Lawyers,
Conflict & Transition

Israel:
Litigation, Human Rights & the Occupation

November 2015

E·S·R·C ECONOMIC & SOCIAL RESEARCH COUNCIL

Queen's University Belfast

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Contents

Preface

This report was commissioned as part of the *Lawyers, Conflict & Transition* project – a three-year initiative funded by the Economic & Social Research Council.

The wider project explores the role of lawyers during conflicts, dictatorships and political transitions. Despite the centrality of the rule of law to the contemporary theory and practice of transitional justice, there is little emphasis in the relevant literature on the role of lawyers outside the courts – or indeed as 'real people' at work in the system.

Drawing on six key case studies (Cambodia, Chile, Israel, Palestine, Tunisia and South Africa) we set out to establish a comparative and thematic framework for lawyering at historic stages in conflicted and transitional societies. Taking a holistic approach to the role and function of law and lawyers, the project is intended as a bridgehead between transitional justice and the sociology of the legal professions.

Project staff members are based at the School of Law, Queen's University Belfast, and the Transitional Justice Institute, Ulster University.

This project has at its core a 'real-world' dimension and seeks to make a difference both to theory and practice. In addition to academic outputs, we were determined to produce a body of work that will assist the societies we have researched. We were also conscious from the outset that academic fieldworkers are sometimes guilty of 'parachuting in' and then moving on, with little demonstrable benefit for participants. As part of our ethics policy we thus developed this series of practice-orientated reports, specifically tailored for each jurisdiction under scrutiny, as well as briefing papers for international audiences.

The individuals interviewed for the wider project (more than 120) were each invited to suggest research topics and themes that are of direct relevance to them and the organisations and networks with whom they work. The core team sifted and analysed these suggestions and commissioned two key reports per jurisdiction. In some instances the work was completed in-house; in other cases we drew on the resources and talents of our international consultants.

The reports are designed to be of immediate value to practitioners and as such we have sought to avoid complex academic terminology and language. We have made the texts available both in English and relevant local languages.

The anticipated readership mirrors the diverse range of interviewees with whom we engaged:

- National and international legal professionals (including cause / struggle lawyers and state lawyers)
- National and international legal professionals
- Scholars interested in the role of lawyers as political and social actors (with a particular focus on transitional justice)
- Government officials
- International policymakers
- Civil society activists
- Journalists and other commentators

The entire series will be made available on our website (www.lawyersconflictandtransition.org) and will be circulated via our various networks and twitter account (@lawyers_TJ).

We hope that you will enjoy reading this report and encourage you to disseminate it amongst your networks.

For further information about the wider project please feel free to contact us at:

www.lawyersconflictandtransition.org/contact

Kieran McEvoy PhD
Director, *Lawyers, Conflict and Transition* Project

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Acknowledgements & Disclaimer

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All views expressed, and any errors, remain the responsibility of the authors.

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Executive Summary

This paper covers some of the key themes involving litigation, human rights and the ongoing Israeli-Palestinian conflict, focusing on the perspective of Israeli lawyers and human rights activists struggling against human rights violations in the context of Israel's occupation of the Palestinian territories. It aims to provide readers with some of the salient background details, debates and dilemmas underpinning human rights legal activism in this context, focusing in particular on litigation in the Israeli Supreme Court, the main site for such legal activism over the past decades. The paper is not meant to be exhaustive and leaves out some other relevant issues, including litigation in relation to Palestinian citizens of Israel or the potential of international criminal law to affect changes in the area. Due to space limits it also does not include historical and factual background to the Israeli-Palestinian conflict as a whole, assuming interested readers will be able to find relevant general sources.

Israel's Legal Culture, Litigation and the Supreme Court

Israeli law is an important arena in which the struggle over shaping political culture and national identity is being waged, and the Supreme Court has been the main site for such legal struggles. The Israeli Supreme Court has acquired a reputation as a powerful, influential and activist court, allowing almost unlimited right of standing to public petitioners such as human rights NGOs, and intervening in political decisions taken by other branches of the state. There are competing explanations and normative evaluations of the court's activist role and its constant involvement in controversial political issues. The absence of a constitution in Israel and the dynamics of politics mean that Court is always under threat of potential retaliation, and consequently it often acts strategically, especially on security matters.

Law, Litigation and the Occupation

The Supreme Court has been the chief arena for Israeli principled legal battles regarding policies in the occupied territories. The court's decision, in the early years of the occupation, to allow petitions from Palestinian residents of the occupied territories, was far from obvious, as the territories were not annexed to Israel and its residents were not Israeli citizens. Many human rights groups, international commentators and Palestinian observers view the Court's jurisprudence as primarily accommodating Israel's military and occupation policies. At the same time, the Court

is seen by many sectors in Israel's society and establishment as too sensitive to the rights of Palestinians. Some commentators argue that the court has gradually become less deferential to the state and that the normalization of the conflict and the turning of the occupation into a more or less permanent situation have led to an erosion of the court's willingness to accept as given any claim by the state. Many others argue on the other hand that the court has gradually become *more* deferential to the state, generally accommodating the state's political wishes at the expense of the protection the human rights of Palestinians. In general the court has engaged in "judicial acrobatics", both regulating and legitimizing the occupation, imposing some restraints whilst also accommodating Israel's' security and other interests in the OPT, a fact which is at the heart of dilemmas and debates regarding the advisability of using litigation as a key tool for the advancement of human rights.

Lawyers, Legal Activism, and the Conflict

Lawyers have been key figures in the establishment and activity of human rights NGOs in Israel. Israeli human rights NGOs have been very active in litigation, which became one of their main channels of activity to advance their cause. Studies show that litigation in the Israeli Supreme court by NGOs, as expert, experienced and "repeat players" in the system, has higher success rates than of individual litigants. Israeli NGOs view petitions to the courts not just as a means to achieving reform but also as a means of communicating with the authorities, gaining publicity and media attention, and public support. The advisability of focusing NGOs resources on litigation rather than on public mobilization in the political realm has been a topic of sustained debate. Some argue that attempts to exert conventional political pressure by Israeli human rights groups would be doomed to failure, given their lack of popularity, and therefore the focus on petitioning the Supreme Court is the most effective method. Others find that the reliance on litigation is problematic: acting through the courts rather than concentrating on mobilizing public opinion, harms the NGOs ambition to inculcate human rights norms: the emergence of rights-respecting policy-making would develop in a sustainable way only through popular demands from society. Therefore it has been argued that human rights NGOs should concentrate on putting pressure on the political system and attempt mass mobilization of the public, rather than focusing on litigation which disconnects the issues from the majority of the Israeli public.

