**Cause Lawyering and Resistance in Israel: The Legal Strategies of Adalah**

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**Abstract**

This article traces the unique dynamic of cause lawyering in the context of a settler colonial situation in which justice is framed ethnically but operates within the framework of liberal democratic institutions, such as the case of the State of Israel presents. It does so through the examination of the work of one of the most prominent Palestinian Non Governmental Organisations (NGOs) engaged in legal activism: ‘Adalah – The Legal Centre for Arab Minority Rights in Israel’. Using interviews with legal activists and scholars in Adalah and beyond, combined with the analysis of legal documents and publications, this article offers an evaluation of the efficacy of legal resistance, addressing its advantages and limits within the Israeli scenario. This article argues that the law has an important role in this struggle; whilst its capacity to affect political change is indeed limited, it should not be dismissed outright. Sometimes the law is one of the few meaningful sources of influence, and much of the time it serves to expose the contradictions in the hegemonic system, thereby uncovering its weaknesses and forcing it to reveal its oppressive nature. Yet, since the utilization of the legal sphere for resistance is a practice found in between submission and subversion, this article analyses the ways in which this tension can be overcome.

**Keywords**

Cause lawyering, hegemony, Israel/Palestine, resistance, Palestinian citizens of Israel, Zionism

**Hegemony, Law and Resistance**

The Israeli state, and the legal system as one of its main institutions, exists in a dialectic of constraints and possibilities with its ‘other’, namely, the Palestinian citizens. The Palestinian citizens are stranded in a unique situation in which they are citizens of a state that defines itself as Jewish but at the same time seeks to be a liberal democracy. It attempts this by granting the members of the minority some rights as individuals, whilst at the same time preserving the de facto and de jure hegemony of the Jewish majority (Masri, 2013). Following the establishment of the state in 1948, although gaining Israeli citizenship, Palestinian citizens lived under military regime regulated by a legal frame of emergency regulations that restricted their rights and freedoms (Jiryis, 1976; Kretzmer, 1990; Robinson, 2013). With the abolition of the military regime in 1966, the Palestinian citizens found themselves living under a different set of laws; however, despite the removal of many restrictions, issues regarding access to land and citizenship have remained outside the reach of the Palestinian citizenry to this very day.

However, segregation and discrimination are not inscribed into the written word of law. Indeed, a main characteristic of Israeli law is the existence of the formal equality of the joint rights of citizenship: political rights, freedom of expression and the right to demonstrate and freedom of movement, and there are no distinctions based on the grounds of national belonging. The actual diversions from the principle of equality are few and appear in relation to collective rights (Kretzmer, 1990; Saban, 2008). Moreover, the Israeli legal system self-represents and is invariably described by Israeli politicians to both international and local audiences as an autonomous and unbiased one based on the supremacy of the rule of law. Israeli politicians and diplomats proudly and repeatedly proclaim Israel’s respect for the rule of law to both foreign and domestic audiences.1 Politically unpopular decisions of the court, rare as they are, are lauded as evidence of the independence of the judiciary.2 Hence, because of the state’s adherence to the rule of law, there is a theoretical, and sometimes real, possibility that the state can be vulnerable to legal contestation, and a potential margin of resistance within the law does indeed exist.

However, the Zionist principle of Israel as a ‘Jewish and democratic’ state lays the foundation to the definition of the polity, its public culture, policies and the scope of protection of constitutional rights (Masri, 2013: 322). Following the rich theoretical literature that conceptualizes and problematizes the concept of ‘hegemony’ that focuses on the delicate balance between consent and coercion in the creation of the people’s ‘common sense’ (Anderson, 1976; Gramsci, 1988; Gramsci et al., 1971; Fontana, 2006; Lears, 1985; Mouffe, 1979), this article argues that Zionist ideology, embodied in the idea that Israel is and should remain a Jewish and democratic state, gained hegemonic status among the Jewish Israeli citizens. This definition is enshrined in some of Israel’s Basic Laws (Human Dignity and Liberty, Freedom of Occupation and the Knesset) and ‘plays an important role in defining the polity, the public culture, state policies and the scope of protection of constitutional rights’ (Masri, 2013: 322). The fact that the law sustains the hegemonic ideology of the state is not unique to the Israeli case and is part of the general functioning of the law (Gabel and Harris, 1983 [1982]; Giddens, 1985; Gilroy, 1987; Goldberg, 2002; Povinelli, 2002).

Whilst the idea of a Jewish and democratic state gains support through mechanisms of legitimation in Jewish society, the most important of which are the education system, the military and the media, it is improbable to assume that Israel’s Palestinian citizens internalize Zionist ideas and willingly consent to Zionist ideology. However, Palestinian citizens are also not subjected to a system of direct domination: they must be seen as part of the hegemonic system in Israel, whilst acknowledging the fact that they are mostly coerced into compliance with it. The issue of legal status is significant – whilst Palestinian citizens are subject to the Israeli legal system, with the privileges and obligations that come along with citizenship, they are excluded from a system of privileges that is the sole domain of the Jewish citizens of the state. At the same time, they are subject to the emergency laws and regulations activated frequently in matters considered as involving ‘national security’ (Kretzmer, 1990; Saban, 2002, 2008). Indeed, as Masri (2013: 327) explained, ‘there is no one uniform Israeli citizenship, but different categories of citizenships, depending on the ethnic/national belonging of the individual’.

Due to their position as being both Palestinians and Israeli citizens, several scholars highlight the fact that Palestinian citizens view Israeli citizenship as the best way in which they can promote their rights and wage their political struggles. Hence, there is a political consensus that all forms of resistance should be conducted within the limits prescribed by Israeli law and enforced through Israeli institutions (Jamal, 2007; Rouhana, 1990). This pattern can be framed as part of general minoritarian behaviour under which people ‘respond to state injustice and utilize all possible options available to them within the repertoire of citizenship before adopting more radical challenges to the state’ (Jamal, 2007: 264). Thereby, the repertoire of resistance, which seems available to the Palestinian citizenry, is shaped by the nature of the regime, which controls it and frames reality and the possibilities according to it. Thus, citizenship is viewed

as an opportunity and resource for mobilization, a space of manoeuvre for resistance that is protected from the exercise of the state’s brute force. Indeed, due to Israel’s democratic structures and legal culture, the state leaves spheres and spaces for protest as well as hope for democratization. These can be utilized in the struggles against the very nature of the state.

**Adalah – ‘The Centre for Arab Minority Rights in Israel’**

The situation of enduring discrimination on the one hand, together with the existence of a space of resistance, due to the nature of the law and the democratic structures of the state on the other, have been the grounds on which Palestinian civil society organizations engaged in legal activism have developed. One of them, Adalah, is the focus of this article. Whilst Palestinian lawyers publicly litigating in Israeli courts for political purposes have existed in Israel for many years, the establishment of Adalah brought to the institutionalization of Palestinian citizens’ appeals to the courts (Barzilai, 2007). Adalah’s establishment filled a gap that existed in the arena of legal advocacy in Israel, which until then had been dominated by Association for Civil Rights (ACRI) in Israel, which at the time focused its work on individual human rights. This focus, according to Hassan Jabareen, Adalah’s co-founder, and Orna Kohn, who worked in Adalah since its establishment, was something that they found unfitting for the actual situation of the Palestinian population in Israel, which is determined by the political reality (interview

with Jabareen, 2011; interview with Kohn, 2009 and 2010).

Starting in 1996 as the legal department of the Arab Association for Human Rights (Arab HRA), Adalah (‘justice’ in Arabic) soon became an independent human rights organization that devotes its work solely to legal activism and advocacy, with an emphasis on Palestinian collective rights inside Israel. Today, it works alongside other human rights organizations, including ACRI, Sikkuy – The Association for the Advancement of Civic Equality, Mossawa and others. Many times, it struggles in court in collaboration with one or more of the parallel organizations, but its uniqueness lies in its focus on Palestinian civil and political rights within Israel and the primacy it gives to legal channels in order to achieve its goals.

In the background of Adalah’s establishment stood the combination of two processes.

The first was the political climate of the early-Oslo years that focused on institutionalizing the relations between the Israeli government and the Palestine Liberation Organization but left untouched the issues relating to the Palestinian citizens. It was at this juncture that the Palestinian citizenry started challenging the nature of the Israeli state as a Jewish state and their location as citizens within it. The other was the enactment of two constitutional laws, the 1992 Basic Law: Human Dignity and Liberty and the 1994 Basic Law: Freedom of Occupation. Although legally grounding for the first time the character of Israel as a Jewish and democratic state, these laws brought a substantial change to the status of human rights in Israel. These new laws enabled the Supreme Court to measure other laws and governmental decisions according to their compatibility with the provisions of the new laws and consequently opened up a space of manoeuvre within the law that did not exist beforehand.

Adalah’s stated goals are to achieve equal individual and collective rights for the Palestinian citizens in Israel in different fields including land rights; civil and political rights; cultural, social and economic rights; religious rights; women’s rights and prisoners’ rights as well as involvement in the protection of human rights in the Occupied Palestinian Territories (OPT). Today, Adalah operates as a human rights organization that deals with a variety of issues concerning the Palestinian citizens of Israel and uses public tools and international platforms to achieve and advance its goals: it advocates legislation that will ensure equal individual and collective rights for the Palestinian citizens, appeals to international institutions and forums, provides legal consultation to individuals, non-governmental organizations and Arab institutions, organizes study days, seminars and workshops and publishes reports on legal issues concerning the rights of the Palestinian minority in particular and human rights in general.

