



**Absentees against Their Will –
Property Expropriation in East Jerusalem under the Absentee Property Law
July 2010**

Introduction

The Absentee Property Law of 1950 was meant to serve as the legal basis to transfer the property of Palestinian refugees into the possession of the State of Israel. The law says that the land and property of Palestinian residents and nationals of Arab countries who, from November 29, 1947 until a declaration that the state of emergency declared in 1948 ended [which has not yet happened] were in one of the Arab countries, or "in any part of the Land of Israel that is outside of the area of Israel," would revert to the possession of the Custodian of Absentee Property, meaning, to the possession of the State.¹

Following the annexation of East Jerusalem in 1967, and as a result the application of all of the laws of Israel -- including the Absentee Property Law -- to the annexed area, a problematic situation arose in which the property of almost all the Palestinian residents of the city became, in fact, absentee property, because those residents were at the time to which the law refers citizens of Jordan, then an enemy country, who resided in "a part of the Land of Israel that [was] outside of the area of Israel." To contend with this problematic situation, section 3 of the Law and Administration Ordinance 5730-1970 provides that the law does not apply to residents of East Jerusalem who "on the day of the incidence of the order of application of the law was in the area of its application and was a resident thereof."² Therefore, only residents who were **physically** present in East Jerusalem on the day of annexation are not considered absentees. However, that article did not solve the problem of Palestinians who lived outside of the municipal boundaries of Jerusalem, but owned land or property inside the city limits. Those who were not excluded from the incidence of the law theoretically remained absentees.³

Application of the Absentee Property Law in East Jerusalem

Even though the law itself was not canceled in the boundaries of East Jerusalem, shortly after the annexation, then-Attorney General Meir Shamgar ruled it was not appropriate to

¹ http://www.knesset.gov.il/review/data/heb/law/kns1_property.pdf

² <http://www.ir-amim.org.il/Uploads/dbsAttachedFiles/mishpatminhal.pdf>

³ The process of registration of a property as absentee is not necessarily public, and the property owner has no way of knowing that his property was registered as absentee; he can not stop the transfer of ownership with legal action and is not entitled to receive compensation for the property registered as absentee. However, he can apply to the court and ask to cancel the registration of the property as absentee, if he succeeds to prove the property owner was not absent.

apply the law to Palestinians living in the West Bank who owned property in Jerusalem, and he repeated that position on later occasions:

"...we found no relevant justification to seize property that became absentee property at the same time that the owner of the property -- a resident of Judea and Samaria -- came under the rule of the Israeli government authorities. In other words, since the property was not an absentee property a day before the IDF forces entered East Jerusalem, and would not have become an absentee property had East Jerusalem continued to be part of Judea and Samaria, we saw no justification for the annexation of East Jerusalem, and that alone, to lead to the seizing of the property of a person who is not in fact absent, but has been from the same time that his property came into our possession under the rule of IDF forces."⁴

Indeed, for years the State of Israel rarely applied that law to East Jerusalem. The major expropriations the State undertook in the area to build Israeli neighborhoods, which constituted 30% of the annexed territory, were usually expropriations for public needs and not under the Absentee Property Law.⁵

This policy changed in 1977 at the initiative of then-Agriculture Minister Ariel Sharon, and the Absentee Property Law was applied again as a "temporary arrangement until brought up for review." According to that arrangement, residents of the West Bank who had property in East Jerusalem were required to apply to the Custodian requesting to continue to possess and use their property. During the 1980s accelerated use was made in East Jerusalem of the Absentee Property Law, especially in the Old City and the neighborhood of Silwan to the south.

