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SYMPOSIUM ARTICLE

The 'Constitutional Reform' and the Occupation

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Abstract

The 'constitutional reform' planned by the government that assumed power in Israel in December 2022 is not an end in itself. Its aim is to provide the basis for planned policies and actions of the government that are incompatible with Israel's present constitutional order, and that are unlikely to stand up to judicial review before the present judges of the Supreme Court. This article discusses the connection between various parts of the reform and the plans to make a radical change in Israel's policies in the occupied West Bank. It examines the coalition agreement between PM Netanyahu's Likud party and the Religious Zionist Party, and exposes the connection between the commitment in that agreement to the policies regarding the occupation and the planned 'reform'.

Keywords: Israel; West Bank; Palestinians; law of occupation; annexation; 'constitutional reform'

1. Introduction

The proposals of the government that assumed power in Israel at the end of 2022 to reform the legal system have met with unprecedented public opposition. As explained in other articles in this issue, the main aim of those proposals is to concentrate unlimited power in the hands of the executive branch of government by abolishing or weakening checks and balances that are intended to ensure that the government acts within the law, respects human rights, and is free from corruption. This aim will be achieved by giving the executive branch of government effective control over the appointment of judges, weakening both the status of government legal advisers and the binding nature of their legal opinions, allowing passage by a simple Knesset majority of

legislation that will not be subject to judicial review, demanding a special majority of judges of the Supreme Court to rule a statute unconstitutional, and limiting judicial review of executive action by abolishing or restricting the grounds of unreasonableness.

The coalition agreements that were signed between PM Netanyahu's Likud party and the other parties that joined his coalition do not mention the details of the 'legal reform' planned by the government. They do state, however, that all members of the coalition are bound to support all the legislative bills proposed by the Minister of Justice, including proposed Basic Laws, 'that will deal, inter alia, with regulating the relationship between the branches of government and their powers, and in particular the relationship between the government and Knesset and the legal system and Supreme Court, and the system of selecting judges'.[1] No details are provided regarding the substance of the minister's proposals and the agreements give the minister carte blanche to propose legislation that all coalition members are bound to support.

Five days after the new government was sworn in the Minister of Justice held a news conference in which he laid out his proposals.[2] He later admitted that his original proposal for the composition of the Judges' Selection Committee was not acceptable in a democratic state,[3] but many commentators, including the present writer, do not believe that the amended proposal, which passed first reading in the Knesset, departs from the threat to independence of the judiciary inherent in the original proposal.[4]

What lies behind the government's proposal for 'legal reform'? There are a number of actors behind the proposals, who are pushing for the 'reform' for a variety of reasons. Some actors, including the Minister of Justice, have been long-term critics of the Supreme Court, based on their perception that the Court is a liberal institution that is antagonistic towards their nationalistic and particularistic world view. These actors want to appoint judges who subscribe to their political position, and in all events to prevent the Court from intervening in policies and practices that have the support of the prevailing political majority, whatever their nature and likely consequences

[1] All the coalition agreements to which the government's guiding principles are attached are available on the Knesset's homepage, https://main.knesset.gov.il/mk/government/pages/governments.aspx?govId=37.

[2] Jeremy Sharon, 'Justice Minister Unveils Plan to Shackle the High Court, Overhaul Israel's Judiciary', *Times of Israel*, 4 January 2023, https://www.timesofisrael.com/justice-minister-unveils-plan-to-shackle-the-high-court-overhaul-israels-judiciary. For a detailed description of these proposals see David Kretzmer, 'Israel's Constitutional Crisis' (2023) 1 *Quaderni costituzionali, Rivista italiana di diritto costituzionale* 178, doi: 10.1439/106791.

[3] TOI Staff, 'Levin Admits Original Judicial Appointments Bill Was a Danger to Democracy', *The Times of Israel*, 3 April 2023, https://www.timesofisrael.com/levin-admits-original-judicial-appointments-bill-was-a-danger-to-democracy.

[4] Under this proposal the government will still have effective control over the appointment of judges. An amended proposal by the Minister of Justice would give members of the opposition a say in the appointment of judges, but only after members of the coalition had elected two Supreme Court judges. On the different proposals see Nina Fuchs, 'A Tie in the Committee for the Election of Judges? The "Compromise" Compared with the Original Netanyahu-Levin Plan', *Ynet*, 8 March 2023, https://www.ynet.co.il/news/article/rksnpyu1h (in Hebrew).

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may be.[5] Other actors make the argument that the Court has overstepped its jurisdiction, by assuming the power of judicial review over Knesset legislation and ruling on ideological issues that should be decided by the other institutions of government. The Court should be 'tamed' so that it will confine itself to strict interpretation of legislation enacted by the Knesset.[6] There are also actors with clear personal interests in the proposed reform – mainly PM Netanyahu who, in the past, had strongly opposed the reforms on the table now,[7] but changed his tune after he was indicted on charges of corruption. Over and above all these actors and interests, there are important actors who are determined to adopt policies in the West Bank that are unlikely to stand up to judicial review under the present constitutional system and composition of the Court. Their 'solution' is to change both the constitutional system and the Court's composition. This change is a necessary means for advancing their nationalistic/messianic ideology. As members of this group of actors hold important positions in the government, and are determined to use their power to implement their ideology, there is a clear connection between the so-called 'legal reform' and the Occupied Territories. My object in this article is to expose this connection.

The article is divided into a number of sections. As background for my argument, I provide in the next section (2) a brief description of the law in the Occupied Territories, as applied by the Supreme Court since 1967. This is followed (Section 3) by an explanation of the issue of 'unauthorised settlements', one of the main issues that concerns the political parties that comprise the present coalition government. Section 4 analyses the coalition agreement between the Likud and the Religious Zionist Party, while Section 5 describes the 'Subdual Plan' of the leader of that party. In Section 6 I explain the connection between the 'Subdual Plan', the coalition agreements, and the proposed 'legal reform'. I end with some conclusions concerning that connection.

