Expropriation in Israel

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In the State of Israel of the 21st century, land is still being expropriated for public purposes in accordance with the laws of the British Mandate period! In a revolutionary judgment that was handed down by the High Court of Justice and in other significant judgments, the Court has expressed its dissatisfaction with the distortion of justice that exists in the Israeli laws of expropriation, and it has set in motion a legislative amendment proceeding which we can only hope will succeed and will move the Israeli situation forward into the proper place. This distortion of justice, which forms the basis of the daily, material conflict between the proprietary right of the individual and the needs of the public, has become particularly acute since the constitutional revolution in Israel and the enactment of the **Basic Law: Human Dignity and Liberty**, in the early nineties of the previous century. In the short period of time which is available to me, I shall present a brief overview of the current situation, which is, in my opinion, almost intolerable from the point of the view of the individual (and the individual is, in fact, each and every one of us ….) and also the positive changes which have been taking place in Israel in recent years, in this area.

The most widespread use of expropriation proceedings in Israel today is in the **Land Ordinance (Acquisition for Public Purposes), 1943 and in the Road and Railway Ordinance (Protection and Development), 1943** (hereinafter: the "Road Ordinance"). However, it is interesting - and perhaps even surprising - to note that the subsequent Israeli legislation also refers to these very same Ordinances.

The assessment principles underlying compensation for expropriation are as follows:

"When the Court comes to assess the compensation which should be awarded for any land or right or benefit in land, it shall act according to the following regulations:

(a) The Court shall not take into account the fact that the land was acquired by force;

(b) Subject to what is stipulated below, that amount which would have been received from the sale of the land had it been sold on the market by a willing vendor - shall be accepted as the value of the land.

(c) The Court shall not take into account the suitability or the special preparation of the land for any particular purpose, if this is a purpose which cannot be used other than in accordance with powers arising from laws, or when there is no demand for the land on the market other than the demand by a particular purchaser for his own special needs or other than the demand for the purposes of the Minister of Finance;

….

(g) In the event that a party is due to acquire only part of the land which belongs to any person pursuant to this Ordinance, the Court is required to take into account any increase in the value of the rest of the land due to its proximity to any

betterment works or to any works which have been performed or constructed or which shall be performed or constructed by the Minister of Finance;

(h) In addition, the Court shall take into account the damage, if any, that would be caused to an owner due to the disconnection of the land being acquired for public purposes from other land which belongs to the same owner, or due to any other harmful effect that would be caused to the said other land due to the exercise of the powers vested in this Ordinance".

The Planning and Construction Law, 5725 – 1965 refers in section 190(a) in Chapter H, which deals with expropriations for public purposes, to the same assessment principles that were set forth in the Ordinances.

Even the **Israel National Road Law, 5755 – 1994**, which was enacted in order to pave the Cross-Israel Highway over a decade ago, and which purports to be an innovative and modern law, did not succeed in breaking through the boundaries of the Ordinances dating back to the British Mandate period and once again, this Law also refers back to the same sections.

The main distortion of justice that lies, in my opinion, at the basis of the assessment principles is that it misses the principle of restoring the situation to its former self! There is no dispute that expropriation, in the sense that it is an involuntary purchase, must allow the party whose land is being expropriated to restore the situation to its former self – not more, but also not less than that! If, for example, an asset was expropriated from him whose value is US$ 500,000, then in the best-case scenario, he will receive the real market value of the asset, i.e. US$ 500,000, but this amount will never be sufficient to purchase an alternative asset whose value is similar. If we take into account the tax which the party whose land is being expropriated must pay (even though it is half of the full tax) and the expenses incidental to the acquisition of a real-estate asset (attorney, real-estate broker, appraiser, etc.), then the party whose land is being expropriated will most definitely be adversely affected, and he will not be able to buy himself an alternative asset whose value is similar to that which was expropriated from him.

Yet another distortion of justice, which does not directly relate to the assessment principles, but which has significant implications for the amount of the compensation, is the rate of land which is expropriable without consideration. According to the Ordinances dating back to the British Mandate period, the rate is 25% of the area of the plot; the Planning Law went to far greater lengths than this, increasing this rate to 40%. Actually, when it comes to this aspect of expropriation without compensation, we are witness to the beginnings of a correction of this distortion of justice, by the case law. In the **Holzman** ruling, it was ruled that when a parcel is expropriated in its entirety, then that part which is expropriable without consideration should not be deducted, and compensation should be paid "from the first meter". Needless to say, this ruling is a welcome first step, however, it is still not sufficient. It is necessary, in my opinion, to continue in this direction until the correct balance is struck between the individual and the public, because after all, there are many situations in which the land is not expropriated in its entirety, and yet also the balance of the land which remains in the owner's possession is

critically damaged, and the economic damage that is caused to the owner is not proportional. The rationale at the basis of this approach is clear and it has been adopted on more than one occasion by the Supreme Court: from the outset, the legislator determined that the expropriation of part of the land without compensation would be permitted, based on the assumption that the balance of the land which remains in the owner's possession would be bettered, concurrently with the approval of the expropriation plan. This assumption is true when all the land owned by a certain individual is contained within a certain plan – and part of it is allocated for public purposes and the other part is bettered for residential uses, commercial uses, etc. However, when a plan expropriates a substantial part of the land and leaves the remainder, at best - unchanged, and at considerably less than best - adversely affected, then this rationale is not satisfied, and compensation should be paid in respect of the expropriated area in its entirety. We may assume that with regard to this question, the last word has not yet been said and we can expect to see further interesting case law on this matter.