According to the language of the law, the Custodian is allowed to sell land only to statutory authorities. Usually, the absentee property was transferred to the Israel Land Administration's Development Authority and from there to the Housing Ministry or other parties. In certain cases such property was ultimately handed to right-wing ideological groups acting to Judaize East Jerusalem.⁶

Along with canceling the absenteeism of the residents of East Jerusalem, the 1970 East Jerusalem Law says that property that until that time was administered by the Jordanian Custodian of Absentee Property would be transferred to its original owners through the Israeli Administrator General. In other words, the law provided for a unilateral return of property only to Jewish owners, whose properties were in the boundaries of the incidence of the 1970 law. In this way Jews received, inter alia, properties in Silwan and Sheikh Jarrah.

⁴ From a letter from Meir Shamgar to the Israel Land Administration, August 1969.

⁵ Expropriations for the public good are Finance Ministry expropriations, and as opposed to expropriations of absentee property are carried out by an open and contestable process, and involve compensation to the owner of the expropriated property.

⁶ On the transfer of absentee property to right-wing organizations, see Ir Amim report [Shady Dealings in Silwan](#).

The Klugman Committee

Following public criticism that arose against this policy, in 1992 "the committee to examine buildings in East Jerusalem" was established, headed by Haim Klugman, the director general of the Ministry of Justice at the time. The committee strongly criticized the "grave conflict of interests" that characterized the declaration of absentee property and its transfer to right-wing organizations in East Jerusalem, and subsequently Atty. Gen. Yosef Harish ordered use of the law to stop. Then-Prime Minister Yitzhak Rabin adopted the committee's opinion, but the government's position changed sharply later.

Use of the Absentee Property Law in Jerusalem 2004-5

When construction of the separation barrier began in 2002, a number of Palestinian land owners from Beit Jalla and Bethlehem petitioned the court to guarantee their access to the olive grove they owned that remained on the Jerusalem side of the barrier. For many generations the land owners cultivated their groves without disturbance, even though they lived outside of the city's municipal boundaries, but erection of the barrier on the municipal boundary created a new situation in which the land owners were physically separated from their property.

Despite an explicit promise by the IDF that it would let the land owners access their land even after construction of the barrier was completed, the land owners received no such permits. In November 2004 the authorities informed the land owners that "entry permits to Jerusalem cannot be issued to your clients in light of the fact that the land is no longer their property and was transferred to the possession of the Custodian of Absentee Property, based on the 1950 Absentee Property Law."

It soon became evident that for the first time since 1967 the Government of Israel intended to make systematic use of the Absentee Property Law in East Jerusalem, following a decision by the ministerial committee on Jerusalem, which was given the status of a cabinet decision even though it was not made public, that "the Custodian Of Absentee Property has powers under section 19 of the Absentee Property Law 5710-1950, including the execution, transfer, sale or leasing of land property in East Jerusalem to the Development Authority."⁷ It should be noted that only two ministers attended the aforementioned meeting: Natan Sharansky and Zvulun Orlev. The fierce public and international criticism that erupted upon publication of the decision brought the decision, to the attention of Atty. Gen. Meni Mazuz, who sent a harsh letter to Finance Minister Benjamin Netanyahu, ordering the immediate cessation of application of the Absentee Property Law to property of residents of the West Bank in East Jerusalem. Mazuz ordered the government to return to the policy that preceded the ministerial decision, namely not to use its powers regarding those properties except in special circumstances and subject to the approval of the attorney general.

⁷ <http://www.pmo.gov.il/PMO/Archive/Decisions/2004/07/des2207.html>

"I declare immediately that this decision cannot stand. It is not within the power of the ministerial committee on Jerusalem to give a legal interpretation of the boundaries of the authority of the custodian of absentee property, and it is not its job to make policy for the use of powers under the Absentee Property Law [...] I ask you to order an immediate stop of the use of the Absentee Property Law for property in East Jerusalem belonging to residents of Judea and Samaria (from Mazuz's letter to Benjamin Netanyahu from February 1, 2005).