The "Legitimation" Debate: Does Litigation Create More Harm Than Good?

While there is no doubt that litigation against occupation policies occasionally succeeds, the question of whether these successes ultimately end up sustaining the occupation has been haunting human rights advocates and activists. Those who support this claim argue that, contrary to the Supreme Court's image in the occupation context, it rules against the government only in very rare cases. Moreover, such "landmark" victories for human rights litigation actually have a negative effect: by occasionally countering government policies in highly publicized decisions, the court in fact confers legitimacy on many other policies: it provides a mask of rule of law which legitimizes the occupation for both the Israeli public and the international community, supplying the Israeli political and legal culture with the collective illusion that the rule of law prevails. Other scholars and activists argue that the restraining function of the Court has been more important than its legitimizing one: in addition to the direct litigation victories, many more receive remedy through out-of-court settlements as a result of litigation, and more broadly bringing government actions under a legal regime, as result of its subjection to judicial review by the supreme court, creates a host of procedural constraints and limitations which improve the situation of at least some Palestinians. In addition, irrespective of the result in court, litigation can bring the issues to the attention of the public and it creates a body of formal documentation of the issues or events discussed (including through the state's response to the litigation).

Legal Versus Political Activism

While Supreme Court litigation and other forms of legal activism have been a key strategy of human rights NGOs in Israel, this is has also led to some tensions with the more political forms of anti-occupation activism, which is mostly associated with grassroots groups rather than established NGOs. Grassroots activists are generally more confrontational and often engage in civil disobedience, while litigation orient human rights NGOs toward working inside the system and using proper channels. The legal-oriented NGOs also work in a slower, more organized manner than the rapid reaction the grassroots are accustomed to. The importance grassroots activists see in joint work with Palestinians, and the ability to make political rather than legal claims, also create differences and at times tension. While political and legal activism can be

based on division of labour, cases of perfect synergy between the two orientations of struggle remain rare.

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I. Israel's Legal Culture, Litigation & the Supreme Court

Israeli law is an important arena in which the struggle over shaping political culture and national identity is being waged. The combination of liberal and militaristic discourses and tendencies in Israel has been feeding tensions and challenges around the rule of law throughout the country's history.[1] The absence of a single-document written constitution is one of the important features of Israel's legal culture, and is at the heart of many debates over human rights, political culture and litigation.[2] In response to litigation, the Supreme Court developed, through its jurisprudence over the years, civil rights principles such as freedom of speech, freedom of movement and so on; in addition, the basic law on human dignity and liberty, from 1992, conferred a higher status on some human rights. Nevertheless, the status of human rights in Israel's legal culture has remained precarious and an object of ongoing struggle. The Supreme Court has been the main site for such legal struggles.

The Supreme Court and "Judicial Activism"

The Supreme Court has a dual function: it can sit as both the high court of appeals for criminal and civil cases from the lower courts, and as a High Court of Justice (HCJ). In the latter function it exercises judicial review over actions of all state agencies. As the HCJ the Supreme Court is the first and final instance. A person who believes that a state agency violated his legal rights can appeal to the court for an *order nisi*, which the court will issue if it finds merit in the petition. The order is often accompanied by an interim order preventing the state from further action for a specific period. The court will then hear the state's explanation and decide either to dismiss the petition and nullify the order nisi, or, if the petition is accepted, make the order permanent.

The Israeli Supreme Court has acquired a reputation as a powerful, influential and activist court, and is considered among the most activist in the world. Until the late 1970s the court in general exercised limited and restrained judicial review. While developing civil rights jurisprudence it used the "political question" doctrine to avoid

[1] Gad Barzilai, 'Between the Rule of Law and the Laws of the Ruler: The Supreme Court in Israeli Legal Culture' (1997) 49 International Social Science Journal 193.
[2] The Declaration of Independence from 1948, while not a constitutional document, was at times interpreted by the Supreme Court as having a quasi-constitutional status.

intervention in political issues and especially those involving national security considerations. Since the 1980s the court adopted highly activist doctrines, enabling it to intervene in decisions taken by other branches of the state; it replaced a formalistic style of reasoning with one based on values; and adopted a perception of itself as an institution which takes part in normative decisions. The Supreme Court's "activist" turn, and its involvement in political issues, provides the context to debates and discussions of human rights litigation.

Several developments anchored the court's transformation, among them: first, the Court has gradually broadened the definition of justiciablity, culminating with Chief Justice Barak's famous formulation that any issue would involve a legal norm (whether specific to the issue or general, for example reasonableness), and therefore virtually all issues, including all political ones, can be discussed by the court. Second, the court's broadening of the right of standing has allowed the possibility of petition by public petitioners, such as NGOs (and not only individuals whose own interests are affected by the state decision challenged). In addition, the Court adopted the tests of "reasonableness" and "proportionality" as a basis for judicial review, concepts which extends beyond previous tests and allows the court a wider scope to overrule state decisions. Finally, in 1992 the enactment of the Basic Law: Human Dignity and Liberty meant that for the first time human rights were entrenched in a major piece of legislation, including rights to life, property, privacy, dignity, freedom of movement, due process of the law, and the court has interpreted the basic law as giving it authority to invalidate primary legislation. The combined result of these developments was termed by Barak "the constitutional revolution". Israel has become a highly legalised country, and submitting petitions to the Supreme Court is a routine activity for any group dissatisfied with any state action.