2. Background on the law in the Occupied Territories

The West Bank was occupied by Israel during the June 1967 War. While the lawyers involved in laying out the legal framework for rule of the territory

[5] According to press reports, in a recent Cabinet meeting the Minister of Justice complained that Arab citizens are moving into 'Jewish' towns, causing many Jewish residents to leave. His conclusion was that the change is needed in the composition of the Supreme Court, so that there will be judges 'who will understand the situation': TOI Staff, 'Levin Said to Call for Judges Who "Understand" Why Jews Don't Want to Live Near Arabs', *The Times of Israel*, 29 May 2023, https://www.timesofisrael.com/levin-calls-for-justices-who-understand-why-jews-dont-want-to-live-near-arabs.

[6] eg, Assaf Malach, '50 Israeli Supreme Court Decisions', *Arutz 7*, 3 May 2023, https://www.israelnationalnews.com/news/370855 (in which Malach complains that the 'reform' is needed because the Court does not stick to a strict interpretation of the law).

[7] TOI Staff, 'Netanyahu in 2012: "Rights Cannot Be Protected without Strong, Independent Courts"', *The Times of Israel*, 14 January 2023, https://www.timesofisrael.com/pm-in-2012-show-me-a-dictatorship-with-independent-courts-theres-no-such-thing (presenting a video clip of a speech delivered by Netanyahu in 2012).

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assumed that the territory was occupied territory, in which Israel's actions would be guided by the international law of belligerent occupation, it became apparent soon after the War ended that there was no consensus on the future of the West Bank.[8] Thus, while in a secret decision adopted in June 1967 the Cabinet decided that it would agree to peace agreements with Egypt and Syria on the basis of the international borders between Mandatory Palestine and those countries, no mention was made of the West Bank.[9] Decision makers also refrained from using the term 'occupied territories', preferring instead to refer to 'administered territory', and later to Judea and Samaria, the biblical names for the West Bank.

The clash between the perception of the Israel Defense Forces (IDF) and other government lawyers and the political echelons of government came to the surface when Palestinians started to challenge actions of the military authorities in the West Bank and Gaza before Israel's Supreme Court. After a policy decision was made not to challenge the Court's jurisdiction to consider such petitions, the state's lawyers had to decide how to relate to arguments that the challenged actions were incompatible with the international law of belligerent occupation, laid out in the Hague Regulations[10] and in Geneva Convention IV.[11] In the first cases the government's lawyers adopted what may best be termed a 'pragmatic approach'.[12] They informed the Court that while they did not necessarily accept that these instruments applied to Israel's actions in the West Bank, they were convinced that the military commanders' actions were compatible with them and therefore had no objection to the Court considering the petitioners' arguments.[13]

As time passed and the military relied consistently on the international law of belligerent occupation to justify its practices and actions in the Occupied Territories, this 'pragmatic approach' was no longer feasible. The 'pragmatic approach' also could not be applied when Israelis who were affected by the military commander's decisions appeared before the Court and challenged the applicability of the international law of belligerent occupation in the West Bank.[14] Hence, as time passed, the 'pragmatic approach' was abandoned

[8] For a detailed description of the political and legal background to Israel's rule over the West Bank see David Kretzmer and Yaël Ronen, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (2nd edn, Oxford University Press 2021) Chs 1 and 2.

[9] ibid 7.

[10] Hague Convention (IV) respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land (entered into force 26 January 1910) *Martens Nouveau Recueil* (ser 3) 461 (Hague Regulations).

[11] Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (entered into force 21 October 1950) 75 UNTS 287 (GC IV).

[12] Kretzmer and Ronen (n 8) Ch 4.

[13] ibid 61–62

[14] In HCJ 390/79 *Dweikat v Government of Israel* (22 October 1979) (*Elon Moreh* case), unofficial translation at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Dweikat%20et%20al.%20v.%20State.pdf, the Court considered a petition relating to the establishment of an Israeli settlement on private land of the Palestinian petitioners, which had been seized 'for military reasons'. The settlers joined the proceedings and argued that international law was irrelevant in cases dealing with the West Bank, as it belongs to the people of Israel. In rejecting the settlers'

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and the accepted legal framework for reviewing actions in the West Bank and Gaza became the international law of belligerent occupation. In a joint judgment of ten of the eleven judges on the bench in the major case reviewing the legality of the government's decision to withdraw the IDF and Israeli settlers from Gaza (named 'the Disengagement'), the Court declared:[15]

> According to the legal outlook of all Israel's governments as presented to this court—an outlook that has always been accepted by the Supreme Court—these areas are held by Israel by way of belligerent occupation ... The legal regime that applies there is determined by the rules of public international law and especially the rules relating to belligerent occupation.

Adopting the legal framework of belligerent occupation placed the Court in a delicate position. While the government was prepared to rely on the law of belligerent occupation in justifying measures that placed serious restrictions on the rights and liberties of the Palestinian inhabitants of the West Bank and Gaza, it was, and remains, the prevailing view of international institutions, and of many Israeli and foreign experts in international law, that many of Israel's policies on the West Bank are incompatible with this law. Foremost among these policies is the establishment of Israeli settlements in the West Bank. Establishment of these settlements by the government is regarded as a violation of Article 49(6) of Geneva Convention IV, which forbids the occupying power from transferring part of its own civilian population into the occupied territory, and of customary international law, which restricts actions of the occupying power in occupied territory to those based on military needs or the good of the local population.[16]

How did the Court cope with the legal argument against the settlement policy, which was initiated by the Labour government which held power until 1977, and which became a major part of the ideology and policy of the Likud government which assumed power in 1977? It did so in two ways: in the first cases it held that Article 49(6) of the Geneva Convention is not part of customary international law that is enforced by Israel's domestic courts.[17]

argument, the Court explained that the only legal basis for the authority of the military commander to seize land for military reasons is the international law of belligerent occupation. If this law did not apply, the commander would have lacked the power to seize land even if the real reasons were military, which, the Court held, was not the case in the petition before it.

[15] HCJ 1661/05 *Gaza Coast Regional Council v Knesset of Israel* (9 June 2005), para 3.