Creeping expropriation

As a rule, Israeli governments usually avoided, following specific instructions by attorneys general, the sweeping use of the Absentee Property Law in East Jerusalem. A notable exception to that policy is an initiative by the Ministry of Housing and Construction at the beginning of 2008 to promote the construction of more than 1000 housing units in extensions of the Har Homa neighborhood in South Jerusalem, among other things on "absentee land" of residents of Beit Sahour, who were declared absentees in the 1990s and their lands were seized without compensation or legal hearing. Those expropriations came in addition to expropriations by the Finance Ministry ("expropriations for public needs") which also served to legalize land for the expansion of Har Homa. Even though the expropriation of that land under the Absentee Property Law occurred before publication of Meni Mazuz's opinion, its materialization into Israeli construction occurred after publication of his opinion and contrary to the policy Mazuz wanted to advance with his instruction.

But parallel to those large expropriations, for all the years since 1967 there has been a "creeping expropriation" of specific properties. It is done by intentional examinations whether Palestinian residents who own property are included in the absentee category, which occur when the residents apply to register their land in the land registry. In that case, the State of Israel becomes a part owner of the property according to the absentee's relative share. It is hard to estimate the amount of properties expropriated in this way since 1967, but it is an extensive phenomenon which is one of the main reasons that many Palestinian residents of Jerusalem avoid having their land registered in the land registry. This policy has grave implications for Palestinians' ability to receive building permits in order to build legally on their land.

The position of the court on applying the law in Jerusalem

The continuing expropriations of land in East Jerusalem under the Absentee Property Law, whether sweepingly or specifically, have brought the issue to the doorstep of the court many times.

Usually, the question the court discussed in this context was whether the property in question was indeed an absentee property, but on several occasions the court also voiced its opinion on the essential issue of the use of the law in East Jerusalem.

In reference to the very question of whether in principle the Absentee Property Law should or should not be applied to property in East Jerusalem, Supreme Court Justices Aharon Barak, Miriam Ben Porat and Avraham Halima ratified a decision by Justice Edmond Levy and ruled that residents of the West Bank who possess property in East Jerusalem could be viewed as absentees and their property could be expropriated under the Absentee Property Law.⁸ Conversely, following Attorney General Meni Mazuz's detailed instruction on this question, Judge Boaz Okon ruled 20 years later that the circumstances in East Jerusalem are fundamentally different than the ones in which the law was passed originally, and that under those circumstances there are no grounds to apply the Absentee Property Law in Jerusalem towards residents of the West Bank.

"Indeed, the territory of Judea and Samaria was not annexed. But Israel recognized no other power in that area and avoided defining it as an occupied area. Applying the Absentee Property Law in this situation could create a twilight situation, whereas the area is outside of Israel for the purpose of "possession of rights" by Israel, without the residents located outside of Israel being defined as the residents of another hostile political entity. It is a kind of legal exercise that does not reflect any reality except for annexation orders of certain territories. It is a kind of legalism without law. From the point of view of the residents nothing actually changed. The residents of those areas were subject to the same effective rule and subject to the authority of the same law or of the government acting under the same law."⁹

Recently the Supreme Court sitting as the Court of Civil Appeals referred to four appeals on judgments given on this issue, submitted both by the Custodian of Absentee Property (one against the ruling by Judge Okon) and by Palestinians, which were united into one file.¹⁰ In its decision of February 2, 2010 the court criticized the fact that the position of the representative of the attorney general in the cases in question was not consistent with the position of the attorney general as expressed by his letter from January 31, 2005 as well as contradicting the directive of Atty. Gen. Meir Shamgar from 1968. The court asked for an updated position from the attorney general within 90 days, after which the court would make its ruling.

The court's position, given by an expanded panel of seven judges, reflects the complexity and sensitivity of the issue of applying the Absentee Property Law to East Jerusalem. One reason for the complexity is the tension between the application of the law to East Jerusalem, which was never canceled, and the positions of Attorneys General Shamgar, Harish and Mazuz, who strongly opposed applying it to residents of the West Bank.

⁸ CA 54/82 Edmond Levy et al v. Legacy of the late Afanah Mahmoud Mahmoud (Abu Sharif) et al, PD 40(1) 374.