The Court also acquired a powerful image: the media, both elite and "yellow" press, tend to depict the court as a powerful and effective actor. The court receives an enormous amount of media attention, and its media coverage is higher than other supreme courts in other countries.[3]

[3] Bryna Bogoch and Yifat Gazit, 'Mutual Bonds: Media Frames and the Israeli High Court of Justice' (2008) 33 Law and Social Inquiry 53.

Explaining and Debating the Court's Activist Turn

Scholars have proposed several explanations for the court's shift to activism. Mautner argues that the activism of the court from the 1980s onward is tied to the ending of decades of unchallenged dominance by the Labour Party in 1977. The former "liberal" hegemons - a group associated with liberal, western, secular values - lost political and cultural power in the country and then shifted much of their action to the Supreme Court, which was seen as the last bastion of their liberal values. The court "collaborated" and devised new legal doctrines which allowed it to supervise and influence the actions of the two other branches of the state.[4] Meydani argues that the source of the rise to prominence of the Supreme Court is Israel's non-governability problem: deep divisions combined with a political system which is inefficient and fragmented, generate conflicts that cannot be resolved by the political system itself, and therefore litigation emerged as a way to generate policy decisions and pressure politicians to enact reforms.[5] The effective transfer of power from the legislature to the court, according to this argument, is on the background of a weakening of the former and growing distrust of the public in the good faith of politicians.[6]

The activism of the Court has generated a huge amount of criticism from right-wing and religious groups, which felt alienated from it and see it as a partisan body. The retirement of Justice Barak in 2005 left the court weaker, and the influence of the second intifada and suicide bombings against Israeli civilians weakened public perceptions of the court's ostensibly liberal role. In recent years there have been several proposals and draft bills, by right-wing actors, aiming to restrict and limit the Court's powers, leading some commentators to speculate whether there would be a constitutional counter-revolution in Israel.[7]

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[4] Menachem Mautner, *Law and the Culture of Israel* (OUP 2011). See also Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).
[5] Assaf Meydani, *The Israeli Supreme Court and the Human Rights Revolution: Courts as Agenda Setters* (CUP 2011).
[6] The public trust of the court is higher than other state bodies (excluding the military) and higher than the public trust of courts in other comparable countries.
[7] Doron Navot and Yoav Peled, 'Towards a Constitutional Counter-Revolution in Israel?' (2009) 16 Constellations 429.

The court's activism was criticised and accused of illegitimate judicial activism not just by right-wing actors but also by other commentators, including from the legal community, from academics and from the center-left. These critics argue that there is over-legalization of political and public administration in Israel, leading to inefficiencies in the functioning of state institutions. They argue that the court enjoys power unparalleled in other states and that it should avoid interfering in political questions, with some dubbing the Israeli regime as "supreme-courtocracy".[8] Ruth Gavison, for example, argued that the expansion of the court's role leads to burdening the system with litigation and legal uncertainty; creates an erosion of the court's legitimacy due to its constant involvement in political questions; and dilutes the public arena, because controversial political issues are referred to the court. Mautner argued that the deep and complex conflicts of Israel's political culture cannot be resolved or even administrated by judicial standards and need to be handled by the political process. Others argued also that while in theory the court can intervene in all political issues, in practice it has not done so in major crossroads of political policy-making, for example in relation to the conflict and peace negotiations. Consequently some have found that the myth regarding the court's omnipotence is larger than the facts.[9] In short, both the effectiveness of jurisprudence at protecting rights, and the political advisability of this trend, have been contested.

The Supreme Court is therefore both an immensely powerful actor, and a very vulnerable one. The absence of a constitution and the dynamics of politics mean that Court is always vulnerable to potential retaliation (unlike for example the more insulated American Supreme Court). The court then needs to balance its institutional position and integrity with anticipating future retribution from the government, the parliament and other actors, and consequently it often acts strategically, especially on security matters.[10] Threats to the court's authority and independence shape and affect its calculations, particularly in cases relating to national security and the occupation.

[8] Ibid.
[9] Daphna Baraek-Erez, 'Judicial Review of Politics: The Israeli Case' (2002) 29 Law and Society Review 611.
[10] Udi Sommer, 'A Strategic Court and National Security: Comparative Lessons from the Israeli Case' (2010) 25 Israeli Studies Forum 54.

II. LAW, LITIGATION & THE OCCUPATION

There are several "layers" of law applicable to the Occupied Palestinian Territories (OPT). First, under International Humanitarian Law (IHL) and the law of occupation, the existing law in the occupied territory - Jordanian law in the case of the West Bank - continues to be in force. Jordanian law itself also had layers of Ottoman legislation, and of the British Mandate emergency regulations which were in force in the West Bank prior to its occupation by Jordan in 1948. Second, under IHL the occupying power may amend existing legislation or enact new laws for security needs and for the needs of the population. This type of legislation is done through Military Orders, formally issued by the Israeli military (technically by the Commander of the West Bank, a General). These legal decrees issued by the Commander of the OPT immediately become law for Palestinians living in the area. There are round 2,500 Military Orders issued, some of them cancelling, suspending or amending earlier ones. In addition, Israeli settlers are subject to Israeli law, which controls also some aspects of Israeli government actions, and to some degree Palestinians in the OPT are subject to laws of the Palestinian Authority (PA). The international community generally argues that Israel is also bound by international human rights law in its actions in the OPT. Therefore, in various permutations, law in the West Bank/OPT consist of: Ottoman law, Jordanian Law, British emergency regulations, Israeli Military legislation, Israeli "ordinary law", PA law, IHL and International human rights law. In general, and subject to some modifications regarding the status of Jewish Settlers and the contested role of the PA, the formal situation in the OPT remains one of belligerent occupation, and therefore the Israeli military remains the governmental and legal authority.

