Prospects of Legal Action and the Discourse of Rights among Palestinians in Israel: Between Achieving Judicial Breakthroughs and Reproducing Power Relations

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This article consists of three sections. Section 1 presents general observations on the nature and relationship of law with politics, ideology, and ethics. Section 2 places a special emphasis on the nature of the relationship between the discourse of rights and question of identity and history. Finally, Section 3 concludes with comments on the role of the discourse of rights and legal adjudication in front of the supreme court in the Palestinian case of Israel in particular taking into account of the specific characteristics of the State of Israel and Palestinian community in Israel. The article concludes that legal proceedings and adjudicating cases in front of the supreme court of justice may achieve certain important goals, but it may contribute to reproducing power relations operating in the system. Still, legal action is of significance. It is capable of documenting and formulating Palestinian claims in a language and discourse based on the principles of human rights and citizenship, feeding and furnishing the political discourse with a condensed and clear language. It is absolutely difficult to know beforehand when and to what extent achievements can be made, and when legal accomplishments constitute a practice that contributes to reconsolidating the status quo.

1. Law – As an abstraction

Karl Marx was the first to draw attention to the importance and limitation of the political emancipation accomplished by the French Revolution and its declaration of human rights.[1] The project of contemporary human rights and citizens' rights cannot be understood without attention to achievements of the French Revolution and Marx's insightful analysis in this context. The old feudal society lacked a clear separation between the socioeconomic position and political status.[2] This meant, among other things, that the participation in political life, right to vote, and right of access to public office were limited to certain socioeconomic groups. In other words, social status and owning property was a precondition to take part in the public political space and political participation. Only those who were members of particular socioeconomic classes and landlords were eligible to participate in political life. That is, they qualified for engaging in the administrative structure of the system of governance.

By contrast, and differently from present-day society, at least in liberal democratic societies, feudal society used to exhibit clear and direct signs of the political status in government, qualifying relevant persons to establish their socioeconomic position. Put differently, the political status impliedly meant an economic and social standing. As a matter of logic as well as legal structure, the latter also reflected a political status. Both were not separate at the time. In our Arab world, it is not difficult to imagine that such a situation is still prevalent. For example, the king would have a fixed share of visa fees at the border insomuch as his political status also qualifies him to make profits and as if the state were his personal property. Like a country estate, engagement in the state can, therefore, be viewed as an authorisation to collect visa fees. In such society property-wealth and sovereignty has not been separated yet. Along these lines, the Arabic language reveals this insight given that the word for king- the symbol of sovereignty is Malek and the word for property if Molk thus they have common linguistic root , an etymological fact that exposes the nature of the relationship between sovereignty and property-wealth, between politics and economy, and between the public and the private.

Within this paradigm, political status also serves as a source of income. The case in point is a society, in which politics is not separate from economy. In this model, political participation and right to vote presume that participants enjoy a certain socioeconomic position. Nobles, lords, vassals, and dukes all denote an economic, social, and political ranks at the same time. For example, the slave-master or lord-vassal relationship is both legal, economical and political. This is practically the ancient regime, which the French Revolution erupted to disintegrate and build the modern state on its ruins, together with the rights and market systems.

A key achievement of the revolution was a sharp separation – at least theoretically – between the realm of economy and society on one hand, and the world of politics and law on the other. It has been possible for the people from across the spectrum to participate in the political/legal process in disregard of their economic positon and land proprietorship. On the other end, politics/law has been separated from economy and society. Politics has been a stand-alone space, which does not directly confer on politicians any economic and social privileges. This new logic is premised on the separation of politics/law (in this section, law and politics are approached as a single designation) from economy and the state from the market. Along these lines, the most socially and economically impoverished citizen can reach the highest political echelons and be prime minister. The richest persons with the highest social status might be politically insignificant and have no position in the administrative and political structure of the state. This means, inter alia, that politics/law stands at one extreme and economy at another. Each evolves along the lines of its own logic: the state is liberated from economy and the economy from the state.

However, liberation of the political and legal communities did not only neutralise private property and its influence on political participation. Another achievement of the revolution was also an emancipation from the different affiliations of individuals, most and foremost religious affiliation. In ancient societies, just like property, religious affiliation was a public concern of society at large, rather than a private matter. That is, individuals used to take their religion with them to the public space. In many aspects, different laws were applicable to the members of different religions and denominations.[3] In ancient – pre-revolution – societies, individuals of different religious groups were subject to different legal systems. These did not only involve personal status laws (marriage, divorce, custody, alimony), but also an extensive set of civil law and public law for sure. Most importantly, individuals with particular religious affiliations were prohibited from holding certain offices in the state, or even engage in particular occupations. An individual walked down the town square not as a mere or abstract citizen, but as a Catholic, Protestant, Jew, and so forth. Each was subject to a different legal set of rules. Each also had a system of privileges, which differed from one religious group to another.