[16] Kretzmer and Ronen (n 8) Ch 1. In September 1967 the legal adviser to Israel's Ministry of Foreign Affairs was asked to write an opinion on whether it would be legal for Israel to establish such settlements. The legal adviser at the time was Theodor Meron, who later became one of the world's leading experts on the law of armed conflict. Meron wrote that establishing such settlements would be regarded as a violation of Article 49(6) GC IV: Theodor Meron, 'Settlements in the Seized Territories', 14 and 18 September 1967, https://www.southjerusalem.com/wp-content/uploads/2008/09/theodor-meron-legal-opinion-on-civilian-settlement-in-the-occupied-territories-september-1967.pdf (in Hebrew).

[17] Kretzmer and Ronen (n 8) 63. According to the approach of English law, adopted by Israel's Supreme Court shortly after the country became independent, customary international law is

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Later the Court held that legality of the settlement policy is not justiciable in that its dominant nature is political, rather than legal.[18]

Although the Court was not prepared to rule on the legality per se of settlements, it made it quite clear that this would not prevent it from deciding whether taking the private land of an individual for this purpose was legal.[19] In the *Elon Moreh* case, the Court held that a military order seizing private land in order to establish an Israeli settlement was unlawful.[20] The military commander has the power to seize land for military purposes, but as the dominant purpose of the seizure was political, rather than military, the commander had exceeded his authority.

In other cases of petitions against government policy, while the Court has not intervened in the policy itself, it has checked whether implementation of the policy in a specific case is highly unreasonable, one of the grounds for review of administrative action in Israeli law. Thus, for example, while the Court was not prepared to question government policy regarding entry into Israel of Gaza residents who needed medical treatment, it did intervene in implementation of the policy in a case in which it found the decision to be highly unreasonable.[21]

The distinction between the policy itself and its implementation in concrete cases reflects the general approach of the Court. Even though the Court has virtually never intervened in policies and practices of the authorities in the Occupied Territories, it has on occasion intervened in implementation of those policies in specific cases.[22]

In the study that my colleague Yaël Ronen and I wrote on the Supreme Court's jurisprudence in cases relating to the Occupied Territories, we found that the Court had given explicit or implicit legitimation to virtually all government policies and practices in the Occupied Territories, even when there were cogent and convincing arguments that these policies and practices are incompatible with international law in general, and the international law of belligerent occupation in particular.[23] Nobody reading our study, and considering all the judgments of the Court relating to the Occupied Territories, could reasonably reach the conclusion that the Court is a 'pro-Palestinian' institution. Nevertheless, pro-settler circles, who are strongly represented in

part of the common law of the land, which will be enforced by the domestic courts unless it is incompatible with parliamentary legislation. International treaties that bind the state will not be enforced unless their provisions have been incorporated in domestic law by parliamentary legislation: David Kretzmer, 'Israel' in David Sloss (ed), *The Role of Domestic Courts in Treaty Enforcement: A Comparative Study* (Cambridge University Press 2009) 273.

[18] HCJ 4481/91 *Bargil v Government of Israel* (25 August 1993), unofficial translation at https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Bargil%20v.%20Government%20of%20Israel_0.pdf. On the Court's decisions relating to settlements see David Kretzmer, 'Settlements in the Supreme Court of Israel' (2017) 111 *AJIL Unbound* 41.

[19] *Elon Moreh* case (n 14).

[20] ibid.

[21] HCJ 5693/18 *Chiam v Prime Minister* (26 August 2018).

[22] A case in point is the issue of punitive house demolitions; see Kretzmer and Ronen (n 8) Ch 18.

[23] Kretzmer and Ronen (n 8) Conclusions 489 ff.

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the present government, adopt this position.[24] The mere fact that the Court does indeed consider the interests of the Palestinians, and very occasionally rules in their favour, is enough to convince them that it is pro-Palestinian. Reform is needed, in their eyes, in order to change the Court's direction.

3. Unauthorised settlements

According to a Cabinet resolution adopted in 1996, no new settlement may be built without the approval of the Cabinet, its committee on settlement, or the Minister of Defence.[25] Despite this resolution, in the years since that resolution was adopted over a hundred unauthorised settlements have been built in the West Bank.[26] Some of these have been built on public land, but others have been built on private land owned by Palestinians.[27] While it is clear that none of these settlements – often called 'outposts' – could have been built without the tacit or active support of government officials and military officers, they did not have the formal approval required, and were all built in contravention of the planning laws that apply in the West Bank.

The issue of these unauthorised settlements became a bone of contention between the government of Ariel Sharon (2001–2006) and the Bush administration.[28] Although Sharon had been a main supporter of grabbing land for settlement in the West Bank, he requested a report on the issue of the unauthorised settlements by Talia Sasson, formerly a senior lawyer in the State Attorney's office. Sasson reported that she had located 105 unauthorised outposts but was not sure she had located all of them. She wrote that some of the outposts had been built on private land and that there was no way that such outposts

[24] See, eg, Regavim, 'Measure for Measure 2018: An Index of Judicial Parity', *Regavim*, June 2018, https://www.regavim.org/wp-content/uploads/2018/06/RegavimMadidEng2806.pdf.

[25] Kretzmer and Ronen (n 8) 206. On 18 June 2023 the Cabinet decided to amend the resolution adopted in 1996. Approval of new settlements will now be in the hands of the Second Minister of Defence: Michal Saliternik and Ronit Levine-Schnur, 'This Decision by Israel is as Dramatic as Attempts at Constitutional Change', *Haaretz*, 22 June 2023, https://www.haaretz.com/israel-news/2023-06-22/ty-article-opinion/.premium/this-decision-by-israel-is-as-dramatic-as-attempts-at-constitutional-change/00000188-e282-df52-a79d-fea3d6150000. On the implications of this change see below.

[26] See Talia Sasson, 'Summary of the Opinion Concerning Unauthorized Outposts', 10 March 2005 (Sasson Report), English summary: https://www.un.org/unispal/document/auto-insert-203215; original report: https://peacenow.org.il/wp-content/uploads/2014/06/SassonSummaryHeb.pdf (in Hebrew).