The whole machinery of the occupation is staffed with advocates, judges and legal officials. Israel's use of law, rather than resorting exclusively to force, is a core component of its narrative of legitimacy and restraint,[11] and is part of a wider Israeli military discourse and practice of what Ron aptly termed "savage restraint", a use of controlled violence accompanied by a performance of legality.[12] According to Hajjar's

[11] Lisa Hajjar, *Courting Conflict: The Military Court System in the West Bank and Gaza* (University of California Press 2005).
[12] James Ron, 'Savage Restraint: Israel, Palestine and the Dialectics of Legal Repression' (2000) 47 Social Problems 445.

analysis: "what distinguishes the Israeli model from many other states embroiled in protracted conflict is that Israel does not repudiate or ignore international law; rather, it 'domesticates' international law by forging interpretations of its rights and duties in the West Bank and Gaza to accommodate state practices and domestic agendas".[13]

The Supreme Court and the Occupied Territories

The chief arena for Israeli principled legal battles regarding the occupation has been the Supreme Court. The Israeli Supreme Court is one of few courts that have engaged in ongoing review of military actions of security forces during armed conflict, and which heard petitions relating to the military action in occupied territories. The court is from a global perspective the most prolific non-military judicial organ to operate in the context of occupation and has attracted considerable scholarly and judicial attention.[14]

The starting point for the discussion is the court's decision, in the early years of the occupation, to allow petitions from Palestinian residents of the OPT. This was far from an obvious decision, as the territories were not annexed to Israel and its residents were not Israeli citizens. Affirming the rights of non-citizens Palestinians to gain a hearing in the Israeli Supreme Court was ostensibly an expansive assertion of rights, also reflecting an assertion of judicial authority over the military (which was technically the sovereign in the occupied territories). The court asserted that since the military is an organ of the state, it was subject to judicial review like other agencies of the executive. As a political institution, the court took for itself a role in managing the OPT in order to preserve its national status.[15] The opening of the court to petitions from the OPT should of course be also seen against the background of the occupation, as a result of which Palestinians do not take part in democratic decision making. Military governance, by definition, is not premised in separation of powers and local residents have no control over the promulgation of laws. The court therefore operates in the context of democratic deficit.[16]

[13] Hajjar (n 11).
[14] Guy Harpaz and Yuval Shany, 'The Israeli Supreme Court and the Incremental Expansion of the Scope of Discretion under Belligerent Occupation Law' (2010) 43 Israel Law Review 514.
[15] Amnon Reichman, 'Judicial Independence in Times of War: Prolonged Armed Conflict and Judicial Review of Military Actions in Israel' (2011) Utah Law Review 63.
[16] Moshe Halbertal, 'Israel's Supreme Court and the Transformation of Israeli Society' (2011) 11 International Journal of Constitutional Law 1111.

While this brief review of course does not aim to cover the court's vast relevant jurisprudence,[17] some approaches of the court to state policies in the context of the conflict and the occupation can usefully be illustrated. In relatively rare cases the court essentially invalidates a policy (for example, the torture case, human shields); at times it allows a questionable policy while inserting procedural guarantees (for example house demolitions, deportations); it can also amend the details of a questionable policy (for example, altering the route of some segments of the wall), or place some conditions on it (for example, the targeted killings case); it often fully allows very questionable policies (for example, the family unification case); and in other contexts avoids making a legal decision (for example, in relation to the settlements). More broadly, the court also often uses an "escape route" of avoiding general questions and demands that petitioners submit separate petitions on more specific issues: this way the court discusses every case on its own facts whilst minimizing the broader political context. For example, the Court can discuss in minute details the sections of the wall, while not discussing the general decision to build it, thus eroding the ability to discuss the full magnitude of the project.

Judicial Review and Occupation Policies

Many human rights groups, international commentators and Palestinian observers view the Court as chiefly accommodating Israel's military and occupation policies. At the same time, the Court is seen by many sectors in Israel's society and establishment as too sensitive to the rights of Palestinians. Some commentators argue that the court has gradually become less deferential to the state.[18] They find that the passage of time in the prolonged conflict and occupation led the court to be exposed to military misconduct and judges have gradually changed their perception when security claims are being made by the military and the state and no longer necessarily accept the good faith of such claims. While during an emergency courts are highly unlikely to challenge the government, the normalization of the conflict and the turning of the

[17] See for example, David Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories* (SUNY University Press 2002).
[18] Guy Davidov and Amnon Reichman, 'Prolonged Armed Conflict and Diminished Deference to the Military: Lessons from Israel' (2010) 35 Law and Social Inquiry 919.

occupation to a more or less permanent situation can lead to erosion of the court's willingness to accept as given any claim by the state.

Many others argue on the other hand that the court has gradually become *more* deferential to the state,[19] and the most authoritative review of its decisions found that it has generally accommodated the state's political wishes at the expense of the protection the human rights of Palestinians.[20] In general the court has engaged in "judicial acrobatics", both regulating and legitimizing the occupation, placing some restraints whilst also accommodating Israel's' security and other interests in the OPT,[21] a fact which is at the heart of dilemmas and debates regarding the advisability of using litigation as a key tool for the advancement of human rights.

It is important to note that the potential of judicial review has influence in and of itself, even without operative court judgements. The authorities act "in the shadow" of potential judicial review in the phase of decision-making. The shadow of possible judicial intervention lies over almost every military operation taken.[22] Litigation in the Supreme Court also has effects in the public sphere, where the mere litigation of issues can contribute to the public debate on these questions, and indeed Supreme Court litigation often involves discussions in the public arena and attempts by litigators to capture public opinion.

[19] Harpaz and Shany (n 14).
[20] Kretzmer (n 17).
[21] Harpaz and Shany (n 14).
[22] Avishai Cohen and Stuart Cohen, 'Israel and International Humanitarian Law: Between the Neo-Realism of State Security and the "Soft Power" of Legal Acceptability' (2011) 16 Israel Studies 1.

