

**The Supreme Court Ruling on the Regularization Law**

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**On June 9, 2020, in a majority decision of eight justices against the single dissenting view of Justice Sohlberg, Israel's Supreme Court ruled that the Regularization Law is unconstitutional and is therefore to be annulled. The ruling was anticipated, as the law was formulated in an overly general manner and approved despite the opposition of Israel's Attorney General. The Court's ruling precludes the sweeping regulation of illegal construction in the Israeli settlements in the West Bank, but leaves open the possibility of resolving individual cases of construction on privately owned land. Therefore, the law's practical damage to the settlement enterprise is not very significant. In the international arena, however, the benefit of the annulment of the law – which would have been used in legal proceedings against Israeli officials, and in the campaign to delegitimize the State of Israel – is considerable. The annulment on the basis of Israeli law means that the application of Israel's sovereignty (annexation) to the settlements will not enable sweeping validation of illegal construction on privately-owned Palestinian land.**

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The Regularization Law of February 2017 was intended to regulate building in the West Bank in two types of instances. One is construction on privately owned land by means of the appropriation of rights of usage and possession, and their allocation to the settlements that were built on them, with compensation for the landowners. The second is construction on land that was not declared state land through registration as government property – with the provision of a period of one year to allow claims to the land with proof of rights. The law applied to all construction that was undertaken in good faith or with the consent of the state, whether implied or explicit. Although the law was formulated using objective language, its context and stipulations make it clear that it was meant to legalize building in Jewish settlements on land to which Palestinians hold rights or potential rights.

A number of petitions were submitted against the law. The Attorney General submitted a brief to the Supreme Court opposing the law, and during the proceedings the government was represented by a private attorney. The law's implementation was enjoined until a ruling was issued in the petitions against it. In its ruling, the Court found the law to be unconstitutional and therefore to be annulled. The state was given 90 days to prepare for the resumption of demolition proceedings.

The majority ruling was written by Chief Justice Esther Hayut, who found that the law violated the right to property and the right to equality of Palestinian residents of the area, and therefore could only be justified if it met the constitutional requirements of the Basic Law: Human Dignity and Liberty. Finding a solution for Israelis carried out construction in good faith in reliance on the consent of the state authorities is an appropriate purpose, the ruling reasoned, as opposed to the "systemic" aim of overall legalization of illegal construction. Still, the wholesale appropriation of land rights is not proportional, especially in light of the existence of alternative means.

According to Hayut:

*The Regularization Law seeks to validate retroactively illegal actions carried out by a specific population in the area, while infringing on the rights of another population in an area under belligerent occupation. The regulation is not "blind" in terms of the group that will be injured by its implementation; rather, the regulation knowingly and unequally infringes upon the property rights of Palestinian residents of the area alone and gives precedence to the property interests of the Israeli settlers, without any individual examination and without giving sufficient weight to the special status of the Palestinian residents of the area as "protected persons."*

In a minority opinion, Justice Sohlberg agreed that the law's infringement of the constitutional rights to property and equality justifies that the law be subjected to judicial review. However, in light of its political nature, extreme caution must be exercised in the process. According to Sohlberg, the Regularization Law's stated purpose of regulating and developing the settlements is an appropriate purpose and the law reflects a proper balance between its political and human benefits on the one hand, and the harm to rights on the other. In his view, the Regularization Law is an expression of a pragmatic approach to a complicated reality, and its annulment would result in stagnation, uncertainty, and eviction and destruction that for the most part would be useless to the owners of the land. Nonetheless, Sohlberg maintained that the law should be narrowed to apply only to residential structures, public buildings, and essential infrastructure, and not to agricultural facilities and means of production, and that it should not cover instances in which the settlement population relied on the consent of local authorities and institutions involved in settlement activity, without the consent of a government authority.