[27] According to information provided by the Civil Administration, as at the year 2016 there were 3,455 structures that had been built by Israelis without authorisation on private Palestinian land. Much of the land in the West Bank is not registered, but 1,576 of the structures had been built on registered land. These figures are cited in the judgment of Chief Justice Hayut in HCJ 1308/17 *Silwad Municipality v Knesset* (9 June 2020) (*Settlement Regularisation Law* case), para 16, unofficial translation at https://www.adalah.org/uploads/uploads/PDF_Final_English_translation_Settlements_Regularization_Petition_May_2017.pdf.

[28] PBS Newshour, 'President Bush Warns Israel Against Building New Settlements in the West Bank', 11 April 2005, https://www.pbs.org/newshour/show/president-bush-warns-israel-against-building-new-settlements-in-the-west-bank.

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could be retroactively 'legalised'. They had to be evacuated, and the sooner the better.[29]

Ostensibly the government committed itself to evacuating outposts that had been built on private Palestinian land,[30] but this commitment faced serious political obstacles. The whole settler community and many of its supporters in the right-wing parties that were part of the governing coalition were totally opposed to evacuation of outposts, no matter on whose land they had been built. After Netanyahu returned to power in 2009 two committees were appointed to find a solution that would allow what was termed 'regularisation' of outposts.[31] The Edmond Levy committee, established in 2012, went as far as to claim that the West Bank is not occupied territory, and that there is therefore no impediment in international law to expropriation of private land there.[32] The government's legal advisers were justifiably dismissive of the committee's report on this question. Hence, when Palestinian landowners petitioned the Court, arguing that the military commander had a duty to evacuate the outposts built on their land, the government was forced to concede that it was indeed required to do so, but kept asking the Court to allow it more time to fulfil this obligation.[33] In a few cases, after allowing a number of delays, the Court held the authorities to the date for evacuation that they had agreed to meet.[34]

Evacuation of the outposts in these cases caused tremendous resentment among the settler community. Their solution was to initiate a number of private members' bills compelling the commander to expropriate the land on which settlements had been built 'in good faith', or with the approval of one of a number of governmental or quasi-government authorities. While PM Netanyahu originally opposed these bills, he eventually gave in to the political pressure and in 2017 the Law for the Regularisation of Settlement in Judea and Samaria was enacted.[35] The Attorney General opined that the law was unconstitutional and contrary to international law. He declared that he could not defend it in court.[36]

A number of petitions challenging the law were submitted to the Court. The Attorney General stuck to his position. In the brief he submitted to the Court he argued that the Law was incompatible with the Basic Law: Human Dignity and

[29] Sasson Report (n 26).

[30] Kretzmer and Ronen (n 8) 183.

[31] Levy Commission Report on the Legal Status of Building in Judea and Samaria, 21 June 2012 (Levy Report); Expert Team for Consolidating a Blueprint for Regularisation of Construction in Judea and Samaria, 15 February 2018 (Zandberg Report).

[32] Levy Report, ibid.

[33] eg. HCJ 8887/06 *Al-Nabout v Minister of Defence* (2 August 2011); HCJ 9060/08 *Abdallah v Minister of Defence* (7 May 2012); HCJ 9949/08 *Hammad v Minister of Defence* (25 December 2014).

[34] See the cases at n 33; Kretzmer and Ronen (n 8) 290–94.

[35] For an English translation of the Law see https://www.adalah.org/uploads/uploads/Settlement_Regularization_Law_English_FINAL_05032017.pdf.

[36] Tamar Pileggi, 'Attorney General Won't Defend Contentious Outpost Law in Court', *The Times of Israel*, 1 March 2017, https://www.timesofisrael.com/attorney-general-wont-defend-contentious-outpost-law-in-court.

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Liberty, which expressly protects property, and has been interpreted as protecting equality too.[37] The government was represented by a private lawyer.[38]

In June 2020 the Supreme Court, by a majority of 8 to 1, accepted the arguments of the Attorney General. It held that the Law violated the rights to property and equality of the Palestinians; consequently the Law was unconstitutional, and therefore invalid.[39]

4. The coalition agreements

The government's guiding principles, which are attached to all the coalition agreements signed between the Likud and the other parties in the governing coalition, state that the 'Jewish people have the sole and indisputable right on all parts of the land of Israel' and that the government will promote and develop settlement in all areas, including Judea and Samaria.[40] The agreement with the Religious Zionist Party states that in the light of the belief in the Jewish people's 'natural right to the land of Israel' the Prime Minister will further the creation and promotion of a policy under which Israeli sovereignty will be applied to Judea and Samaria 'while choosing the time and considering all the national and international interests of the State of Israel.'

The guiding principles and coalition agreements also include commitments to:

(a) regularise all 'young settlements' (a term used to whitewash the term 'unauthorised settlements') and all neighbourhoods in existing settlements that were built without government and planning approval; to the extent that this is not possible under the existing law, legislation will be adopted to enable it;
(b) ensure the existence and continued development of the Jewish settlement in the city of Hebron;
(c) amend the Cabinet decision that requires Cabinet approval for all new settlements;
(d) regulate and define the status and function of the Settlement Division of the World Zionist Organization (the main body that supports Jewish settlement in the West Bank), and to provide this body with a budget of 750 million shekels;
(e) adopt a five-year plan for settlement in Judea and Samaria;
(f) revoke the disengagement from a number of settlements in the northern part of the West Bank, which was part of the Disengagement from Gaza, implemented by the Sharon government in 2005.

[37] Initial Response of the Attorney General in HCJ 1308/17 *Silwad Municipality v Knesset* (22 November 2017), https://law.acri.org.il/he/wp-content/uploads/2017/11/bagatz2055-17-hoq-hahasdara-yoamash1117.pdf (in Hebrew).

[38] Initial Response of Government in HCJ 13078/17 (21 August 2017), https://law.acri.org.il/he/wp-content/uploads/2017/08/bagatz2055-17-hoq-hahasdara-memshala2-0817.pdf (in Hebrew).