Abeer Baker (2010, interview), one of Adalah’s senior attorneys, explained to me that Adalah is using the law as both a shield and a sword: We see our role as pushing forward positive rights and not only negative rights. This means that we do not only defend citizens against something that happened to them, such as land expropriation or arrests during political protests, but we are dealing also with positive rights, which means that we are demanding that things will be done in a way that will promote the rights of the Palestinian community in Israel.

Following the work of Adalah, this article examines the ways in which the law is manifested in the constellation of the Jewish democratic state, and if, and how, it can be used

in the struggle against this contradictory self-definition. Theoretically, it traces the unique dynamic of cause lawyering in the context of a settler-colonial society in which justice is framed ethnically but operates within a framework of liberal democratic institutions. In doing so, it offers an evaluation of the efficacy of this strategy of resistance, addressing its advantages and limits within this particular scenario, and elucidating the meaning of cause lawyering in a colonial/liberal context. This article argues that the law has an important role in this struggle; whilst its capacity to affect social–political change should not be exaggerated, at the same time, its effect should not be dismissed outright. Sometimes the law is the only meaningful source of influence, and much of the time it serves to expose the contradictions in the hegemonic system, thereby uncovering its weaknesses and forcing it to reveal its oppressive nature. This potential exists since the law also provides a space for counter-hegemonic struggles: since the state has to maintain the legitimacy of its rule both internally and externally, power relations have to be masked, and the law must appear to be just and independent of manipulation. Apart from appearance, in many cases, namely in democratic societies, there must be a real space for

the citizens to question and object to what they see as unjust in the attempt to challenge and change it. Thus, it can be determined that the limitations of the law operate on the rulers as well as on the ruled (Fitzpatrick, 2008; Thompson, 1975). Hence, the legal battles should be seen as part of the long and steady counter-hegemonic project.

Through the discussion of Adalah’s role, its uniqueness, the background for its activity and its actual work, I offer an analysis of the possibilities, limits, constraints and boundaries of legal resistance as well as the possible way out of these limitations. In this regard, I consider Adalah’s lawyers as cause lawyers. Cause lawyering can be defined as ‘any activity that seeks to use law related means or seek to change laws or regulations to achieve greater social justice – both for particular individuals [ . . . ] and for disadvantaged groups’ (Sarat and Scheingold, 1998: 37). I conceptualize Adalah’s legal strategies as ‘legal resistance’ which is treated here as a practice that ‘seeks transformative goals while working within legal processes that are wedded to the established order’ (Scheingold, 1998: 124). Litigation can be considered to be the most prominent form of legal resistance, but the term includes any resistance practice that is conducted within the existing law and legal institutions of the state.

The primary research material for this research is extensive semi-structured interviews

and open and informal conversations conducted during several research trips to Israel during 2009–2013. I interviewed current and former attorneys and other officers of Adalah. To inform and enrich the discussion, I also interviewed independent attorneys who dedicate their work to cause lawyering, who provided a critical perspective on the organizational legal work of Adalah. Additionally, I spoke with scholars from the fields of law, politics and sociology, in conversations that contributed greatly to the processing of data and provided insights that enriched my analysis. This research project also entailed discourse analysis of legal materials, including documents, appeals to the Supreme Court and position papers. Furthermore, other verbal and written statements, publications, and reports were examined and evaluated. Since this project is grounded in social and political analysis, these materials are dealt with accordingly; they were read in their social and political setting. Since most of the material involved in this research is found within the rubric of attempts within Israeli law to subvert it, close attention is paid to the use of language, frames and to the context in which they were produced, the identity (political, national and social) and social location of the actors who produced them as well as to the silences within them.

Adalah’s legal resistance will be discussed here through the lenses of three cases in which the organization was (and still is) involved, representing three different types of resistance in relation to the law. First, engagement with the law through litigation. Here, I analyse the strengths and shortfalls of litigation in the context of the battle against the Citizenship and Entry into Israel Law (citizenship law). Second, public campaigning and representation. In this section, I assess the power of advocacy and public campaigning with specific reference to the events of October 2000 and their aftermath. Finally, the transformation of the law in the form of a political/legal proposal. In this section, I scrutinize the programme for the transformation of the state and the legal system offered in Adalah’s Democratic Constitution. In examining this range of cases geared towards varied ends, this article offers a measured consideration and a critical evaluation of the full spectrum of Adalah’s legal and political activities.

**The Possibilities and Limitations of Litigation:**

**Israeli Citizenship Law**

At the end of March 2002, Eli Yishai, then Minister of Internal Affairs, decided that all requests for family unifications submitted by Palestinian citizens of Israel married to Palestinians from the OPT would be frozen until further notice. The decision was made following the suicide attack at the ‘Matza’ restaurant in Haifa, which was executed by a person who had acquired resident status through family unification procedure. Government decision 1813, taken on 12 May 2002, declared that all requests for family unification regarding Palestinians from the OPT would be frozen, due to the ‘security situation’ (The Government, 2002). On 4 June 2003, a governmental bill, Nationality and Entry into Israel Law (Temporary Order) – 2003, based on Governmental Decision 1813, was submitted:

During the period in which this Law shall be in effect [ . . . ], the Minister of Internal Affairs

shall not grant a resident of the region nationality pursuant to the Nationality Law and shall

not give a resident of the region a permit to reside in Israel pursuant to the Entry into Israel

Law . . . (The Government, 2003)

On 31 July 2003, the majority of parliament members voted for the governmental proposal

and the law was enacted as a temporary order for the period of one year. However, its duration has continued to be extended ever since. The law puts a complete halt on the submission of new applications by citizens requesting status for their spouses who are residents of the OPT and explicitly excludes Jewish settlers residing in the OPT, thus affecting only Palestinians.

Ever since its legislation, Adalah has fought against this law. It has petitioned the Supreme Court, challenging the law and trying to halt its application, sent letters and petitions to the Minister of Internal Affairs, addressed members of parliament and issued press releases and appeals to various international platforms such as the United Nation’s (UN) committees for human rights and the European Commission. Here, the focus is on Adalah’s struggle on the local legal stage, namely, the Israeli Supreme Court. In August 2003, Adalah filed a petition to the Supreme Court against the new law calling for its nullification. Petitions to the Supreme Court are divided into two parts: the factual part in which the petitioners are free to unfold ‘the story’ and the legal part in which the petitioners must keep the argumentations strictly legal and grounded in precedents, laws and legal conventions. The tension and gap between the factual description and the legal argumentation highlight the tensions within which Adalah functions: between the adherence to the word of the Israeli law and the desire to achieve justice.

In accordance, it seems that the ‘subversive’ practice can be found only in the factual

part of the petition rather than in the legal argumentation. However, further investigation proves otherwise, when the practice of petitioning and litigation is placed within a context that has different aims. These are elaborated below. In Adalah’s petition, the factual introduction to the petition narrated personal stories of Palestinian couples whose lives together would become impossible as a result of the new legislation. Additionally, Adalah claimed that the law was enacted in the absence of sound factual grounds elaborating the need for this law and its repercussions. The petitioners proved that the records showed only twenty cases of suspected involvement of Palestinians with Israeli citizenship in terror attempts, out of a population of many thousands of inhabitants of the OPT who had received resident status in Israel due to the unification of families.

Adalah’s main legal argumentation was based on the assertion that the law explicitly contradicted the instructions of Basic Law: Human Dignity and Liberty, namely the constitutional right to equality between citizens. Hence the discrimination against Palestinian

citizens in the law is apparent from ‘the clear, unambiguous wording of the law’. The petition continued, claiming that: The constitutional status of the principle of equality is required for a constitutional regime built on a free and democratic society. [ . . . ] A society that wishes to establish itself on the fundamental principle of freedom and equality has no choice but to recognize the constitutional status of the principle of equality.

It is not surprising that the petition had to follow strictly legal argumentation, using the state’s concepts and narratives of ‘liberal democracy’, ‘constitutional rights’ and ‘equality between citizens’. The legal field has established conventions that must be adhered to by those who choose to enter it. In the Israeli context, the Palestinians find themselves fixed in legal categories that enshrine their historical national reality as a minority in their homeland, as citizens of a state that is not theirs. However, of interest here are the silences in the petition that Adalah’s lawyers were obliged to keep, which found their expression outside of the petition and the court.

Whilst insisting on constitutional rights and democracy was a good legal tactic, a more sincere line of argumentation is revealed in Adalah’s lawyers’ publications, where they expressed their conviction that security considerations have been used many times as a cover for ideological-demographic ones and that what guided the legislators in this case was the need to preserve the Jewish character of the state (Baker, 2005). Accordingly, Adalah maintains that ‘security legislation’ often serves as a disguise for ideological motives and becomes part of the general law (Esmeir, 2004: 8). Finally, Adalah’s lawyers claim that this case marked a transition from discrimination to extreme racial oppression, leading to the conclusion that this law was not only blatantly and radically unconstitutional but it also contradicted basic human

morality (Jabareen, 2004).