A distortion of justice which is no less serious lies in the question of the effective date of the expropriation and the linkage mechanism for the compensation from this date up until the date of payment. The value of the compensation for the expropriation should be determined for the "effective date", which is the date on which the Authority could have taken possession of the land, or, in other words – the date of the declaration of the fact of expropriation. On many occasions, the expropriation was declared according to one of the Ordinances dating back to the British Mandate period, many years ago, however, as long as the expropriation was not implemented, we did not know that such an intention even existed; when the expropriating authority knocks on the door of the owner of the land and informs him that it has come to take away its "own" land, only then does the owner of the land get to hear the bad news. This has two ramifications: firstly, the value of the land on the effective date is significantly lower than its current value; and secondly, the linkage mechanism for the compensation for the expropriation pursuant to the Amendment of the Laws of Acquisition for Public Purposes Law, 5724 – 1964, determines an annual rate of 1.5% (!) only, thus creating an additional significant erosion of the compensation funds. In this regard, too, we are witness to the beginnings of a correction of this distortion of justice in the case law. In the **Alpatiani** case, it was ruled by the Supreme Court that compensation that had been awarded by the District Court and that had still not been paid, would bear, effective from the date of the handing down of the judgment by the District Court to the date of the actual payment, interest and linkage pursuant to another law, at a rate of 4% per annum.

We can see that the most significant and longed-for earthquake on the path to the correction of these distortions of justice in the expropriation laws, took place in the **Krasik** ruling:

In the late fifties, the Minister of Finance published a notice of the expropriation of the petitioners' lands for the purpose of zoning them as training areas for the Israeli army. In 1993, when it transpired that there was a demand for residential construction in this area, the Government decided to remove the army from the land and to change the zoning of the land, including the petitioners' lands, to zoning for commercial and residential construction. The petitioners attacked the State's action to cause the change of zoning of the lands. They claimed

that since the public purpose for which the land had been expropriated had come to an end, the State was required to return the land to its owners, and it is not entitled to make any other use of the land, which is different from the original purpose for which the land had originally been expropriated.

The Supreme Court ruled:

a. If the public purpose which served as a basis for the expropriation of the land according to the Ordinance has ceased to exist, then, as a rule, the expropriation is revoked and the owner of the expropriated land is entitled to the return of the land.
b. The expropriation must comply with the test of proportionality. What this means is that in the act of the expropriation, three cumulative conditions must be satisfied: the existence of a specific and defined public purpose; the connection of the public purpose to the land which is intended to be expropriated; and the existence of the need for this particular expropriation in order to achieve the public purpose. It would not be reasonable to interpret the Ordinance as meaning that these conditions must be satisfied solely on the date of the expropriation. The said three conditions of the test of proportionality must be satisfied with regard to the expropriation not only at the stage of the purchase of the land from its original owners, but also thereafter, for as long as the act of expropriation continues.
c. The expropriating authority is not entitled and is not authorized to make use of the expropriated land in whatever way it may choose – as if it were a private owner – but it is subject to a particular regime of public uses for the land.
e. The Basic Law: Human Dignity and Liberty caused a significant change in the legal status of the proprietary right, and turned it into not only a basic right, but also a constitutional right. As a consequence, it has now become possible and appropriate to interpret the power of expropriation based on a balance between the needs of the public and the proprietary right, a balance which shall be consistent with the values of the State of Israel, in a manner that will strengthen the protection of the proprietary right, which was so flimsy in the Ordinance; the power of expropriation of the Minister of Finance pursuant to the Ordinance should therefore be interpreted as a purpose-related power. Accordingly, the expropriation is valid as long as the public need exists, and yet, once the public need has ceased to exist, then once again, the expropriation is no longer valid.
f. Also pursuant to this ruling, when the public need for the expropriation has expired, then the original owner does not receive possession of the proprietary right automatically, but only after a decision has been made in this matter by the expropriating authority or by the Court. It follows that when the expropriating authority becomes aware that the public need has expired, then it should provide notice of this fact to the original owner and it should hold talks with him in order to determine an arrangement for the return of the land to him, or in order to devise another arrangement (such as a purchase or compensation) to which he will grant his consent, or even in order to give him notice that the expropriating authority intends to continue to hold the land for some other public purpose.

An analysis of the situation shows that in the past, the predominant approach was one which classified the institution of the expropriation as an act severing the connection with the land. This approach gave the authority extremely broad discretion: should it so wish, it could use the expropriated asset; should it so wish, it could use it for other purposes; or it could not use it at all; and the owner of the expropriated asset has no standing against the expropriating authority or any cause of action against it. The **Krasik** ruling deflected, and quite rightly so, the point of equilibrium in the balance of interests between the expropriating authority and the individual, whilst recognizing the importance of the proprietary right as a basic constitutional right.

In the **Krasik** ruling, the Court appealed to the legislator with a request that he act to regulate the matter of the expropriation of land in a comprehensive, modern and systematic law. Following this request made by the Court, and due to the need to give a legislative response to the question of the application of the ruling that was set forth in the judgment, today, a legislative proceeding is being conducted in Israel which we can only hope will bring about the desired change.

In conclusion, the situation as exists at present – whereby expropriations in the State of Israel of the 21st century are being carried out in accordance with the outdated Ordinances of the British Mandate period – must change! Indeed, in recent years, this situation has undergone certain welcome developments. The State of Israel, as an advanced, enlightened and democratic country, is adopting various modern principles into its laws of expropriation, principles which will preserve a proper and fair balance between the public and the individual, and which will protect the basic and important right of the individual, namely the proprietary right; and to this end, Israel is drawing on precedents and ideas from other advanced countries around the world, such as those from which this distinguished audience has come, in order to participate in this Conference.

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