III. LAWYERS, LEGAL ACTIVISM & THE CONFLCIT

Israel has one of the highest per-capita number of lawyers among comparable states. Lawyers have become key actors not just in litigation and in representing clients but in public bodies, political parties and state institutions, assuming leading managerial and leadership positions, outmatching any other professional group in the Israeli public sphere, with the exception of former senior military officers.[23]

In Israel, lawyers have traditionally not played a role as oppositional agents to state power, and in common with many emerging nations states, their role was confined to supporting basic values of formal rule of law, separation of powers and judicial independence.[24] The bar as such has not commented on important human rights issues, such as torture, and Barzilai emphasizes the notion of "silence" as a key attribute of lawyers in Israel.[25]

At the same time a handful of high-profile committed cause lawyers have been working since the 1970s for the protection of Palestinian human rights. The first generation of such lawyers included people of left-wing, often communist backgrounds, prominent among them women such as Felica Langer and Lea Tsemel. While a new and somewhat larger generation of individual cause lawyers (with their own law firms) emerged in the 1980s, the bulk of litigation in relation to military and occupation policies is done through NGOs (at times through in-house lawyers and at times while hiring the services of individual cause lawyers). In most Supreme Court cases Palestinians are represented through human rights NGOs.

Human Rights NGOs

Lawyers have been key figures in the establishment and activity of human rights NGOs in Israel. As Barzilai observed, "it is hardly conceivable to imagine how the setting of human rights NGOs [in Israel] could have been developed without the major contribution of lawyers".[26] This has been influenced by the significant role of lawyers

[23] Gad Barziliai, 'The Ambivalent Language of Lawyers: Between Liberal Politics, Economic Liberalism, and Dissent', in Malcolm Feely et al (eds.), *Liberalism and Lawyers* (Hart 2007).
[24] Neta Ziv, 'Regulation of Israeli Lawyers: From Professional Autonomy to Multi-Institutional Regulation' (2009) 77 Fordham Law Review 1763.
[25]Barziliai (n 23).
[26] Ibid.

in Israel's political culture, the importance of lawyers in social movements and human rights campaigns more generally, as well as by several cohorts of Israelis lawyers trained in the US who returned to Israel and applied their legal knowledge and the norms of political struggle through litigation.

The first Israeli human rights NGO, the Association for Civil Rights in Israel (ACRI), was established in the mid-1970s. For years it remained the only human rights organization in the country. Many of the other well-known human rights NGOs were established in 1988-1990, around the eruption of the first intifada, including B'Tselem, Hamoked (hotline), The Public Committee against Torture in Israel, and Physicians for Human Rights Israel. This wave of NGOs was mainly a response to rights abuses in the first Intifada, but it was affected also by the growing importance of human rights in the Israeli discourse (with the Basic Law and the constitutional revolution), Israel's ratification of the major human rights Conventions in 1992, and the global rise of the international human rights movement at the same time.

Israeli human rights NGOs have never been part of the consensus in Israeli society and have little if any electoral power. They are often seen by the Israeli mainstream as traitors. Nevertheless they have "vastly disproportionate influence" on national security decision-making and claim much of the credit for the way in which international law considerations entered decision-making.[27]

NGOs and Litigation

Israeli human rights NGOs have been very active in litigation. Indeed it has been argued that their main channel of activity to advance human rights in the realm of public policy is the legal system.[28] Studies show that litigation in the Israeli Supreme court by NGOs has higher success rates than of individuals. NGOs are "repeat players" in the system, have more acquired expertise, resources to invest in fact-finding, and more experience and ability to conduct successful out-of-court settlements, something

[27] Cohen and Cohen (n 22).
[28] Assaf Meydani , 'Judicial Behaviour: A Socio-Cultural Strategic Approach - Conceptual Framework and Analysis of Case-Studies in Israel' (2008) 14 Israel Affairs 704.

particularly important for repeat players who can anticipate future dealing with the other party in the future.[29]

Israeli NGOs view petitions to the courts not just as a means to achieving reform but also as a means of gaining publicity, media attention, and public support. NGOs often invest in efforts to publicize court petitions in all stages of litigation. The media are indeed much more likely to report NGO petitions than other court petitions.[30] Dor and Hofnung characterise NGO litigation in Israel as having three goals: protest against state authorities, communication with the same authorities, and participation in decision-making. They argue that NGOs also frequently employ litigation whilst knowing that their chances of outright success in court are negligible. This is because litigation, even if not successful, makes petitioners known for fighting for the public good, and allows the possibility of bargaining with the public authority (often toward out-of-court settlements).[31] Litigation by NGOs can be seen therefore as an action designed not just to advance the general cause but also to enhance the organization's status, public platform and standing. Berkovitch and Gordon further argue that NGOs' strategic decision to invest in litigation is influenced by the fact that this is an activity favoured by donors and therefore can assist the organizations fund-raising.[32]

Two debates relating to NGO litigation will be covered in the next two sections: the question of whether litigation, even if successful, ends up sustaining the occupation; and the relationship between NGO legal activism and the political activism favoured by grassroots actors. A third debate, which will be summarised briefly here, concerns the advisability of focusing NGO resources on litigation rather than public mobilization in the political realm.

Cohen and Cohen, for example, argue that attempts to exert conventional political pressure by Israeli human rights groups would be doomed to failure, given their lack

[29] Yoav Dotan and Menachem Hofnung, 'Interest Groups in the Israeli High Court of Justice: Measuring Success in Litigation and in Out-of-Court Settlements' (2001) 23 Law and Policy 1.
[30] Bogoch and Gazit (n 3).
[31] Gal Dor and Menachem Hofnung, 'Litigation as political Participation' (2003) 11 Israel Studies 131.
[32] Niza Berkovitch and Niv Gordon, 'The Political Economy of Transnational Regimes: The Case of Human Rights' (2008) 52 International Studies Quarterly 881.

of popularity, and therefore they suggest that their power derives from their understandable decision to focus on petitioning the Supreme Court.[33] However, Meydani, for example, argues that the human rights NGOs' reliance on litigation is problematic: by acting through the courts rather than concentrating on mobilizing public opinion, NGOs can create the impression among the public of human rights as an elitist project, an interest only of a small expert group.[34] This effect can deflect from the ambition of NGOs to inculcate human rights norms as a basis for Israeli society. According to such views, appealing to the courts can be effective in the short run, but in the long run changes in attitudes and the emergence of rights-respecting policy-making would develop in a sustainable way only through popular demands from society. Therefore it was argued that human rights NGOs should concentrate on putting pressure on the political system and attempt mass mobilization of the public, rather than on litigation which disconnects the issues from the majority of the Israeli public.[35]

To some degree this dispute can be articulated as a debate around what should be the operational conclusions from the observation (shared by all sides to the debate) that there is a lack of consensus on human rights issues in Israel - or in less subtle terms, that most Israelis do not support the human rights of Palestinians. Some draw the conclusion that in these conditions the most effective route is the legal one, and that litigation can lead to changes in both reality and public opinion. Others draw the conclusion that the problem should be dealt with through changing public opinion, and that focusing on litigation can be not only unsuccessful but also counter-productive.