The Supreme Court gave its decision after almost 3 years, rejecting Adalah’s petition (together with six other petitions against the law) by a six-to-five majority. Deputy Chief Supreme Court Justice Michael Cheshin, who was in the majority, maintained that the law did not violate constitutional rights and even if it did, the violation was proportional. He explains that: in a ‘‘state of war’’, the state is entitled to prevent the entry of enemy nationals into its territory [ . . . ]. The Palestinian residents of the region are enemy nationals and as such, they

constitute a risk group [ . . . ]. For this reason, the state is entitled [ . . . ] to legislate a law

prohibiting their entry into the state. (H.C. Decision 7052/03, 2006) As an immediate response to the Court’s decision, Adalah issued a press release stating that the court had approved the most racist law to date, a law that even the apartheid court in South Africa had refused to approve since it undermines the most fundamental right to family life (Adalah, 2006). Ever since the Court’s decision, the law has been extended continuously, albeit with minor amendments put in place, whilst Adalah has tried to challenge these extensions.

Examination of the text of the petitions and the nature of the legal arguments brought forth by Adalah reveals some of the inherent limitations of resistance in courts. The legal argument of Adalah follows the logic of proving the new law to be unconstitutional and unsuitable for a liberal democracy. As many lawyers point out, appeals to court and the choice of struggle in the legal system of the state bear some concessions that must be understood and calculated in advance. Adalah could not have used arguments accusing the state of deliberate discrimination in the name of demographic considerations and the preservation of the ‘Jewish state’. Nor could it have straightforwardly attacked the alleged security considerations that were brought up. Instead, it had to maintain and use a certain language, confined within the boundaries of the acceptable legal discourse, in which the law can be challenged only from the point of view of the existing legal framework of the state. This meant that the law had to be examined in the light of Basic Law: Human Dignity and Liberty, which is meant to guarantee equality and dignity to all citizens.

The paradox in this line of argument is that the issue at the basis of the citizenship law

and the court’s decision is found in the nature of Israeli law itself and the premises on which it is based: Israel as being both a Jewish and democratic state. Thus, a certain degree of discrimination will always have to be justified within the law, and the question thus becomes centred on the extent of discrimination and not on the discrimination itself. Following this line, the claim that the law is unconstitutional under Israeli law is in fact ignoring the problematic nature of the Israeli political ideology on which the law is based.

This issue opens up an important discussion about the paradoxes that are part and parcel of legal resistance, first and foremost of which is the question of legitimation, which is found at the core of debates among professionals and legal scholars in various contexts where lawyers operate or operated within oppressive systems (on South Africa see Abel, 1995 and Ellman, 1995; On Palestine see Reynolds, 2010 and Bisharat, 1995; On Northern Ireland see McEvoy, 2000; On Feminist critique of International Criminal Court see Halley, 2009 [2008] and MacKinnon, 2006 [2005]). Stephan Ellman explains the legitimation dilemma:

those who seek to challenge unjust states by using the law of those states against them are

very likely to feel tarnished by the need to speak in terms of laws they despise. [ . . . ] It is

even worse to wonder whether one’s desperate efforts to maneuver within an unjust system

in the end add luster to that system and so help preserve the evil one opposes. (Ellman, 1995:

339)

The issue is therefore two-fold: on the one hand, to take part in the oppressive system as a default condition of litigating within its courts, and on the other hand, the fact that litigation can help maintain the illusion that the oppressive system is operating justly. An additional aspect to the legitimacy dilemma is the fact that the state uses internal opposition such as litigation in courts (and other channels of resistance from within state institutions and systems) in order to better assess the feasibility and ease of implementing its policies. As the Israeli human rights lawyer Michael Sfard clearly illustrates in his discussion of ‘fine-tuning’ the Israeli occupation of the OPT, resistance can thus become part of the practice to which it objects and a phase in the policy structuring procedure (Sfard, 2009: 48).

In our context, many lawyers indeed point to the fact that the law serves to legitimize

the Israeli political authority, and therefore recourse to the Israeli courts provides legitimacy

to the courts and thereby sustains the Zionist hegemony that is found at their base. It also assists the State of Israel to hold to its claim to be a democracy, since the Supreme Court in particular maintains a positive image, both locally and internationally, as the ‘gatekeeper of Israeli democracy’, a vanguard for the protection and maintenance of human rights in the country (Reynolds, 2010: 7).

In the attempt to assess the legitimation dilemma, the question of audience and effect

becomes relevant. In other words, could an oppressive system be considered legitimate

by those who are oppressed by it? George Bishrart, in his study of Palestinians in Israeli

military courts in the OPT, holds that the law, as a tool of legitimation, may be effective

only among those proximate to the centres of social and political power. ‘The effectiveness

may diminish, however, as the law radiates ‘‘outward’’ in the direction of socially

and culturally marginal groups in the society, or ‘‘downwards’’ in the direction of less

powerful social classes’ (Bisharat, 1995: 560–561). Indeed, as Ellman emphasizes, the

legitimacy effect is more important for the rulers that need to legitimize their conduct

and win and maintain the approval of those groups in society that they seek support from.

In this way:

Law may well have helped legitimize apartheid in the eyes of whites; occupation of the

West Bank and the Gaza Strip in the eyes of Israelis; and campaigns against the left in the

eyes of some portions of Brazilian and Argentinian society. (Ellman, 1995; 344)

Hence, the legitimacy argument here concerns mainly the Israeli regime and its supporters

(in the Israeli society and beyond) and forms part of its internal discourse, in

which the Supreme Court has an important role of legitimation.

However, the third dimension of the audience/effect question is the international

arena, where the work of lawyers opposing injustice may offer some reassurance about

the fundamental legitimacy of the system as a whole. Indeed, resistance to Zionism has

an important international dimension and therefore the question of the effect of the

Israeli Supreme Court on the international public opinion is important and still needs

to be taken into consideration. Despite the legitimation effect it might have, litigation

can have positive effects on the international arena, as will be elaborated below. In total,

the legitimation dilemma is complex and must always be examined in light of the costs

and benefits in the particular context, and this is part of the day-to-day dilemmas a cause

lawyer must deal with.

In any case, since the hope of creating change through litigation is limited to smallscale

victories and first aid to individual clients that materializes occasionally due to the

fact that this will necessitate a change in the political and legal culture as a whole, litigation

assumes a different role.

One of the most important roles of litigation is to expose contradictions in the Jewish

and democratic state formula, and to force the court to face these contradictions and the

need to defend them time and again. In this sense, there is an accumulative effect that can

influence the court, together with the fact that it also creates pressure on the system.

(Similar discussion that sees legal battles as part of a larger war appear in Harlow and

Rawling’s (1992: 295) analysis of the use of litigation in England for political ends.)

Indeed, legal centres and human rights organizations such as Adalah focus on creating

the memory of the court regarding its failure to defend human rights and its submission

to repressive ideology (Sultany in Dakwar, Saban and Sultany, 2006). Exposure of contradictions

in the system forces hegemony to be more explicit in its coercive nature and

in its need to defend itself and repress attempts at resistance against it. Examining the

Supreme Court’s ruling regarding the family unification case in this light, one can claim

that the ‘bright side’ of the ruling lies in the fact that it exposes the system’s problematic

nature; as the court becomes more self-consistent, its adherence to the system of subordination

becomes more apparent.

Another related role of litigation is the exposure of information that otherwise would

be kept hidden from the public. Appeals to court often attract media interest and can

serve to expose to the public hidden aspects of the (Israeli) regime and its practices. This

exposure of information in turn contributes and adds strength to campaigns and struggles

waged by social movements and stir public debate. It exposes the brute force of the state

that may be rendered illegitimate or at least questionable (Harlow and Rawling, 1992:

295).

Additionally, litigation constitutes the documentation of the struggle and functions as

both history writing and narration of the resistance. Litigation in these types of cases,

which can be defined as ‘losing causes’, constitutes a refusal to accept the present and

lawyers carry a vision of the future in which ‘justice prevails over that violence’. In this

way, the lawyer also serves as a witness, testifying against these injustices. The lawyer is

thus ‘bearing witness, writing history’ (Sarat, 1998: 322).

Litigation also empowers the individual or community that is using it, and therefore

many groups tend to resort to litigation to compensate for their disadvantages or exclusion

at the political level (Harlow and Rawling, 1992: 292). Accordingly, Palestinian citizens

tend to take to court because of the limitations they encounter at the political or

bureaucratic levels. Finally, litigation can also be used as a first step before an appeal

to international platforms: it can be utilized in campaigns that aim to influence public

opinion also internationally. This strategy was used extensively in the Northern Ireland

case, where Republicans sought to embarrass the British government and to expose state

abuses on an international level (McEvoy, 2000: 553–557). Adalah is certainly using it in

that way, in its appeals to extra-juridical international platforms such as the UN or the

European Union, in a way that serves to erode Israel’s international standing and image.