### **Implications of the Ruling**

1. The Court ruled that the Regularization Law does not meet the requirements of Israeli law – neither the constitutional requirements of Basic Law: Human Dignity and Liberty, nor the rules on land expropriation, as the expropriation of Palestinian land for the purposes of settlements, without the Palestinians being able to enjoy the benefits of the expropriation, is not considered expropriation “for public purposes.” This means that the application of Israeli law to settlements in the course of the application of sovereignty/annexation will not necessarily solve the legal problems of illegal construction in the Jewish settlements, and will not allow for its sweeping validation.
2. The political dimension of the ruling is reflected in the disagreement over the appropriate purpose of the law. Whereas Justices Sohlberg and Hendel viewed the national-political purpose of the law – regulating and developing Israeli settlement – as a worthy purpose, Chief Justice Hayut argued that only the law’s “human” purpose – that of providing a solution for settlers who acted in good faith – is a worthy purpose. She defined the political aim, which she refers to as “systemic,” as “retroactive authorization of illegal construction in the area on land that is not government property.” This, she ruled, is not an appropriate purpose. This approach puts the Court on course for a head-on collision in the political realm. A more cautious approach, like that employed by Justice Hendel, could also have been taken. In Hendel’s view, the Court should not decide on this fundamental public controversy and “determine that the solution that is espoused by a particular political camp – and that was adopted in the Regularization Law – does not serve the Israeli interest.” His analysis focuses on the implementation of the test of proportionality and agrees with the majority view that the law does not maintain an appropriate balance between the harm to constitutional rights and its benefit.
3. As indicated by the ruling, practical solutions can be found for many of the individual cases. The law was meant to enable a sweeping regulation of illegal construction, while discriminating distinctly in favor of the Israeli population over the Palestinian. In doing so, it created an arrangement that collides head-on with constitutional principles, as was also explained by the Attorney General during the process of legislation. The law’s supporters knew well that the Court would be hard-pressed to authorize it, and presumably their aim was in part to provide additional “proof” of the political nature of the Court, its obstruction of right wing policy, and the need to restrain it.
4. According to the information contained in the ruling, as of 2016 there were 3,455 illegal permanent and moveable structures of Israeli settlements in the West Bank located on privately owned Palestinian land. However, this does not mean that all

- these structures will need to be demolished. The ruling states that solving individual cases of buildings that were built in good faith relying on the consent of the state is reasonable. This would provide a solution to more than 1,000 structures that were built on land that was considered to have been declared state land, but ultimately turned out to be private land following a re-examination of the line marking the borders of the state land by a special team (known as the Blue Line Team) using more precise methods. The ruling also opens a door to the provision of practical solutions for other construction, based on a case-by-case examination and appropriate balance. The Regularization Law's attempt to provide a sweeping and general solution is the crux of the problem.
5. The Court refrained from deciding the question of whether Israel can directly apply Knesset legislation in the West-Bank, and whether such legislation is subject to the limitations of international law that applies within this area. Instead, it centered its analysis on the law's constitutional aspects. Still, although the Court did not focus on the law's compliance with international law, it took it into consideration while examining its constitutionality. Ultimately, the law's nullification is consistent with the dictates of international law.
  6. The issue of the settlements is under examination by the International Criminal Court, and a criminal investigation of the issue will most probably be launched. The ruling is helpful to Israel in a number of ways:
    - a. The law's annulment, due to the injury it causes to Palestinian rights, is indicative of the fact that the courts in Israel protect Palestinian rights. As such, the ruling helps establish the argument of complementarity, namely that Israel has an independent and effective judicial system, and that intervention by the ICC is unwarranted.
    - b. The Regularization Law would have bolstered claims of seizing Palestinian property contrary to the law. Israel is charged with a crime for simply establishing settlements; however, whereas there is doubt regarding the extent to which such a customary war crime actually exists, the offense of illegally appropriating private property is better established in law.
    - c. The Court clarifies that equating the law that applies to Israelis in the area to the law that applies in Israel is justified when it relates to matters in which there is a relevant difference in comparison to the Palestinians. On the other hand, as explained by the Court, the Regularization Law would grant differential treatment that benefits Israeli building offenders as opposed to Palestinian building offenders. In this way, it would create unacceptable discrimination. Therefore, the law could have served to strengthen the argument regarding the existence of an apartheid regime, both in court proceedings and within the framework of the international campaign to delegitimize Israel.

In conclusion, the ruling prevents sweeping regulation of illegal Israeli construction in the West Bank, but it allows for the possibility of a solution for many of the individual cases of construction on private land. Therefore, the tangible damage to settlements stemming from the law's annulment is not exceedingly significant. On the other hand, the ruling offers significant benefit in the international arena, in its disqualification of a law that would be used against Israeli officials in legal proceedings, and in the international campaign for the image of the state. In addition, the fact that the ruling is based on Israeli law – constitutional law and land expropriation law in Israel – and that it annuls the law on this basis, means that the application of Israeli law to the settlements (the application of sovereignty/annexation) will not enable the sweeping validation of illegal construction on private Palestinian land.