed to govern. When legal advisors or the court place obstacles that prevent the government from

carrying out the will of the majority, at issue are undemocratic measures, which stem from attempts by the old elite to preserve their power and continue the implementation of their worldview.

This approach is based on a misunderstanding of the basic meaning of the notion of democracy. The principle of majority rule indeed underlies the concept of democracy, but majority rule must be congruent with the principles of democracy, primarily the principle of protecting the rights of minorities and of respecting human rights and liberties. The democratic worldview recognizes that disagreements exist between people and considers them to be legitimate. In a democratic regime, such disagreements are resolved in peaceful ways, while honoring the accepted rules of the game, which include democratic elections, rule of law, separation of powers, decision making by the majority and political and juridical equality. It should also be noted that the preservation of these fundamental values of democracy does not conflict with the “Jewish” nature of the State, but rather, in essence, also gives expression to this character of the State.

The significance of these matters is, that while a government that was elected by the majority of the public can and is supposed to carry out the policies for which it was elected it must not be allowed to do so if its actions deviate from the aforementioned principles that form the foundation of Israel as a democratic Jewish state. The opening assumption is that whoever is elected through democratic elections will honor the rules of the democratic game and therefore it would be proper for the courts to exercise judicial restraint. However, there are also instances when those who were democratically-elected act in a way that runs contrary to the fundamental values of the nation that put them in power. For example, Erdoğan, who was elected in democratic elections in Turkey, is now methodically silencing all criticism of him, including by arresting journalists and shutting down parts of the media.

In other words, the mere fact that a leadership was elected in free and democratic elections does not mean that it can be fully trusted to honor the state’s fundamental values. It is for this reason that a system of checks and balances is necessary, which includes not only parliamentary supervision, but also legal supervision within the government system and judicial oversight, all of which are destined to restrain any regime that tries to undermine these values.

Consequently, while it is right and proper to hold a debate about the bounds of legal intervention and about the delineation between government decisions that implement legitimate policies and decisions that are liable to harm the protected values of a democracy, it is a mistake to consider any legal intervention as interfering with fulfilling the will of the people and hence as an anti-democratic imposition. On the contrary, legal intervention, and in appropriate cases also judicial intervention, in government decisions that cross the said line and undermine the fundamental values of democracy, are important tools in safeguarding democracy. Accordingly, attempts to weaken governmental legal advisors and the High Court of Justice in order to prevent them from

carrying out this mandate constitute a real danger to the continued existence of the Israeli democracy in the long run.

In light of the above, the objection of the State Attorney-General to the Regularization Law is a fulfillment of his basic role to ensure that the government acts in accordance with the rule of law without deviating from democratic values. It is reasonable to assume that the Supreme Court will strike down the law for similar reasons. It is misleading to present these positions as conflicting with exercising the right of the majority to set the desirable policy, or as preserving a set of values belonging to the old "elite". At issue are positions that are critical to preserving Israel as a democratic and Jewish state, as defined by the founding fathers in the Declaration of Independence.