A report Adalah submitted to the EU in February 2011 together with the Arab HRA

serves as an interesting example. The report deals with the Palestinian minority status

in Israel and the specific steps the EU could take in this regard. The reportenumerated

cases of discrimination against the Palestinian citizenry Adalah was

involved in, embodied in legislation (such as the citizenship law) and limitation of political

participation (disqualifications and restraints on political activity), among others.3

Following the submission of this report, the EU issued a statement for the first time calling

upon Israel ‘to increase efforts to address the economic and social situation of the

Arab minority, to enhance their integration in Israeli society and protect their rights’.4

Additionally, Adalah participates and intervenes in different UN committees, where

states are monitored for their compliance with treaties and conventions they sign on.

In these committees, Israel is often implicated in ‘issues of concern’ regarding different

aspects of its treatment of the Palestinian citizenry in the country, also based on Adalah’s

ongoing local involvement and monitoring.5

Moreover, litigation, and the limited possibilities it poses in terms of achieving actual

victories in courts, is often used just as a first step before addressing international legal

platforms such as the International Court of Justice (ICJ) in The Hague. A striking example

of this is the case of the wall Israel is building in the West Bank, submitted in 2004 to

the ICJ after a failed attempt to achieve an Israeli legal condemnation of the legality of

the wall itself. On July 2004, the ICJ indeed determined that the construction of the wall

is contrary to international law and therefore illegal, and ordered Israel to dismantle it.

Despite the fact that this legal victory did not have any effect on the ground since Israel

refuses to recognize the application of this decision to it, and the construction of the wall

is still underway, it had a rather enormous effect on campaigns ever since, the most significant

of which is the Boycott Divestment and Sanctions (BDS) campaign. The Palestinian

call in July 2005 for the international community to adopt a policy of boycott,

divestment and sanctions against Israel until it complies with International Law mentions

that it drew its inspiration from the ICJ decision.6

In spite of these important roles assumed by litigation, whilst Palestinians are unlikely

to support an ideology or system of government that is built upon their oppression, the

legal struggle might weaken the intensity of other forms of resistance. Some lawyers

refer to this as the ‘anaesthetic effect of the court’. This means that the appearance of

recourse to justice transfers responsibility to the justice system and its representatives

and can lead to the paralysis of other forms of struggle and in general to the legalization

of the political struggle (Esmeir and Rosenberg, 2000; Sfard, 2009).

Adalah’s lawyers testify that they are aware of this limit and try to maintain the delicate

balance. Abeer Baker (2010, interview) confirmed that Adalah thinks about and

examines every case in depth before it agrees to take it to court, taking into consideration

the possible risks, outcomes and implications, ‘[I]t is a struggle with strategies and tactics.

You do not go to court for every violation of human rights; you have to think about

the bigger picture’. Nevertheless, critique of Adalah’s use of litigation can be found. In a

conversation about the limitations of the legal work, Lea Tsemel (2010, interview), an

independent attorney who has worked for over 40 years in the defence of human rights

both inside and outside the Green Line, mentioned that for her:

the legal struggle around Citizenship and Entry into Israel Law is nonsensical. We must

organize the people; we must go out to the street and protest. It is horrible when we replace

political work with legal work. We are losing cases in court instead of doing the hard political

work.

Raef Zreik, a former member of Adalah and a legal scholar mentioned a similar critique,

claiming that Adalah, in the specific decision of the citizenship law’s appeal, could

not have achieved anything, since ‘even a legal victory cannot uproot the Jewish public’s

feeling that they are in demographic danger’, which means that ‘even if the court will

overrule [the law], something else will come up’. Therefore, the litigation strategy in this

case is futile (Zreik, 2010, interview).

In sum, whilst litigation can be indeed an important tool of resistance, and it has its

potentials and benefits, in the light of its limits it should be used carefully and strategically.

A possible way out is limited use of litigation in a wider context of sociopolitical

legal calculation, where the variety of possibilities for collective action is found under

constant examination, measuring the possible benefits and costs of each particular strategy.

Additionally, legal struggles should not replace mass participation political struggles

on the ground, as these could influence public opinion and open the way to a

more substantial political change than a court’s decision could. Accordingly, whilst

on the community level one should use litigation where it can indeed support, mobilize

and push forward political campaigns and popular struggles, it will always serve as the

recourse of the individual against state power.

Despite the limitations and narrow possibilities, Adalah’s struggle against the citizenship

law still continues. On 11 January 2012, the Israeli Supreme Court decided to reject

the petitions against the law by a majority of six to five, upholding its constitutionality.

**Truth and Power: Adalah and the Al-Aqsa Intifada**

On 28 September 2000, Ariel Sharon, then Member of Parliament, visited al-Haram al-

Sharif (the Noble Sanctuary, otherwise known as Temple Mount), in what was described

as an attempt to reclaim and display the Jewish right to visit the compound (Roa and

Waked, 2000). Demonstrations that occurred in protest the following day at the compound

were repressed by the Israeli security forces. Following these events, violent

clashes erupted in the OPT, resulting in the death and injury of dozens of Palestinians.

These clashes marked the outbreak of the al-Aqsa Intifada. On 30 September 2000, as an

act of solidarity, the High Follow-Up Committee for the Arab Citizens in Israel7 called

for a general strike. During the first 3 days of October, thousands of Palestinian citizens

participated in demonstrations in many towns and villages throughout the country.

From the outset, the demonstrations were severely repressed by the security forces

that reacted to stone-throwing with tear gas, rubber-coated steel bullets and live ammunition,

during which thirteen Palestinian citizens were killed. During the course of the

first 2 weeks of October, the police arrested more than a thousand people, about twothirds

of them Palestinian.

From the first days of the protests, Adalah was involved in leading the public outrage

and protest against the government and its policies, demanding the establishment of a

commission of inquiry. Until today, Adalah is involved in the campaign demanding that

the government and the police take full responsibility for their part in the killings of

Palestinian citizens. For our purposes, it is interesting to examine Adalah’s involvement

and strategies here, since cause lawyers, aside from litigation, are typically committed to

encourage, enhance and supplement deployment of other political tactics that can

enhance the goals of the overall struggle.

The ‘Or Commission’. Immediately after the events abated, Ehud Barak, Prime Minister at

the time, appointed a Commission of Examination to examine the clashes. The Commission

lacked any legal powers or independence and was therefore rejected outright by the

families of the Palestinian victims. Following intense pressure from the families,

together with the Palestinian leadership, Palestinian and Israeli NGOs and academics,

among them Adalah, the Israeli government decided to establish an official Commission

of Inquiry, headed by the Supreme Court Justice Theodor Or, known as ‘The Or Commission’.

The Commission was mandated to investigate the clashes between the security

forces and Jewish and Arab citizens and to investigate ‘the causes leading to their occurrence

[ . . . ] including the conduct of the inciters, organisers, participation from all sectors,

and the security forces’ (Or et al., 2003).

The families of the victims and the High Follow-Up Committee appointed Adalah to

represent them before the Commission. Hassan Jabareen explained that Adalah was

considered by then a highly professional and skilled organization, dedicated to cause

of the Palestinians inside Israel, and therefore acquired credibility in the eyes of the

Palestinian public (Jabareen, 2011, interview). In accordance with Israeli practice in

relation to official commissions of inquiry, neither the families of the victims nor Adalah

had any official legal standing before the Commission at that stage of the proceedings,

and Adalah’s lawyers were not allowed to cross-examine witnesses.

Nevertheless, throughout the course of the yearlong hearings and as a result of Adalah’s

continuous motions and interventions in an attempt to challenge the procedures

and evidence, the organization gained a quasi-official status before the Commission

(Dalal, 2003: 12–13).

Whilst most of those who called for the establishment of the Commission were satisfied

by its establishment (most important of which is ACRI), Adalah, together with the

High Follow-Up Committee opposed the scope of the mandate given to the commission

from the outset. First, the commission dealt with the events as they unfolded only from

29 September onwards. In doing so, it did include Sharon’s visit to the holy compound as

a context for the outbreak of the events and also dismissed the role of the underlying

social processes, deriving from years of historical discrimination against the Palestinian

citizenry, beginning in the 1948 Nakba. This, according to Adalah, led to the narrow and

at times ahistorical and a sociologically uninformed view of the events that appeared to

guide the members of the Commission (Dalal, 2003).

Second, and significantly, Adalah rigorously opposed the reference to the role of the

‘inciters’. Adalah claimed that it is clear that the term inciters would be applied exclusively

to Palestinian political leaders. When these fears materialized, and the Commission

issued warning letters to three Palestinian leaders – Azmi Bishara, Abd al-Malik

Dahamshe and Ra’ed Salah – with regards to the ‘inciting messages’ they delivered in

the period preceding October 2000, Adalah tried to challenge the mandate of the Commission

that was carried out in a discriminatory manner against Palestinian leaders.

Here, Adalah again pointed also to the fact that Ariel Sharon’s visit to al-Haram

al-Sharif on 28 September 2000 remained outside the scope of the Commission in spite

the fact that it ignited the outbreak of the Intifada.