[39] *Settlement Regularisation Law* case (n 27).

[40] All the coalition agreements to which the government's guiding principles are attached are available on the Knesset's homepage, https://main.knesset.gov.il/mk/government/pages/governments.aspx?govId=37.

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One could argue that these are only 'political agreements' and that, like many other coalition agreements, in practice they may very well remain unimplemented.[41] That would conceivably be true if it were not for the major provision in the coalition agreement between the Likud and the Religious Zionist Party that may be even more important than the above provisions: namely, the appointment of the leader of that party to two important ministerial posts. We must turn to the provisions, which provide for and define the authority of the holder of one of these posts.

As opposed to the general nature of the 'legal reform' mentioned in the coalition agreements, the agreement signed between the Religious Zionist Party and the Likud includes not only detailed proposals regarding government policies in the occupied West Bank; most significantly, the agreement provides that the leader of the Religious Zionist Party, Bezalel Smotrich, will serve not only as Minister of Finance, but as a minister in the Ministry of Defence (hereinafter 'Second Minister of Defence'). In the latter capacity he will have control over the military bodies responsible for civil affairs in the West Bank – namely, the Civil Administration and COGAT – and will be directly in charge of Israeli settlements.[42] As mentioned above, on 18 June 2023 the Cabinet decided that in future the power to decide on new settlements, or the expansion of existing ones, will be in the hands of the Second Minister of Defence.[43]

Under the coalition agreements the bodies subject to the Second Minister's control will receive legal advice from the legal department in the Ministry of Defence (rather than from the IDF Advocate General's office). Most significantly, 23 lawyers will be assigned to the unit dealing with the West Bank in that department, and they will work in the administration of the Israeli settlements and in those matters under the authority of the Second Minister of Defence. If this were not enough, the agreement provides that all briefs of the state in petitions to the High Court of Justice relating to matters under the minister's authority will be subject to the minister's approval (in coordination with the Prime Minister and Minister of Defence).

Fundamentally, when stripped of all the technical details, the above agreement means not only that as Minister of Finance the leader of the Religious Zionist Party will hold control of the purse strings, but that he will also have

[41] Under the existing, highly problematical, jurisprudence of the Israeli Supreme Court, coalition agreements are legally binding. The present writer is a strong critic of this jurisprudence: David Kretzmer, 'Political Agreements – A Critical Introduction' (1992) 26 *Israel Law Review* 407.

[42] The Civil Administration is a branch of the IDF military government on the West Bank. Headed by a senior IDF officer, it is in charge of all civil, as opposed to military matters in the West Bank. The Coordinator of Government Activities in the Territories (COGAT) is a senior officer who serves in the Ministry of Defence. According to the home page of COGAT, its functions are as follows: 'The Coordination of Government Activities in the Territories (COGAT) implements the government's civilian policy within the territories of Judea and Samaria and towards the Gaza Strip. COGAT is responsible for implementing the civilian policy within Judea and Samaria and towards the Gaza Strip, in coordination and cooperation with officials from defense and government offices in various fields', https://www.gov.il/en/departments/coordination-of-government-activities-in-the-territories/govil-landing-page.

[43] Saliternik and Levine-Schnur (n 25).

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control over all 'civilian' (as opposed to military) matters in the occupied West Bank. This includes Israeli settlements, land use, and exploitation of other resources, such as water and stone quarries. Significantly, it relates to the unauthorised establishment of outposts, on both public and private Palestinian land, building and planning laws, and law enforcement against unlawful use of land. It also includes Israel's relationship with the Palestinian residents of Area C in the West Bank over which Israel maintains virtually full control and in which all Israeli settlements outside Jerusalem are situated.[44]

The granting of such powers in occupied territory to political appointees in the civil government of the occupying power is incompatible with the international law of belligerent occupation. That law rests on the notion that governmental power in the occupied territory is in the hands of the military, on the assumption that it will act on the basis of military, rather than political, considerations. Thus, Yoram Dinstein writes that 'government of an occupied territory is military *per definitionem*'.[45]

The duty of the military commander of the occupied territory not to pursue the political aims of the occupying power was emphasised in the leading judgment of the Supreme Court in the *Jam'iyat Iskan* case. In describing the powers of the military commander, the Court stated:[46]

> The commander is not allowed to consider the national, economic or social interests of his own state, unless they have implications for his security interests in the area or for the interests of the local population. Even the needs of the army are its military needs and not the needs of national security interests in its broad sense. An area subject to belligerent occupation is not a field open to economic or other exploitation.

These are the factors that the military commander of the occupied territory is entitled to consider. The military commander is the arm of the occupying power in the occupied territory. All governmental powers in the occupied territory are concentrated in his hands.[47] Even if other organs of the occupying power take over responsibility for various aspects of government in the occupied territory, they will be bound by the same norms that apply to the military commander, including the restrictions on the legitimate considerations of the military commander set out by the Court.

[44] Under the Oslo Accords and subsequent agreements between Israel and the PLO, the West Bank was divided into three areas: A, B and C. In areas A and B, in which the Palestinian cities and towns are situated, the Palestinian Authority has limited autonomy. Israel retains virtually total control over Area C, which comprises about 60% of the West Bank, and in which the Israeli settlements are situated: Kretzmer and Ronen (n 8) Ch 7.

[45] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge University Press 2019) 56. Dinstein explains that the occupying power may create a 'civil administration', 'but only as a subdivision of the military government, and not as a separate body': ibid.

[46] HCJ 393/82 *Jam'iyat Iskan v IDF Commander in Judea and Samaria* (18 December 1983), para 13.

[47] A Proclamation issued when the IDF took control of the West Bank in 1967 states that all governmental powers are now in the hands of the military commander or his appointees: Proclamation concerning Law and Order (No. 2) 1967. This proclamation has never been abrogated.