⁹ Motion (Jerusalem District Court) 3080/04, Daqaq Noha et al v. Heirs of the late Naama Atiya Adawi Najjar et al.

¹⁰ CA 2250/06; CA 5931/06; CA 6580/07; CA 2038/09.

On May 12, 2010 Atty. Gen. Yehuda Weinstein gave the court, through his representative, the Advocacy's position as follows:

"The Attorney General hereby announces that he accepts the recommendation of the Honorable Court in its hearing of these cases from February 2, 2010. Therefore the special committee under section 29 of the Absentee Property Law 5710-1950 will discuss the release of the properties that are the subject of this hearing on these files, after submitting requests to release them by those who claim the rights to them, on the basis of the position of the State and the Custodian of Absentee Property according to which those properties are indeed absentee properties."

It is important to stress that in his answer the attorney general avoided presenting a position in principle of the Advocacy as to the very application of the law in East Jerusalem, and referred specifically only to the four files in question. However, this answer can be interpreted as signaling the legitimacy of using the Absentee Property Law to expropriate Palestinian property in East Jerusalem.

If the court adopts this approach, which contradicts the position of attorney generals since the eastern part of the city was annexed, it would give Israel the possibility of expropriating thousands of dunams of land and many properties from their Palestinian owners, a step that can be expected to draw severe Palestinian and international criticism.

Conclusion

The annexation of East Jerusalem by Israel in 1967 created a complex political situation that constitutes one of the core issues of the Israeli-Palestinian conflict to this day. Whereas from the point of view of Israeli law East Jerusalem became an integral part of the sovereign State of Israel, the international community, and moreover the Palestinian population, never recognized the legality and legitimacy of Israeli rule in East Jerusalem or Israeli construction in East Jerusalem on land expropriated from Palestinian residents.¹¹ The 1970 law was meant to soften the annexation of the territory and to limit the application of the Absentee Property Law due to the idea that turning the Palestinian residents of East Jerusalem into absentees in their own homes would expose Israel to grave and severe international criticism. To prevent that, the 1970 law provided that anyone living in the annexed territory would not be an absentee in regard to the property in the annexed territory. In other words, the situation would not change for the worse as a result of the annexation.

But along with the carrot came the stick: Israel decided in the same law that properties of Jewish absentees would be returned to them, even though those properties were occupied by refugees from 1948. Meanwhile, the legal legislative reality remained intact, according to which all the residents of the West Bank remained absentees in regard to their property in East Jerusalem, even though Israel is the ruler in most of the areas of the West Bank. Indeed, different governments and attorneys general, and even courts,

¹¹ Some 35% of the 70 square kilometers annexed to Jerusalem were expropriated after the annexation as part of "annexations for the public good."

understood this was an impossible situation both politically and legally, and set a policy that restricted the application of the law as it was. But this was the root of the evil: the law remaining as it was, its application depended on the discretion and policy of the government. Furthermore, the same law that legalizes expropriation of Palestinian property in East Jerusalem allows Jews to claim their property from before 1948, in clear discrimination due to nationality-ethnicity. The consequences of that discrimination are evident in neighborhoods such as Silwan and Sheikh Jarrah, where Palestinian families, some of which are refugees from 1948, are being evicted from their homes on the basis of such ownership claims.

The legal situation described here allows any government that wishes to do so to continue taking over the property of Palestinians who sometimes live within touching range of the cabinet ministers' homes, in blatant discrimination due to nationality. Meanwhile it should be stressed that the implications and significance of this issue exceed the legal field well into the political arena. On the political level, use of the Absentee Property Law in East Jerusalem is another tool to deepen the Israeli stronghold of an area whose future is subject to political dispute, by the unilateral dictation of facts on the ground. This matter creates an additional and substantial burden on an already complex situation in Jerusalem, and may also contribute to the difficulties the sides will face when they attempt to decide the future of the area at the negotiating table.