Adalah published the arguments and the materials it presented in front of the Commission

in March 2003. The title of Adalah’s report reveals its contents: Law and Politics

Before the Or Commission of Inquiry. The report outlines the main reasons for

the October 2000 protests, thereby unfolding the counter narrative to the one the

Commission presented and that has defined its work. Adalah contextualized the protest

within the immediate (response to Sharon’s visit in the holy compound and the

repression of the protest) and the long-term causes (continuous discrimination and realities

of oppression since 1948 to the present day), traced the decision-making process

of the High Follow-Up Committee in coordinating the call for a strike rather than

escalating the protests and discredited the accusations against Palestinian leaders for

denying the legitimacy of the existence of Israel. Adalah thus attempted to untie the

link between the state and Zionist ideology, highlighting the strict separation between

the two.

The Or Commission published its report on 1 September 2003, almost 3 years after its

establishment. The report did not recommend any legal action against those responsible

for the killings of unarmed civilians. It indeed pointed to failures in police conduct and

excessive use of lethal force but recommended taking only minor disciplinary steps

against those responsible. The Commission investigated incitement only in relation to

statements made by Palestinian leaders, and ignored the role of Jewish leaders in the process,

claiming that incitement in the ‘Jewish sector’ was only a response to the events of

the ‘Arab sector’.

Despite Adalah’s affirmation of the report and its recommendations, first and foremost

towards police conduct with the Palestinian citizens, Adalah severely criticized the

report on several levels: firstly, for putting enough effort into making final decisions

about the direct circumstances of the killings; secondly, about the fact that the Commission treated Palestinian leaders differently than Jewish leaders and investigated the former ‘under warning’; thirdly, for ignoring the fact that police violence led to the

escalation in the intensity of events rather than the other way around and fourthly, for the

unbridgeable gap between the conclusions and recommendations of the Commission,

regarding the conduct of the responsible Minister of Internal Security and the relevant

police commanders (Dalal, 2003).

In spite of the flaws in the Or report, its importance should be evaluated in the context

of the existing Israeli discourse regarding the Palestinians. Discursively, the report is

ground breaking, a result of the Adalah’s work of inserting new terms into the Israeli

hegemonic discourse: the report mentions the Nakba and acknowledges the existence

of continuous discrimination against the Palestinian citizens as the underlying factors

to the growing discontent that finally erupted in violence. This fact could be seen in

reports, articles and analyses published in the Israeli media following the publication

of the report (see e.g. Arens, 2003; Atinger, 2003; Baram, 2003). Jabareen (2011, interview)

also explained that for Adalah, the campaign is considered a success – not because

of its specific results but due to the process it initiated; it stirred public opinion and for

months and even years the whole country was talking about the events and police conduct.

This empowered the families of the victims and the Palestinian population as a

whole. In other words, the platform of the committee was used as an official stage to

present the Palestinian narrative of history and the specific events of October 2000 in

ways that did not exist beforehand.

The publication of the Or Commission report did not put an end to Adalah’s involvement

in the case. Adalah decided to continue to struggle to bring to justice those it considered

responsible, in the police and at the governmental level. In this strategy, Adalah

plays a significant role, providing professional knowledge and legal tools. Adalah’s work

consists of media campaigns in the Hebrew newspapers, appeals to the police and the

Ministry of Justice Police Investigation Unit (Mahash) and the Attorney General with

requests to investigate and bring to justice those responsible, and a flow of publications,

reports, articles and conferences that are continuing to this day.

A great part of Adalah’s work around the October 2000 case is dedicated to the creation

of an alternative narrative of the events. As Baker (2010, interview) explained, the

Palestinian struggle inside Green Line Israel is not documented, and in the absence of

museums or textbooks, the appeals to courts, the petitions, reports and researches are

a form of history writing and evidence of the resistance. This is a central component

of Adalah’s work.

Legal and Other Struggles. Adalah’s involvement in the October 2000 campaign constitutes

another front of legal resistance. Adalah assumed a leadership role in the public campaign,

together with the High Follow-Up Committee and the bereaved families. Its

involvement derives from the understanding that litigation and the official-legal institutional

channels as a method of struggle are limited by their nature and other strategies

should be adopted. A question arises if this kind of activity can be categorized as legal

resistance as such. Indeed, in many cases, cause lawyers reach the point where ‘frustrations

with the halting tempo and uncertain consequences of litigative strategies lead to

adoption of political strategies and to close association with social movements’. The availability to counsel and defend movement activists place cause lawyers within the

‘fairly restrictive definitions of professional responsibility’. But the problem occurs

where cause lawyers get more involved in organizing activities and become engaged

in political mobilization up to the point that they might participate in legally proscribed

activities. These activities move them beyond the ‘generally accepted understandings of

the appropriate role of legal professionals’. Whether the boundaries of the profession are

real or constructed, ‘cause lawyering may so merge with political activism as to be indistinguishable

from it’ (Sarat and Scheingold, 1998: 8). Indeed, following McCann and

Silverstein’s (1998) analysis, Adalah’s legal resistance can be termed ‘flexible lawyering’,

a style of legal activism that encompass a variety of activities cause lawyers engage

in, within a context where litigation strategies are deemed to bear only partial, if any,

results. This is not new or unique to the Israeli case. This is part and parcel of the realities

cause lawyers encounter in the various contexts where they operate. Indeed, on the 10th

anniversary of its establishment, Adalah took this flexibility even further when it published

a document titled The Democratic Constitution calling for the reconstitution of the

entire Israeli legal system.

**Adalah’s Democratic Constitution**

The State of Israel does not have a written constitution. Over the years, different elements

within society made several attempts at proposing draft constitutions. These

efforts intensified at the beginning of the 2000s by elite groups within Israeli Jewish society,

in an attempt to persuade the Israeli authorities to adopt a constitution based on the

common denominator among the Jewish community.

Set against this background, Adalah published The Democratic Constitution in March

2007. Adalah’s proposal is based on the concepts of a democratic, bilingual and multicultural

state. Marwan Dwairy, Adalah’s Board of Directors Chairman, explains the

rationale behind Adalah’s Democratic Constitution, stating that the other proposals are

distinguished by:

[T]heir lack of conformity to democratic principles, in particular the right to complete

equality of all residents and citizens, and by their treatment of the Arab citizens as if they

were strangers in this land, where history, memory and collective rights exist only for Jewish

people. (Dwairy, 2007: 3)

Adalah’s constitution is thus based on the Palestinians’ integral part in the country’s

history and political processes and on democracy as the organizing principle of the

state’s political structures.

Adalah’s constitutional proposal can therefore be seen as a political proposal for the

redefinition of the nature of the regime in Israel, based on democratic values. This document

is a result of work and discussions that involved Adalah’s team, management and

board of directors, but it does not constitute a final text, but rather a draft open to further

discussions and suggestions. It is important to mention that Adalah’s members, who

were involved in the drafting process, highlight the fact that the main, if not only, reason

for the drafting of this document was to form a response to the attempts in the Jewish

society to draft a constitution. Dalal (2010, interview) made it clear:

A minority will never initiate a constitution. It will never be in its favour. This [the other

proposals] is the only reason we did it, we have much more important things to deal with.

It is meant to be a challenging document, and not a real constitutional proposal.

Hassan Jabareen (2011, interview) reaffirmed this and explained that in the environment

of that time, the idea was ‘to challenge, we didn’t want to sit on the fence’.

The Democratic Constitution is not only a response to processes in the Jewish-Israeli

society, but it is also a part of a broader set of documents, four in total, drafted by teams

made of the Palestinian citizenry’s intellectual elite together with community and political

activists during 2006–2007. These ‘vision documents’ were published against a

background of the growing oppositional consciousness among the intellectual and political

Arab leadership in Israel and its activation after the crisis of the events of October

2000. The multiplicity of the documents reflects rivalry between different organizations

to some extent, and can be understood as a matter of prestige. For example, Adalah

viewed the preparation of a The Democratic Constitution as a professional task that

should be left solely to lawyers. Following this line, The Democratic Constitution can

be understood as the legal manifestation of the vision documents.

Not long after its drafting, the document was put on hold, and currently it does not

constitute an active project of Adalah. The reason for this, according to Kohn, is found

in the simple fact that the issue of forming a constitution went off the agenda in Israeli

society as a whole. In the current state of events and the political atmosphere prevailing

in the country, ‘it is better to have no constitution than a bad one. A bad constitution will

just make things worse’ (Kohn, 2010, interview). Despite the fact that this political initiative

was abandoned, it is nevertheless interesting to discuss and understand the nature

of this document as a third sphere of legal resistance undertaken by Adalah. The reasons

for this lie in the fact that it contributes an additional dimension to the comprehension of

Adalah and of cause lawyering in the Israeli context. It sheds light on Adalah’s selfperception

of its role in society, as a legal organization, together with the critique that

is heard about its self-assumed leadership role in the Palestinian society. Additionally,

in light of the reactions in the Jewish-Israeli society to the publication of the Democratic

Constitution, this document calls attention to the potential embodied within this form of

resistance, revealing its subversive nature within the Israeli context and is therefore pertinent

to our discussion.