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Whatever the situation under international law may be, in order to appreciate the full implications of the terms of the coalition agreement with the Religious Zionist Party, one must look a bit further. The demands of the leader of the Religious Zionist Party for the Ministry of Finance and the position in the Ministry of Defence are intimately connected to the political programme that he set out in an article published in a right-wing magazine in 2017.[48] He called this programme the 'Subdual Plan'.[49]

5. The 'Subdual Plan' of Minister Smotrich

The so-called Subdual Plan is based on a number of assumptions and measures:

1. Smotrich proclaims his religious belief in the divine promise of the whole land of Israel exclusively to the Jewish people. While he claims that his plan is not based solely on this belief and that non-believers can support it too, there is no doubt that a religious world view of Jewish exclusivity and divine providence lies at the basis of the plan. This is reflected in the terms of the coalition agreement between Smotrich's party and the Likud described above. That agreement states that the 'belief' in the view in the natural right of the Jewish people to the land of Israel means that the sovereignty of the State of Israel should be extended to the Occupied Territories.
2. The policy of successive Israeli governments has been to 'manage' the conflict with the Palestinians until such time as an agreed political solution will be reached. As there is no chance of any such agreement that would answer the minimal demands even of the left in Israel and Palestinians, the time has come for decisive action, to 'resolve' the conflict.
3. The two-state solution was never a viable option, and is certainly no longer an option. There is no place for two national movements in the territory of the land of Israel. Hence the only solution for those who support the continued existence of the Jewish state is to destroy any illusions that the Palestinians could at any stage realise national aspirations in this land. Palestinians who continue to live here will be allowed to do so only if they waive their national aspirations and are prepared to live as individuals in the Jewish state.
4. Implementation of the plan involves a number of stages. The first is to increase Jewish settlement in the West Bank by hundreds of thousands. This will be carried out on what is termed 'state land' (a misnomer for government property or public land).
5. The Palestinian residents of the Occupied Territories will have to choose between three paths:

[48] Bezalel Smotrich, 'The Subdual Plan: The Key to Peace is in the Hands of the Right' (2017) 6 *Hashiloah* 81, https://hashiloach.org.il/wp-content/uploads/2019/12/hashiloach-6-all-web.pdf (in Hebrew).

[49] The Hebrew term used by the author of the article is 'tochnit hachra'a'((תכנית הכרעה). It is not easy to translate this term, as the word להכריע means both to decide in an argument and to subdue. I thank the translator, Jessica Cohen, for suggesting the term 'Subdual Plan'.

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(a) emigration to surrounding Arab states or other countries, with material help from the government of Israel;
(b) waiving any national aspirations and expressing a willingness to live as individual subjects in the Jewish state, who will enjoy civil liberties but will not acquire citizenship and will not be entitled to vote in national elections;
(c) those who choose to oppose continued Israeli rule will be crushed with force; the army will go to war and defeat them: 'Given a decisive and unambiguous political directive [the IDF] will without doubt know how to defeat the terrorists in a short time; to kill those who need to be killed, to collect all weapons to the last bullet and to restore security to the citizens of Israel'.[50]

It is not my intention in the present context to assess the political feasibility or the legal and moral legitimacy of the Subdual Plan. I leave this for the reader. For the moment I shall only mention that since assuming his positions as Minister of Finance and the Second Minister of Defence, Minister Smotrich has made statements and adopted policies that show quite clearly that he intends to use his power to implement the plan. Thus, for example, he directed government ministries to make plans for settling another half a million Jewish Israelis in the West Bank[51] and, at a meeting in Paris, he declared that the White House should know that there is no such thing as a Palestinian people.[52] Furthermore, in the budget that Minister Smotrich proposed and that was adopted by the government and the Knesset, large sums of money are devoted to settlements in the West Bank, which receive much more funding than local councils in Israel itself.[53] Finally, the military have been told by the political echelons (which presumably included the Second Minister of Defence) not to evacuate new or existing outposts established on Palestinian land.[54]

As stated above, the issue that interests us here is not Smotrich's plan itself, but the connection between the plan and the 'constitutional revolution'. We now turn to that question.

[50] Subdual Plan (n 48) 97.

[51] Yaniv Kubovich, 'Far-right Israeli Minister Lays Groundwork for Doubling West Bank Settler Population', *Haaretz*, 18 May 2023, https://www.haaretz.com/israel-news/2023-05-18/ty-article/.premium/far-right-israeli-minister-lays-groundwork-for-doubling-west-bank-settler-population/00000188-2de6-d6e4-ab9d-ede74a3e0000.

[52] Jonathan Lis, 'Far-right Minister Smotrich: There's No Such Thing as the Palestinians, White House Must Hear the Truth', *Haaretz*, 20 March 2023, https://www.haaretz.com/israel-news/2023-03-20/ty-article/.premium/israels-smotrich-theres-no-such-thing-as-palestinians-white-house-must-hear-the-truth/00000186-fd95-db5a-a787-ffddb9550000.

[53] Interview with Dr Doron Hoffman, 'The State Is Actually Saying: Do You Want To Be Middle Class? Live in a Settlement', *Haaretz*, 24 May 2023, https://www.haaretz.co.il/magazine/2023-05-24/ty-article-magazine/.highlight/00000188-4891-dde3-abf9-f89943280000 (in Hebrew).

[54] Yaniv Kubovich and Hadar Shezaf, 'Israeli Defense Officials Slam Gov't for Harming Efforts to Fight Settlers' Violence', *Haaretz*, 27 June 2023, https://www.haaretz.com/israel-news/2023-06-27/ty-article/.premium/israeli-defense-officials-slam-govt-for-harming-efforts-to-fight-settlers-violence/00000188-fc21-d182-a58f-fde933f00000.

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6. The coalition agreements, the Subdual Plan and the constitutional revolution

There are a number of reasons why the politicians behind the coalition agreements and guiding principles of the government probably fear that without at least part of their planned 'legal reform' they will not be able to implement their policies in the West Bank. Many parts of their plan are incompatible both with the legal regime that applies in the West Bank, and with the fundamental principle of equality in Israeli constitutional law. Their plan is likely to meet two major hurdles: (i) legal opinions of lawyers in the IDF Judge Advocate's department and in the office of the Attorney General, who represent the government in court; and (ii) petitions to the Supreme Court against implementation of the plan or parts thereof.