[33] Cohen and Cohen (n 22).
[34] Meydani (n 28).
[35] Assaf Meydani and Shlomo Mizrahi, 'The Politics and Strategies of Defending Human Rights: The Israeli Case' (2006) 39 Israel Law Review 39.

IV. THE "LEGITIMATION" DEBATE: DOES LITIGATION CREATE MORE HARM THAN GOOD?

Perhaps the key question for Israeli cause lawyers and organizations using litigation is the question: does litigation ultimately do more harm than good with regard to the protection of Palestinian human rights? While this question relates to several legal arenas (including for example the military courts), here it is explored in the most important context, of Supreme Court litigation.

While legitimizing state institutions is a concern in any legal struggle for social change, it is more acute when the situation is one of occupation, where the relevant population has no democratic say in influencing the state authorities, and when the legitimacy of the state's control over the occupied population (and territory) is the very core and essence of the struggle. This context brings into sharp relief the dilemmas of bringing minor but concrete victories and improvements versus sustaining an unjust system, of individual rights versus collective goods, and of short-term versus long-term gains and losses.

Small Victories and Broader Defeats

While there is no doubt that litigation against occupation policies occasionally succeed, the question remains whether these successes ultimately end up sustaining the occupation. The first argument of those critical of the role of the Supreme Court is that, contrary to its image, the court rules against the government only in very rare cases. They argue that on the whole the court did not restrain the occupation's policies, and has justified abusive actions such as closures of schools, house demolitions, or detentions without trial.[36]

More importantly in this context, critics argue that "landmark" victories for human rights litigation actually have a negative effect (from the perspective of the struggle for human rights and against the occupation). By occasionally countering government policies in highly publicised decisions, the court in fact confers legitimacy on many other (and sometimes similar) government policies. Such rare decisions are

[36] Ronen Shamir, 'Landmark Cases' and the Reproduction of Legitimacy: The Case of the Israeli Supreme Court' (1990) 24 Law and Society Review 781.

disproportionally reported by the media and analysed by legal scholars, contributing to the court's unjustified image as an impartial actor which boldly challenges the government in its pursuit of justice. The net effect of these isolated cases has been legitimizing the occupation regime. They provide a mask of rule of law which allows the occupation policies to be framed as a western democracy fighting terrorism rather than as a structural asymmetrical system of oppression.[37] By opening itself to petitions from the OPT, the court legitimizes the occupation for both the Israeli public and the international community. The court and the litigation supply the Israeli political and legal culture with the collective illusion that the rule of law prevailed in the OPT. While the rights and interests of some petitioners are protected, the overall net-effect can therefore be legitimizing and prolonging the occupation.[38]

Even when siding with petitioners, the overall problem is that the court created "oppression-blind jurisprudence", avoiding using the term "occupation", rarely questioning state's claims of "security needs", and de-contextualizing general questions by focusing on specific cases, and presenting narratives chime with the state ideology (for example, presenting a narrative of the state as a defensive democracy).[39] When litigation leads to creating and enforcing procedural guarantees in the context of abusive policies, this often comes with the price of legitimizing the same policies. For example, litigation has led to enforcing due process in the case of punitive house demolitions, which saved some Palestinians from demolition of their houses; but engaging with due process in the context of a practice which constitutes collective punishment prohibited by international law is also highly problematic is it legitimises the policy as such.[40]

This type of critique has led many to explore the counter-factual speculation that had the court declined to intervene in the OPT (or had NGOs refrained from petitioning it) the human rights situation would have been worse for a limited period of time; but

[37] Ibid.
[38] Kretzmer (n 17).
[39] Nimer Sultany, 'Activism and Legitimation in Israel's Jurisprudence of Occupation' (2014) 23 Social and Legal Studies 315.
[40] Ron Dudai, 'Advocacy with Footnotes: The Human Rights Report as a Literary Genre', 28 Human Rights Quarterly 783.

without the illusion of a rule of law, a public mobilization against the situation would have been more likely, in a way that would have perhaps ended the occupation.[41] Consequently, the option of ending NGO litigation has been periodically discussed among Israel's human rights community.

Litigation as Restraining Occupation Policies

The "legitimizing" thesis, while popular, has also been challenged over the years by scholars and activists who argued that the "restraining" function of the Court has been more important than its legitimizing one. Part of the argument draws attention to the many cases where the court did intervene and changed military and government policies – a glass-half-full type of argument. But in addition, many argued more broadly that bringing government actions under a legal regime, as result of its subjection to judicial review by the supreme court, creates a host of procedural constraints and limitations which improve the situation of at least some Palestinians.[42]

Others pointed out that though in formal cases the Court rarely rules against the state, its effects are much more profound when examining out of court settlements: in such cases, there were numerous occasions where litigation ended in out-of-court settlements in which petitioners got the remedy they sought.[43] While formal decisions against the state are not common, they do occasionally occur, and this serves as an implicit threat by the court and can convince the state representatives to agree to an out-of-court settlement rather than risk a formal decision against the state (which would also serve as precedent). Out-of-court settlements are an imperfect achievement: they do not serve as precedent, they involve deciding on human rights issues behind the scenes rather through public and clear-cut decisions, and they are based on the discretion of the court rather than clear legal avenues. At the same time it can be argued that they have the long-term effect on the legal bureaucracy of engaging in compromises with petitioners.[44] NGOs and state lawyers have also devised an informal practice of a "pre-petition" letter, in which NGOs announce/threat that