The Document. The Democratic Constitution draws on the experiences of different peoples

and countries with majority–minority situations, countries that went through democratic

regime change, such as the South African constitution and the constitutional

arrangements in Canada, Belgium, the Republic of Ireland and Macedonia (Adalah,

2007: 4, 10 notes). On the whole, the content of the proposal deals with two fields. The

first deals with individual rights in the state and the collective rights of Palestinians in

Israel as a homeland minority. As for the second, it addresses the political structures and

institutions in the State of Israel, including the demarcation of the borders of the state.

Here, the full document will not be analysed. Alternatively, only issues that contribute to

our comprehension of Adalah’s legal resistance strategies would be highlighted.

As a whole, the document calls to turn Israel (along the pre-1967 borders) into a democratic

state based on the values of human dignity, liberty and equality. The state will be

bilingual and multicultural, as opposed to a Jewish and democratic state. In practice, it

calls to cancel any privileges granted to Jews and to secure the protection of Palestinians

as a homeland minority, most importantly the right to citizenship and access to land. In

sum, it can be said that the Democratic Constitution calls for the transformation of the

State of Israel in accordance with a totally new paradigm, a binational one that overturns

the entire Israeli legal system. In other words, the proposal correlates its demands with an

unequivocal abandonment of the paradigm of the Jewish and democratic state.

Supporters of the Jewish democratic paradigm criticize the document precisely on

these grounds:

great many demands which appear in the proposed constitution do not shatter the Zionist

paradigm, namely the fair allocation of land to the Arabs, cultural autonomy for the Arabs

[ . . . ], the right to have a say in the state’s symbols, returning the uprooted citizens [ . . . ].

All of these and more are attainable and even morally necessary according to the humanistic

concepts of Zionism. Why, then, set forth a proposal that sounds like ‘‘all or nothing’’?

(Saban, 2007).

But here stands the core of the document and its importance. What Saban termed ‘the

humanistic concepts of Zionism’ do not correspond to the implementation of Zionist

ideology in the State’s laws ever since 1948, which secure privileges for the Jewish community

whilst systematically discriminating against the Palestinians. This is precisely

Adalah’s answer to attempts within Jewish-Israeli society at composing a constitution

that will ground and bind the existence of Israel as a Jewish state. The Democratic Constitution

offers a process of ‘transformative integration’, in which the state’s structure

will undergo a radical change that will enable the creation of real equality between Palestinians

and Jews as citizens as well as national collectives (Jamal, 2008: 23).

Perhaps the most controversial article in the constitution is article number one, ‘The

borders of the State of Israel are the borders of the territory which was subject to Israeli

law until 5 June 1967’. Here, Adalah took a firm stand regarding the territorial solution to

the Israeli–Palestinian conflict, in support of the ‘two state solution’, with a Jewish

majority in the State of Israel. This issue stands at the centre of both the praising and the

condemnation of the document, both within the organization and outside it. Whilst some

claim that this constitutes a brave step forward as the question of boundaries is the one

that Israel avoids defining ever since its establishment (Ghanem, 2007), by taking this

position the document is laying down the solution instead of offering guidelines and criteria

for various possible solutions to the Israel/Palestine question, a highly debated topic

among the Palestinian population (Kohn, 2009, interview).

Whilst Adalah explains its choices in legal terms, they have also political implications.

Adalah here assumes the role of an organization that aims to create and shape

political directions and programmes and to place itself in a leadership position without

being elected to do so. Indeed, it is essential to reflect on the implications of Adalah’s

decisions in phrasing the democratic constitution and the political solutions it promotes

on the Palestinian citizenry as a whole (Zreik, 2010, interview). The issue of selfrepresentation

is a problematic one, as it constrains the authority of the elected leadership,

takes its place and acts as representative of a community that did not seek this

representation, or, alternatively, uses it to exempt itself from participatory politics, and

to some extent from political struggles at large. It reflects the political impasse the Palestinian

citizenry in Israel found itself in, and the prevalence of the ‘rights discourse’ that

constrains effectiveness of the political struggle against Zionism (Zreik, 2010, interview).

However, despite these considerations, one must try to understand the potential of this

document in the larger frame of resistance against Zionist hegemony.

**A Radical Document or an Accepted Strategy of Resistance?**

Following Amal Jamal’s analysis, the democratic constitution can be understood as an expression of political self confidence on the part of the Palestinian community in Israel, but one that is expressed in a way that does not put the Palestinian citizens’ status at risk. Thus, the document is an expression of the balance between the oppositional consciousness among the Palestinians and the endurance mechanisms of the Israeli control system, in a way that does not completely break the boundaries of tolerance of the Israeli political discourse (Jamal, 2007: 9). Indeed, Adalah clearly states: the goal is to have a serious discussion with the Israeli Jewish elite [ . . . ]. We will also launch a campaign to enlist international experts in the fields of human rights and constitutional law in backing our proposed Democratic Constitution, and to present it on international platforms. (Dalal, 2007)

However, whilst accepting this analysis, I would like to suggest that the evaluation of

this form of resistance should be contextualized within the reactions that followed the

publication of the document.

The reactions in the Jewish Israeli public can be described as panic, rejection, dismissal

and overall unwillingness to engage in a serious discussion around the contents

of the documents. In the Israeli media, the documents were referred to in phrases such

as ‘declaration of war’ (Tal, 2006), ‘an attempt to empty Zionism from its meaning’

(Lapid, 2006) and ‘subversive activity against the state of Israel, while joining its enemies’

(Arad, 2007). A poll conducted to examine the reactions in the Jewish public to

the documents found that the vast majority reject the core notions of the documents altogether

(Smooha, 2012). In a closed discussion in 2007, Yuval Diskin, the head of the

Shin Bet, expressed to Ehud Olmert, then the Prime Minister, the Shin Bet’s concerns

about the phenomenon of the vision documents, claiming they deny the existence of the

State of Israel as a Jewish state. The assessment was that these documents were representing

separatist tendencies among the Palestinian elite in Israel that might carry with

them the Palestinian masses (Caspit and Haleli, 2007). Commenting on this publication,

the Shin Bet has confirmed that it:

would thwart the activity of any group or individual seeking to harm the Jewish and democratic

character of the State of Israel, even if such activity is sanctioned by the law [ . . . ] in issuing documents, that pretend to be constitutional or foundational there is not fault as is,

unless they have contents that can mirror or encourage forbidden phenomena like political

subversiveness. (NDA Media Team, 2007)

Jabareen (2011, interview) explained that in Adalah ‘we were surprised by the severe

Israeli reactions that saw in the vision documents a threat to the State of Israel. And that

was not the case! This reaction did not enable rational dialogue’. However, Jabareen considers

it as an important and positive experience for Adalah:

phrasing the constitution released us from the legal tools we must adhere to as a legal organisation, proving that we have a vision beyond the limited legal tools. This enabled the organisation to know what it wants: we want a democratic and multicultural society and state.

This is the vision and everything we do should be intended to enhance it. The importance of the document as a form of resistance is thus found in the rejection and the fact that it was perceived as a highly subversive document, one that challenges and refuses to accept the reality imposed on the Palestinian citizens. The document places Adalah’s work in a different light, not just as an organization that represents and fights for Palestinians’ collective rights in Israeli courts, but one that also aims to advance a new and positive political programme that calls for a radical transformation in the nature of the regime itself.

Despite the document’s weaknesses and the fact that it accepts the historical situation

that led to the fragmentation of the Palestinian people and the need to find a separate

‘solution’ to each segment of it, I argue that in the light of the context in which the document

was published, it offers a distinct form of resistance that challenges the Zionist

hegemony in Israel. It forced the state to reveal its intolerant face towards challenges

to its ideology: the attempts to advance a political programme that poses a democratic

vision to the Jewish and democratic reality are treated as subversive activities and lead

to close monitoring by the state security services.

**Legal Resistance Re-evaluated**

In 2013, a journal of the Haifa based research centre Mada al-Carmel, dedicated wholly

to the issue of legal resistance, was titled The Master’s Tools, referring to the essay by

Audre Lorde that argued against the possibility of using of tools available by structures

of power in order to dismantle them.8 Reflecting on this claim, this article suggests that

there is a need to rethink how the dismantling process should be approached: Is it about a

full-blown strike to the house’s foundations, or a patient process of dismantling it,

removing it brick by brick? I argue that Adalah aims at the latter. Characterized in this

way, we can understand Adalah’s legal resistance as more radical than a mere struggle

for inclusion and reform. It also includes demands for transformation of the regime,

involvement in appeals to international platforms alongside the more standard legal battles

in courts.

At the same time, the fact that the appeal to legal struggle is a ‘dialogical process and

dialogue requires the participation of at least two parties’ (McEvoy, 2000: 569) cannot

be disregarded. That means that the choice of legal channels can constrain and limit the

movement up to the point where the struggle could be absorbed and neutralized by the

state. However, I agree with McEvoy’s assertion that this is not an inevitable outcome.

There is a constant need to evaluate strategies in light of their efficacy (Ibid: 571).

Reflecting on the role of law in resistance, it seems that whilst appropriation of the

terms, constructs and procedures of law in formulating opposition may contribute to

underpinning existing power relations, the negotiation of this logic is also possible, and

historical experience proves that subordinated people can engage in transforming the

law. Cases vary from apartheid South Africa (Abel, 1995; Mostert and Fitzpatrick,

2004), to Australia (Russell, 2005) and Canada (Bhandar, 2014) to name just a few.