Until now the actions of the authorities on the West Bank have had to receive the legal stamp of the lawyers both in the IDF Judge Advocate's department and in the Attorney General's office. Two units in the Judge Advocate's department are charged with considering proposed actions in the West Bank: the Department of International Law, and the Department of Legal Advice in Judea and Samaria, which 'gives legal advice to the bodies operating in the area of Judea and Samaria, principally to the Central Command and to the Civil Administration, in security and civil matters'.[55] While I have serious reservations about much of the legal advice given by these departments to the military authorities over the years, there is no doubt that they are familiar with the legal regime that applies in the West Bank and consider it their duty to base their legal advice on this regime. As noted above, this legal regime – as presented to the Court by government counsel and adopted by the Court since the early 1970s – is the regime of belligerent occupation. Many of the steps planned by Minister Smotrich are incompatible with this legal regime, as it has been interpreted by the Supreme Court. Thus, for example, the Court has upheld the protection of private land. In its judgment in the *Settlement Regularisation Law* case the Court invalidated a law enacted so as to compel the military commander of the West Bank to expropriate private land on which unauthorised settlements had been built.[56] It is hard to believe that it will be possible for the government to make room for hundreds of thousands of settlers without serious infringement of private property rights. Even if the settlements themselves are built on what is called 'state land', private land belonging to Palestinians will be seized in order to build roads to the settlements and establish security cordons around them. Furthermore, while the Court has so far refrained from ruling on the legality under international law of using public land for the sole use of nationals of the occupying power, there is no guarantee that it will refrain from ruling on this issue in the future. In the *Mitzpe Cramim* case Chief Justice Hayut referred to statistics provided by the Civil Administration, according to which 99.75 per cent of public land that

[55] See the description of these departments in the homepage of the Military Advocate General's website, https://tinyurl.com/y3br9cf6 (in Hebrew).

[56] *Settlement Regularisation Law* case (n 27).

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has been allocated for private use was allocated for use by Israeli nationals.[57] It is only a matter of time before this highly discriminatory allocation of public land is challenged in court.

In cases involving unauthorised settlements built on private land, the approach of the authorities for a long time was to concede that the settlements should be evacuated and the land returned to its owners, but to use delaying tactics in order to avoid confrontation with the settlers. When a strongly pro-settlement politician served as Minister of Justice in a previous Netanyahu government, she demanded that the lawyers find a 'solution' that would avoid evacuation of buildings in settlements or outposts that had been built on private land.[58] While the government's lawyers had originally conceded that the buildings that had been built on private land should be dismantled, following the minister's directive they changed course in the middle of the litigation. Invoking a provision in military legislation that protects agreements made in good faith with the Custodian of Government Property, they argued that the settlers should benefit from this provision. An enlarged bench accepted the argument on the facts of a concrete case.[59]

Under the coalition agreements the Second Minister of Defence must approve the state's response in all petitions relating to the Occupied Territories. Hence, the days in which the state concedes that it has to evacuate settlements built on private land are probably over. Even if the minister does not make an attempt to depart from the regime of belligerent occupation, the 'good faith' argument will probably be raised in all cases. The judicial decision that upheld this argument was based on the facts of the specific case, and it is by no means certain that the Court will be prepared to accept the argument in all cases. Other means will therefore be necessary to ensure that the government can implement its policy of 'regularising' all unauthorised settlements.

The coalition agreements lay the ground for overcoming some of the hurdles that IDF lawyers may place in the way of implementation of the settlement plan. The legal advice to the minister in charge of civil matters in the West Bank will be provided by lawyers who are not part of the IDF command. Furthermore, the said minister will have to give his approval to any brief submitted by the Attorney General's office in petitions challenging actions of the authorities in the West Bank. The most likely approach of the newly appointed non-IDF lawyers who advise the minister will be to adopt the approach of the Edmund Levy Report, according to which the West Bank is not occupied territory.[60] This will involve departing from the position of the authorities held since 1967.

The government is not taking any chances. One of the proposals for 'legal reform' is that legal advice given to the government will not be binding; the

[57] HCJ 953/11, CivA 7688/18 *Salha v Minister of Defence* (27 August 2020), para 35.

[58] Ayelet Shaked, 'HCJ Ofra Case Is Just the Beginning', *Makor Rishon*, 9 January 2020, https://www.makorrishon.co.il/opinion/196051 (in Hebrew) (Shaked was Minister of Justice from 2015 to 2019; at the time of writing this article she was Minister of Interior).

[59] FHHCJ 6364/20 *Minister of Defence v Salha* (27 July 2022).

[60] Levy Report (n 31).

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government may ignore it. So even if the newly appointed lawyers stick to the view taken until now on the nature of the legal regime in the West Bank, the government will be able to ignore their advice. Under the government's proposals, if the Attorney General refuses to defend the government's actions in court, the government may brief a private lawyer to represent it.

Changing the lawyers, or ignoring their advice, may not be enough. Petitions will reach the Supreme Court and the Court will have to decide whether to depart from the legal regime under which it has ruled for over 50 years or, even if that regime still applies, whether the government's actions are compatible with that legal regime. In order to raise the chances that the Court will go along with the government's plans, judges who identify with those plans must be appointed to the Supreme Court. A new president of the Court, who may decide on the panel of judges who will preside in a case, must also be appointed. Here, then, is another clear connection between parts of the constitutional revolution and the occupation.

The Supreme Court's judgment that the Settlement Regularisation Law was unconstitutional[61] may impede implementation of the plan in the coalition agreements to regularise all so-called 'young settlements'. The proposed 'legal reform' seeks to overcome this judgment of the Court in two ways. The judgment of the Court in that case was handed down by a majority of 8 to 1. If two judges who identify with the settlement project are appointed to the Court, and the government also elects the Court's president, an attempt may be made to legislate that law again (with or without some small changes). When it is challenged in court, the President may try to influence the outcome by determining the 'right' panel of judges. Furthermore, under the Minister of Justice's proposal, a majority of 12 of the 15 judges of the Court will be required to declare a statute unconstitutional. With two new 'sympathetic' judges in the Court, it may be difficult to achieve the required majority to declare the law unconstitutional again.