[41] Kretzmer David (n 17).
[42] See, for example, George Bisharat, 'Legitimation in Lawyering under Israeli Occupation' (1995) 20 Law and Social Inquiry 349.
[43] Yoav Dotan, 'Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the Intifada' (1999) 33 Law and Society Review 309.
[44] Ibid.

they will file a petition if they do not get an adequate response from the state. Sometimes such letters can themselves lead to solving an individual problem which the authorities otherwise refused to address. More broadly, the shadow of the court can be influential also in a wider sense, for example leading the state to avoid devising policies because of a concern they might not be approved by the court in the future; government agencies almost take for granted that any major policy decision would be challenged in the court.[45]

In addition, as mentioned earlier litigation can have important positive effects for NGOs' campaigns, irrespective of the result in court. It can, for example, bring the issues to the attention of the public, through the extensive media coverage the petitions and litigation process can generate, and it creates a body of formal documentation of the issues or events discussed (including through the state's response to the litigation). The information generated as a result of these proceedings can serve, for example, as official documentation of human rights violations before international mechanisms.[46]

The Lingering Dilemma

The extensive litigation concerning the wall can be used to illustrate the ongoing dilemmas on the use of litigation in our context. On the one hand the legal campaigns led to a change in the wall's route, resulting in reducing by around half both the territory and population of Palestinians "stuck" between the wall and the green line. However, the structure of the legal argument also legitimized the project as such.[47] The project as a whole was found legal by a high-profile decision, accepting the security establishment's rationales. The court accepted that the wall is built for security reasons alone and not for political reasons such as annexation, shaping future border or the interest of settlers (as human rights and left activists argue). It accepted the principle of building the wall inside the OPT on Palestinian land.[48] The need to alter

[45] Dotan and Hofnung (n 29).
[46] Hassan Jabareen, 'Transnational Lawyering and Legal Resistance in National Courts: Palestinian Cases Before the Israeli Supreme Court,' 13 Yale Human Rights and Development Journal.
[47] Yishai Blank, 'Legalizing the Barrier: the Legality and Materiality of the Israel/Palestine Separation Barrier' (2011) 46 Texas International Law Journal 309.
[48] Uri Ben-Eliezer and Yuval Fiensten 'The Politics of border and the Borders of Politics: Sovereignty and Autonomy around Israel's Human Rights Abuses in the Separation Barrier Project' (2011) 14 Mobilization: An International Journal 357.

some segments of the route can lead to strengthening the project as such, as it was subject to human rights-based judicial review. The cost of changing some of route could be seen by some as a small price - for Israel's government - given the internal and international gain in legitimacy, but at the same time there is also no doubt the litigation has had very positive effects for some Palestinian individuals and communities. This type of tension has led one leading Israeli human rights lawyer to describe his task as involving an "existential dilemma".[49]

While phrased as a dilemma and leading to many discussions, in practice – thus far at least – the idea that NGOs might boycott the Supreme Court has never materialised. Many activists and scholars argue that, from the perspective of individuals, what matters is their chances of getting a remedy to their own suffering. Arguments along these lines suggest that it should suffice that one prisoner unlawfully detained was released, one house saved from demolition, and so on, to justify litigation. The reluctance to boycott the court is also affected by lawyer-client ethics, where for many people the decision of the client to approach them and ask for legal representation is a sufficient reason to halt theoretical discussions and take the case to court. This is especially so in the context of Israeli lawyers and NGOs working for Palestinian rights, where, implicitly at least, an Israeli refusal to assist a Palestinian individual, in the name of caring for Palestinian rights, may seem invalid. Nevertheless the issue remains a key question for Israeli human rights advocates.

[49] Michael Sfard, 'The Price of Internal Legal Opposition to Human Rights Abuses' (2009) 1 Journal of Human Rights Practice 37.

V. LEGAL VERSUS POLITICAL ACTIVISM

While Supreme Court litigation and other forms of legal activism have been a key strategy of human rights NGOs in Israel, this has also led to some tensions with the more political forms of anti-occupation activism, which is mostly associated with grassroots groups rather than established NGOs. There are also many types of cooperation between these types of groups, often divisions of labour are mutually established, and individuals can be both paid staff members of NGOs and grassroots activists. However, tensions remain and have perhaps intensified in recent years, and discussions of human rights litigation in Israel must take these into account.

Grassroots Groups and NGOs

A renewed wave of grassroots anti-occupation groups emerged since the eruption of the second intifada, including for example Ta'ayush, Solidarity Sheikh Jerah, Anarchists against the Wall, and others. Unlike the more established NGOs, the grassroots groups are based on volunteers rather than paid staff, have little if any bureaucratic structures, their decision-making is diffused, and they depend less on organized fund-raising. Their work is based on direct action, and their ethos is grounded in the notion of being "on the ground", in explicit and conscious comparison with NGOS. In the discourse of this world these days the term "activist" (the English term is used in spoken Hebrew) denotes grassroots work, not NGO work. Grassroots activists, unlike human rights NGOs, are much more confrontational and often engage in civil disobedience (for example re unauthorised demonstrations, access to land closed by a closed military zone order and so on). Litigation often draws the NGOs to work inside the system, using proper channels, rather than working outside the system, through civil disobedience, demonstrations and so on, and this often leads to tensions between the two types of activity.

Legalistic NGOs, grounded in the confines of human rights law, also often takes public positions which can alienate the grassroots. NGOs tend to condemn Palestinian violence, while grassroots activists would rarely do it publicly (even while they object to it and will condemn it privately). NGOs would also condemn human rights violations of settlers (for example rare cases of Israeli police violence against them), while grassroots activists would rarely do so publicly.

More broadly the legal-oriented NGOs work in a slower, more organized manner than the rapid reaction the grassroots are accustomed to. Litigation to the Supreme Court can take months to arrange, petitions are written slowly, and even formal public letters from NGOs to the authorities can take several days and at times weeks to draft, be approved by legal advisers and so on. Grassroots activists, which often ask NGO to intervene, are frustrated by these working habits and what seem to them as needlessly cumbersome working methods, while NGOs are frustrated by the activists' lack of understanding as to the requirements of litigation-oriented work.