Since law and society are intertwined, law’s legitimacy depends on the support it

receives from the media and also from outside the society. For example, in South Africa

when the courts confronted apartheid, the media, both domestic and foreign, was supportive

and celebrative, together with the support from foreign governments that extolled

the rule of law, and private donors that financially supported human rights lawyers

(Abel, 1998). Thus, law can be a source of countervailing power, and this potential

derives from the fact that the state is not monolithic – its power is divided among

branches and within them; in addition, law inherently embodies and expresses ideals that

nowadays many states do not tend to oppose openly, such as democracy and equality,

and therefore the potential to change does exist.

Since law is also a tool in the hands of lawyers, the potential of resistance through the

law depends on the ways lawyers choose to utilize it. A ‘delegitimisation strategy’ is one

through which lawyers might ‘find a way of working in the legal arena that consistently

challenges the State’s control over the way that we are to both feel and think about the

nature of social reality’ (Gabel and Harris, 1983 [1982]: 374). This can be achieved

through a power-oriented approach to law practice, in which the goal of defending people’s

rights will be subordinate to the goal of ‘building an authentic or un-alienated political

consciousness’ (Ibid: 375). Here, lawyers assume an instrumental role in the

construction of a social and political movement through the utilization of the courts to

increase people’s sense of personal and political power, developing a relationship of

equality with the clients and demystification of the whole legal procedure and instrumental

use of the different legal instances in order to achieve different political goals.

In the study of the role of law in the struggle against apartheid in South Africa, resistance

is portrayed as not about all or nothing at once:

[M]ost paralyzing is the anxiety that limited victories will co-opt the masses. Some activists

argue that only progressive immiseration can stiffen resistance. All the evidence contradicts

this. Hope is necessary for struggle. Legal victories, far from legitimating the regime,

demonstrate its vulnerability and erode its will to dominate. (Abel, 1995: 549)

Indeed, legal battles cannot win the war by themselves, but they have a role in

empowering the masses whilst offering some protection from state retaliation, and their

importance lies therein. Moreover, as the Northern Ireland case shows, the contribution

of the legal struggle to the dismantling process lies also in the weakening of the system’s

foundations through the exposure of information that highlights the contradictions inside

hegemony, revealing its oppressive and coercive nature. The strength of litigation can

also be found in the fact that it takes political issues that the state would prefer remained

in the political arena which it controls, and places them in the more autonomous legal

field that the state has less control over. As such, political issues that directly challenge

hegemonic discourse are forced into the public discourse with the assistance of the

media. In any case, litigation has to be used strategically and as a supplement for other

forms of struggle (McEvoy, 2000).

Whilst litigation is indeed a limited form of legal resistance, lawyers and legal activists

tend to move into other forms of struggle within the legal framework and become

more heavily involved with social/political movements. As a result of this, legal strategies

become more diverse in range and can include individual service, calls for institutional

change, advocacy, legislative lobbying, challenging conventional legal strategies

and giving more direct voice to clients who choose to politicise the legal process. These

strategies are chosen in accordance with the needs of the clients, the political/institutional

environment, the remedies possible (from formal proceedings in courts to other

means of solving the legal issue) and the assessed efficacy of the advocacy methods

in the specific context (Menkel-Meadow, 1998). Hence, it is the combination of both

legal and non-legal strategies that constitute cause lawyering such as Adalah’s in a background

in which legal victories in court are not easily achieved. Certainly, the boundaries

between legal strategies and other political strategies are not clearly marked, and cause

lawyering and political activism become indistinguishable.

Adalah is involved in various court cases and campaigns, and the three cases discussed

reveal a spectrum of legal resistance, one that is not confined to litigation in

courts, but rather combines popular struggles and proposals for the political that will

affect the Palestinian collective as a whole, whilst keeping in mind possibilities to help

individuals. Adalah’s unique role lies exactly within this combination of struggles, all

located within the legal boundaries, but at the same time openly suggesting the option

of ignoring them and aiming to break and overturn them.

Assessments of the efficacy of the struggle should be made as a whole rather than just

on the separate legal strategies of resistance. Each one bears its advantages and at the

same time faces limitations and constraints. It is only the combination of the three that

brings to light the greatest potential of effective legal resistance. Thus, in our case, it

becomes clear that using the tools of democratic structures of the state can indeed lead

to its weakening, if used strategically, in a delicate balance between the use of courts,

public campaigns and political struggles. In Israel, it leads the state to incline to suspend

its democratic feature to defend its Jewish character. Multidimensional strategic campaigns

that involve litigation, organizing, lobbying, public demonstrations and other

tactical activities are the most effective combination of legal resistance.

**Notes**

1. These declaration are prevalent in addresses of Israeli representatives to the United Nations,

celebrating Israel’s democratic culture, the strength and independence of the judiciary and

respect for the rights of minorities. The emphasis on the rule of law is also apparent in cases

of military attacks on the Gaza Strip, where Israel repeatedly claims its respect for international

law in belligerent activities.

2. See for example the Supreme Court decision in 2000 regarding the Ka’adan case: http://www.

adalah.org/eng/Articles/40/Adalah%E2%80%99s-Comments-on-the-Supreme-Courts-in-the-

3. For the full report see: http://www.adalah.org/eng/Arab\_Minority\_Rep.pdf.

4. For the full statement see: http://eeas.europa.eu/delegations/israel/press\_corner/all\_news/news/

2011/20110222\_01\_en.htm.

5. For some of these comments and reports see: http://www.adalah.org/eng/pressreleases/unccs.html.

6. The Palestinian 2005 BDS call opens with a direct reference to the ICJ’s decision. It follows:

One year after the historic Advisory Opinion of the International Court of Justice (ICJ) which found Israel’s Wall built on occupied Palestinian territory to be illegal; Israel continues its construction of the colonial Wall with total disregard to the Court’s decision. (See www.bdsmovement.net/call)

7. The High Follow-Up Committee for the Arab Citizens in Israel is an extra-parliamentary

umbrella organization that represents the Palestinian citizens on a national level.

8. Audre Lorde (1993), a black lesbian feminist scholar and activist dealt with what she saw as the internal oppression of black and lesbian women within the feminist movement and claimed that as long as one uses the frameworks and points of reference of the oppressors, the ability to

evade and construct a new reality remains impossible.

**References**

Adalah (2006) Press release: The high court of justice approved today in a majority of six judges against five the most racist law in the state of Israel. [Hebrew].

Adalah (2007) The Democratic Constitution. Adalah: Shfa’amer.

Abel RL (1995) Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994.

London: Routledge.

Abel RL (1998) Speaking law to power: Occasions for cause lawyering. In: Sarat A and Scheingold S (eds) Cause Lawyering: Political Commitments and Professional Responsibilities.

New York: Oxford University Press, pp. 69–117.

Anderson P (1976) The antinomies of Antonio Gramsci. New Left Review I/100: 5–78.

Arad U (2007) The future vision of the Arab Palestinians in Israel. Presented in Conference at the Van Leer Institute, Jerusalem, Israel, 28 February 2007.

Arens M (2003) Three failed commissions [Hebrew]. Haaretz. Available at: http://www.haaretz.

co.il/misc/1.910764 (accessed 4 May 2011).

Atinger Y (2003) The high follow-up committee praised the or commission report: Historical

change of direction [Hebrew]. Haaretz. Available at: http://www.haaretz.co.il/misc/1.909042

(accessed 12 December 2014).

Baker A (2005) Ideological legislation in the name of ‘‘security’’. Adalah’s Newsletter, p. 19.

Baram U (2003) Stepping out of the darkness [Hebrew]. Ynet. Available at: http://www.ynet.co.il/

articles/0,7340,L-2743199,00.html (accessed 4 May 2011).

Barzilai G (2007) The ambivalent language of lawyers in Israel: Liberal politics, economic liberalism, silence and dissent. In Halliday TC, Karpik L and Feeley M (eds) Fighting for Political Freedom: Comparative Studies in the Legal Complex and Political Liberalism. Oxford: Hart, pp. 247–279.

Bhandar B (2014) Critical legal studies and the politics of property. Property Law Review 3:

186–194.

Bisharat GE (1995) Courting justice? Legitimation in lawyering under Israeli occupation. Law & Social Inquiry 20(2): 349–405.

Caspit B and Haleli Y (2007) Head of the ISA: Dangerous radicalisation of the Israeli-Arabs

[Hebrew]. NRG. Available at: http://www.nrg.co.il/online/1/ART1/555/618.html (accessed

12 July 2012).

Dakwar J, Saban I and Sultany N (2006) Roundtable discussion of the supreme court’s decision on nationality and entry into Israel law. Adalah’s Newsletter, p. 26.

Dalal M (2003) October 2000: Law and Politics Before the Or Commission of Inquiry. Haifa:

Adalah.

Dalal M (2007) Interview with Adalah Attorney Marwan Dalal on the publication of ‘‘the democratic

constitution’’ by Adalah. Adalah’s Newsletter 34. Available at: http://www.adalah.org/

uploads/oldfiles/newsletter/eng/mar07/marwan.php (accessed 21 June 2012).