There is, of course, no guarantee that the new judges appointed to the Court will fulfil the expectations of those who appointed them. Even judges who are assumed to be sympathetic to the presiding government may rule against it. Hence, the 'legal reform' contains a further proposal aimed at overcoming judicial review of problematic legislation. Under this proposal a clause will be added to one or more of Israel's Basic Laws under which such laws will not be subject to judicial review. As there is no definition of what constitutes a 'Basic Law', the prevailing view is that it is the name of the law that determines its status. Thus, the Knesset could attach the title 'Basic Law' to the Settlement Regularisation Law that was declared unconstitutional and enact it again, on the assumption that the Court will not have the competence to subject it to judicial review.[62]

[61] *Settlement Regularisation Law* case (n 27).

[62] I will not address in detail a number of ways in which the Court could conceivably circumvent the prohibition of judicial review of Basic Laws. To mention just two such ways: (i) the Court could hold that there was an abuse of the constituent power that lays the foundation for passage of Basic Laws by the Knesset (HCJ 8260/16 *Academic Centre for Law and Business v Knesset* (6 September 2017));

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In the *Settlement Regularisation Law* case the Supreme Court held the Law to be unconstitutional, inter alia, because it discriminated between illegal building by Israeli settlers and Palestinian residents of the West Bank, thereby violating an aspect of the right to equality that, under the Court's jurisprudence, is protected under the Basic Law: Human Dignity and Liberty.[63] It seems to some that the main issue that bothers proponents of the 'legal reform' is not so much judicial review as such, but rather the protection of equality by the Court.[64] Although the right to equality was intentionally omitted from the Basic Law: Human Dignity and Liberty, the Supreme Court has held that many aspects of this right are covered by the protection of human dignity.[65]

It is abundantly clear that the proposals in the Subdual Plan of Minister Smotrich are incompatible with the right to equality, as they envision discrimination between the rights of Israelis and Palestinians who reside in the West Bank. Smotrich admits as much, but claims that this discrimination is justified in order to protect Israel as the national state of the Jewish people. It is far from clear that the Supreme Court will accept his view. In fact, it is highly unlikely that it will do so. The 'solution' once again: change the lawyers who will consider whether the policy can stand up to judicial review, and who will argue a case challenging the policy before the Court; change the Court's composition and open the way for granting immunity from judicial review to legislation that will have the title 'Basic Law'.

Finally, the Court may on occasion continue to intervene in the implementation of government policies, even though it has not held that those policies themselves are unlawful. One of the main grounds for such intervention will be that implementation of the policy in the specific circumstances is highly unreasonable. Here we meet a further proposal of the 'legal reform': abolishing 'unreasonableness' as a ground for judicial review of administrative action. It is impossible to know whether implementation of this proposal will indeed prevent the Court from intervening in implementation of government policies on other grounds for review of governmental action, such as lack of proportionality or an improper purpose.

(ii) the Court could hold that the Knesset lacks the power to pass legislation that undermines the rights of protected persons in the Occupied Territories who are not part of the *demos* in Israel, as they are not represented in the Knesset. This argument was raised in the *Settlement Regularisation Law* case, but as the Court found the Law to be unconstitutional on other grounds it refrained from considering this argument. It should be noted that the original proposal of the Minister of Justice included the enactment of an override clause in the Basic Laws. The proposal was that the majority of the Knesset could enact legislation that included a provision that the legislation would be valid even if it were contrary to a Basic Law. At the time of writing it seems that this proposal has been abandoned.

[63] *Settlement Regularisation Law* case (n 27).

[64] eg, Yoel Kretzmer-Raziel, 'On Equality', *Yashar*, 8 May 2023 https://www.yashar-magazine.co.il/post/%D7%A2%D7%9C-%D7%94%D7%A9%D7%95%D7%95%D7%99%D7%95%D7%9F (in Hebrew).

[65] Aviad Bakshi, 'Symposium on the Basic Law: Nationality and the Override Clause | Does the Nationality Law Negate the Right to Equality?', *ICON-S-IL Blog*, 21 October 2018, https://tinyurl.com/mrumdm64 (in Hebrew). The writer, one of the main proponents of the 'legal reform', mentions that the decision of the Court to include equality as one of the rights protected under the Basic Law has been criticised, although he himself seems to have come to terms with the decision.

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7. Conclusion

A major aim of the steps proposed by the government in its so-called 'legal reform' is to enable the government to implement plans, many parts of which are unlikely to gain approval by lawyers in the IDF and the Attorney General's office, and even if they do receive such approval, will not stand up to judicial review. I do not claim that the plans regarding the occupation are the only part of the government's policies that may face obstacles under the present system. However, as I have shown here, the plans for changing course in relation to the occupation are a central part of the coalition agreements and the guiding principles of the government. It is unlikely that all parts of the new policies for the occupation will receive legal and judicial approval under the present constitutional arrangements. Thus, for the plans for the occupation to be realised, the 'legal reform' must be furthered. The 'right' judges and the 'right' president of the Supreme Court must be appointed; the 'right' lawyers should also be appointed, and in any event their legal advice should not be binding; there should be a requirement of a special majority to declare legislation unconstitutional; and there must be a way to pass legislation that is not subject to judicial review. Furthermore, just in case the Court still may intervene in actions of the authorities in the West Bank, the grounds of unreasonableness in review of government action should also be abolished.[66]

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[66] On 24 July 2023 the Knesset passed an amendment to the Basic Law: The Judiciary, which removes the power of any court in Israel to consider a claim that a decision or action by the Cabinet or one of its ministers was unreasonable. While this Law does not apply to decisions and acts of the military commander, it does apply to all decisions and actions of the Minister of Defence and the Second Minister of Defence. As many of the decisions relating to the West Bank will be taken by these ministers, the law could severely curtail the chances of judicial review of implementation of government policy in the West Bank.

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