Another potentially divisive issue is that of joint work with Palestinian activists. For many grassroots activists, joint action with Palestinians is at the heart of their efforts, and has intrinsic value irrespective of any material success. Building working relations with Palestinians and maintaining solidarity with them is a key issue for the grassroots activists, who often also let Palestinians be the chief decision-makers in their joint actions. Human rights NGOs in the main do not share this ethos. Litigation work in particular gives advantages to Israeli lawyers over Palestinian lawyers (for example, with regard to language, experience and ability to negotiate with the state) and in general does not lend itself to joint cross-national work. The intimacy with the legal system gives Israelis advantage in representing Palestinians, but at the same time it emphasizes their distance from the Palestinian clients; and as Hajjar notes, while Palestinian political lawyers see themselves as soldiers in their nation's struggle, Israeli lawyers have more complex motives - in this way shifting definitions of identity and cause combine in the work of these cause lawyers.[50]

The Political and the Legal in Fighting the Occupation

One type of division between many grassroots groups and many NGOs is over the definition of "political" versus "human rights" activism (with the latter associated with "legalism", and the former breaks away from it). The starting point for political activism is the occupation as a system of oppression, a structure synonymous with injustice. On the other hand, from the perspective of human rights NGOs the main issue is the legal human rights violations taking place in the context of occupation, rather than the occupation as such. This difference may seem subtle but it is significant in practice,

[50] Hajjar (n 11).

both shaped by and shaping the legalistic strategies of NGOs versus the grassroots work. In general, human rights NGOs in Israel tend to be more legalistic and less political than other comparative cases, such as South Africa during apartheid.[51]

The discourse and practice of International Humanitarian Law (IHL) underlines the litigation and advocacy of human rights NGOs. It provides them with the legal and conceptual framework that states that even in times of wars and national emergencies there are some prohibited actions. At the same time IHL (and human rights law) is also a-political, in the sense that all parties to the conflict are equal, the question of the conduct of hostilities is separated from the question of restoring to force, and there is little engagement with root causes and with the question of which side is ultimately politically and morally responsible for the existence of the conflict. These limitations are for legalistic NGOs a reasonable price to pay for the strength that IHL provides them, but the same limitations can be alienating and even appear odd for grassroots groups.

IHL conceptualise occupation as a factual situation, rather than a normative one. Moreover, occupation is meant to be temporary, sovereignty cannot be invested in the occupier, and people in the occupied territory should have their right to self-determination respected. These conditions are not met in the OPT, but notions of the "illegality of the occupation" as such have not influenced the legal discourse.[52] For grassroots activists, following IHL and seeing the occupation as a factual rather than normative situation goes against the very heart of their political motivations and vision. The grassroots discourse also moved in recent years to present the situation in the OPT as resembling apartheid or colonialism, a shift that thus far the legalistic NGOs have avoided, considering it to be based on "political" rather than legal analysis.

In addition, as was seen in other places and contexts, litigation itself can also cause de-politicisation and de-radicalization of the struggle against the occupation. The energy of the battle is exhausted in the courtroom and political battle subsides while

[51] Stanley Cohen, *The Human Rights Movement in Israel and South Africa: Some Paradoxical Comparisons* (Hebrew University of Jerusalem, 1991).
[52] Orna Nen-Nafatali and Aeyal Gross, 'Illegal Occupation: Framing the Occupied Palestinian Territory' (2005) 23 Berkeley Journal of International Law 551.

awaiting the legal remedy, as perhaps happens with some of the anti-wall campaigns. Blank suggests, for example, that legal campaigns against the wall put professional experts on the foreground, elaborating planning, health, security, psychology and other professional assessments in making the case for the harms of the wall, taking over the discussion and turning it into a technocratic debate.[53] These and other risks and concerns led to profound disagreements between activists and professionals regarding whether to pursue a legal course of actions or focus on extra-legal activities.

For example, many activists object to the barrier/wall, on political and moral grounds, objecting to the very idea of forced separation between Israelis and Palestinians. For those activists any barrier as such would have been illegitimate, even if constructed exactly on the Green Line. But from a legal perspective, a barrier on the Green Line would have been legal, and indeed practically all legal challenges to the wall accepted that a wall on the green line would have been legitimate and that it is its incursion to the OPT which makes it illegitimate.[54] In addition to the legal campaigns, the wall has been a site of grassroots activism, including the very high-profile joint Friday demonstrations, which continue to this day. These demonstrations were based on a total rejection of the wall - not just segments of it. They illustrated a mode of action which does not engage with specific state institutions, and are premised on the importance of joint work with Palestinians, as well as the importance of engaging solidarity activists from abroad. The emphasis of joint Israeli-Palestinian activity in protesting the wall was also an important symbolic and practical response to the separation premise of the entire project.[55]

On one level there can be division of labour and even symbiosis between the two types of campaigns, with the extra-legal protest mobilizing and capturing media and public opinion in support of the litigation, and the legal battle conferring legitimacy on the protests. But it can also be argued that on another level the two types are in tension with each other. While litigation and mass mobilization could work in synergy, in practice this rarely the case. Occasions where public mobilizations were successful –

[53] Blank (n 47).
[54] ibid
[55] Nen-Nafatali and Gross (n 52).

for example, the 2009-2011 protests over settlement in Sheikh Jerah, East Jerusalem – were grounded in political rather than legal campaigns.[56] Yet the operational conclusions which should be drawn from this observation are still unclear and hotly debated by activists and lawyers.

[56] This is also the case with the massive public protests over social justice in Israel, in the summer of 2011, where lawyers and legal arguments were almost totally absent. See Shulamit Almog and Gad Barzilai, 'Social Protest and the Absence of Legalistic Discourse: In the Quest for New Language of Dissent' (2014) 27 International Journal of the Semiotics of Law 735.

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