Dwairy M (2007) A word from the chairman of the board of directors. In The Democratic Constitution. Shafa’amr: Adalah, p. 3.

Ellman S (1995) Struggle and legitimation. Law & Social Inquiry 20(2): 339–348.

Esmeir S (2004) Introduction: In the name of security. Adalah’s Review 4: 2–9.

Esmeir S and Rosenberg R (2000) On resisting legalization. Adalah’s Review 2: 23–25.

Fitzpatrick P (2008) Law as Resistance: Modernism, Imperialism, Legalism. Hampshire: Ashgate.

Fontana B (2006) State and society: The concept of hegemony in Gramsci. In: Haugaard M and Lentner H (eds) Hegemony and Power: Consensus and Coercion in Contemporary Politics.

Oxford: Lexington Books, pp. 23–44.

Gabel P and Harris P (1983 [1982]) Building power and breaking images: Critical legal theory and the practice of law. NYU Review of Law and Social Change 11: 369–411.

Ghanem A (2007) The democratic constitution: The question of the occupation and bi-nationalism. Adalah’s Newsletter, p. 34.

Giddens A (1985) A Contemporary Critique of Historical Materialism: The Nation State and Violence. London: Polity.

Gilroy P (1987) There Ain’t No Black in the Union Jack: The Cultural Politics of Race and Nation. London: Hutchinson.

Goldberg DT (2002) The Racial State. Oxford: Blackwell Publishers.

Gramsci A (1988) A Gramsci Reader: Selected Writings, 1916-1935. Forgacs D (ed). London:

Lawrence and Wishart.

Gramsci A, Hoare Q and Nowell-Smith G (1971) Selections from the Prison Notebooks of Antonio Gramsci. London: Lawrence and Wishart.

Halley J (2009 [2008]) Rape at Rome: Feminist interventions in the criminalization of sex-related violence in positive international criminal law. Michigan Journal of International Law

30: 1–124.

Harlow C and Rawling R (1992) Pressure Through Law. London: Routledge.

Jabareen H (2004) Comments on the unreasonableness of the attorney general’s ‘‘reasonable discrimination policy’’. Adalah’s Newsletter, p. 1.

Jamal A (2007) Strategies of minority struggle for equality in ethnic states: Arab politics in Israel. Citizenship Studies 11(3): 263–282.

Jamal A (2008) The political ethos of Palestinian citizens of Israel: Critical reading in the future

vision documents. Israel Studies Forum 23(2): 3–28.

Jiryis S (1976) The Arabs in Israel. London: Monthly Review Press.

Kretzmer D (1990) The Legal Status of the Arabs in Israel. Oxford: Westview Press.

Lapid T (2006) A state within a state. Ma’ariv [Hebrew].

Lears JTJ (1985) The concept of cultural hegemony: Problems and possibilities. The American

Historical Review 90(3): 567–593.

Lorde A (1993) The master’s tools will never dismantle the master’s house. In: Lorde (ed) Zami; Sister Outsider; Undersong. New York: Quality Paperback Book Club, pp. 110–113.

MacKinnon CA (2006 [2005]) Defining rape internationally: A comment on Akayesu. Columbia Journal of Transnational Law 44: 940–958.

McCann M and Silverstein H (1998) Rethinking law’s ‘‘allurements’’: A relational analysis of

social movement lawyers in the United States. In: Sarat A and Scheingold SA (eds) Cause Lawyering: Political Commitments and Professional Responsibilities. New York: Oxford University Press, pp. 261–292.

Masri M (2013) Love suspended: Demography, comparative law, and Palestinian couples in

the Israeli supreme court. Social and Legal Studies: An International Journal 22(3): 309–334.

McEvoy K (2000) Law, struggle and political transformation in Northern Ireland. Journal of Law and Society 27(4): 542–571.

Menkel-Meadow C (1998) The causes of cause lawyering: Toward an understanding of the motivation and commitment of social justice lawyers. In: Sarat A and Scheingold SA (eds) Cause Lawyering: Political Commitments and Professional Responsibilities. New York: Oxford University Press, pp. 31–68.

Mostert H and Fitzpatrick P (2004) Law against law: Indigenous rights and the Richtersveld Cases. Law, Social Justice & Global Development Journal. Available at: <http://www2.warwick.ac.uk/> fac/soc/law/elj/lgd/2004\_2/mostertfitzpatrick (accessed 12 July 2014).

Mouffe C (1979) Hegemony and ideology in Gramsci. In: Mouffe C (ed) Gramsci and Marxist

Thoery. London: Routledge & Kegan Paul Ltd, pp. 168–204.

NDA Media Team (2007) The political persecution and incitement against the Arab citizens and their elected representatives [Hebrew]. Magazin ha-kibush [Occupation Magazine]. Available at: http://www.kibush.co.il/show\_file.asp?num=19316 (accessed 13 February 2011).

Or T, Khatib H and Shamir S (2003) Din ve-heshbon Va’dat ha-hakira ha-memsaltit le-berur hahitnagshuyot byn kohot ha-bitahon le-ezrahim yisraelim be-october 2000 [Hebrew]. [Report by the Governmental Commission of Inquiry into the Clashes Between Security Forces and Israeli Civilians in October 2000].

Povinelli EA (2002) The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism. Durham: Duke University Press.

Reynolds J (2010) Legitimising the Illegitimate: The Israeli High Court of Justice and the Occupied Palestinian Territory. Ramallah: Al-Haq Organisation.

Roa A and Waked A (2000) Sharon’s visit to temple mount: Riots and injured [Hebrew]. Ynet

Robinson S (2013) Citizen Strangers: Palestinians and the Birth of Israel’s Liberal Settler State.

Stanford, CA: Stanford University Press.

Rouhana N (1990) The intifada and the Palestinians of Israel: Resurrecting the green line. Journal of Palestine Studies 19(3): 58–75.

Russell PH (2005) Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism. Toronto, Canada: University of Toronto Press.

Saban I (2002) The minority rights of the Palestinian-Arabs in Israel: What is, what isn’t

and what is taboo [Hebrew]. Iyunay mishpat [Tel Aviv University Law Review] 21(1):

241–319.

Saban I (2007) The ‘‘democratic constitution’’: Justified aims overshadowed by the bi-national

claim. Adalah’s Newsletter 34. Available at: http://www.adalah.org/uploads/oldfiles/newsletter/eng/mar07/ilan.php (accessed 24 June 2012).

Saban I (2008) Law and the Arab-Palestinian minority in the first three decades of the state: Measures

of control [Hebrew]. Mehkaray mishpat [Studies in Law] 24(2): 565–637.

Sarat A (1998) Between (the Presence of) violence and (the Possibility of) justice: Lawyering

against capital punishment. In: Sarat A and Scheingold SA (eds) Cause Lawyering: Political

Commitments and Professional Responsibilities. New York: Oxford University Press, pp.

317–348.

Sarat A and Scheingold SA (eds) (1998) Cause Lawyering: Political Commitments and Professional Responsibilities. New York: Oxford University Press.

Scheingold S (1998) The struggle to politicize legal practice: A case study of left-activist lawyering in Seattle. In: Sarat A and Scheingold SA (eds) Cause Lawyering: Political Commitments and Professional Responsibilities. New York: Oxford University Press, pp. 118–148.

Sfard M (2009) The price of internal legal opposition to human rights abuses. Journal of Human

Rights Practice 1: 37–50.

Smooha S (2012) Arab and Jews in a Jewish and democratic state: Multilateral repudiation of public responsibility [Hebrew]. In: Cohen-Almagor R, Arbel-Ganz O and Kasher A (eds) Public Responsibility in Israel. Jerusalem: Hakibbutz Hameuchad Publishing House and the Jerusalem Center for Ethics, pp. 527–551.

Tal A (2006) This means war. Ha-aretz [Hebrew]. Available at: http://www.haaretz.com/print-edition/opinion/this-means-war-1.206594 (accessed 4 May 2012).

The Government (2002) Government decision 1813 [Hebrew]. Mazkirut ha-memshala [Secretariat of the Government].

The Government (2003) Hatz’at hok ezrahut ve-ha-knisa le-yisrael (pkuda zmanit) 5763-2003

[Nationality and Entry into Israel (Temporary Order) Bill, 5763 – 2003] [Hebrew]. Reshumot

[Acta].

Thompson EP (1975) Whigs and Hunters: The Origin of the Black Act. New York: Pantheon.

**Cases cited**

Adalah, et al. v. the Minister of Interior, et al. [2003] H.C. 7052/03 [Hebrew].

Interviews

Baker, Abeer. 1 April 2010. Senior attorney, Adalah. Interview with the author, Haifa.

Dalal, Marwan. 19 December 2010. Former attorney, Adalah. Interview with the author, Haifa.

Jabareen, Hassan. 22 April 2011. Founder and General Director, Adalah. Interview with the

author, Haifa.

Kohn, Orna. 20 December 2009. Senior attorney, Adalah. Interview with the author, Haifa.

Kohn, Orna. 16 November 2010. Interview with the author, London.

Tsemel, Lea. 15 August 2010. Independent attorney. Interview with the author, Jerusalem.

Zreik, Raef. 16 December 2010. Interview with the author, Haifa.