The greatest achievement of the French Revolution, which we continue to experience, is the removal of religion from being a relevant issue in the public sphere , rendering it merely a private issue. This meant a secularisation of the public space. On the other end, the exclusion of private property from the public sphere (i.e. private property is not considered a prerequisite for political participation in the life of the state) means that the public at large can engage in political life. It has pulled down the barrier of property and social status, which prohibited individuals' participation in political life, ultimately mainstreaming the democratic project.

The profound implication of this project, namely the liberal democratic state, is that all distinctive features of individuals as well as their histories and particular personalities have been removed from being a relevant significance in the public sphere – from the realm of law, where law is premised on abstraction; In English, to abstract and to subtract have the same origin, given that when we abstract we take some feature of the object and keep its form only- we subtract something from it. As an abstraction, law in the public sphere disregards the unique characteristic of each individual (black- or white, Muslim or Jew, Tall or short, wealthy or poor). In other words, it brackets their private characteristics, which become irrelevant and insignificant in the public space. There is one law for all, regardless of their personal charactarsitics.

In post-revolution societies, individuals engage in the political space, completely devoid of their material and moral distinctions, of their class status, and of their spiritual and religious affiliation. People come out to the public political realm, leaving behind their religious affiliations and all matters related to their private property. The achievement of the revolution or post-revolution culture is based on the fact that the poor and the

rich are equal – at least theoretically – in the world of law and politics. Also equal is the Jew, Catholic, Protestant, and Muslim. The concept of the modern citizen could have not emerged if it were not for stripping modern individuals of their multiple affiliations and all that makes them materially and morally distinctive (insofar as religion is a model of moral distinction and private property is an emblem of material distinction).

In the public space, citizens come together, deprived of their material, moral and personalised distinctions as legal persons. Similarly, in the market, goods come together, devoid of their distinctive use value as monetary entities floating in the homogeneous realm of money (hence the famous saying "money has no colour").[4]

In the modern liberal state, the logic of equality originates in this abstraction, which lays the foundation for the concept of modern citizenship. A judge does not render a ruling on the basis of the religious or ethnic affiliation of adversary parties, nor on grounds of their occupations or political stances. All these matters are irrelevant when they appear before the law or before the judge. The legal and judicial systems do not judge individuals in the light of these affiliations. In that sense, law is an abstraction of history and affiliation. This is also, in fact, the essence of the concept of right.

However, law is not only premised on abstraction of the past, but of the future as well. Law dispossesses us of our affiliations and also of our purposes. It treats us equally regardless of the question of our ethnic, religious, and material affiliations on one hand, and with a blind eye to our future goals on the other. Rights are not meant to secure our purposes or to attain them, but to guarantee our purposiveness i.e our agency, and our ability to make free choices regardless of the matter-content- of these purposes. In its liberal form, the discourse of rights is not concerned with the goals and objectives, but it deals with them neutrally. As demonstrated below, goals are left for the will and free choice of individuals. Every citizen has the right to decide whether they wish to be generous or stingy, be a doctor or an engineer, be married or stay single, or lead the life of a monk or a self-indulgent. Designated as goals and objectives, these options reflect quality values, which individuals believe to constitute the meaning of their existence and to be a cause they devote their lives for. Law has nothing to do with determining goals. It can only put the tools in order. The legal system in general, and discourse of rights in particular, bear more resemblance to traffic laws. These do not specify the destination or final target of drivers, but set controls that govern driving. In other words, laws lay out the controls along our path to accomplishing our goals: there is a way for overtaking; there is a limit for maximum speed; there are traffic lights; there are rules and controls which prevent damage to other cars; and so on. Some drivers want to become doctors, while others wish to spend their lives as poets or making a fortune. Some drive to work, watch a football match, or go on a picnic. Traffic laws pay no attention to the destination of drivers. Likewise, the discourse of rights keeps at arm's length from these goals and objectives.

Its role is restricted to creating a space of autonomy for each individual, enabling them to plan their lives and work towards achieving their goals, while at the same time allowing others to organise their lives and work on accomplishing their own goals.

Let us reflect on the following example: if X borrows US$ 100 from Z. While X is poor, Z is incredibly rich and shows no interest at all in the US$ 100. When they appear before it, law is blind. In other words, it pays no attention to the obscene wealth of Z, but takes due diligence to help him restore his money, regardless of the consequences of recovering the amount from X to Z.[5]

Likewise, if Z has used the amount to gamble or buy medicine for his ill child, the law does not take the goals of using the money into consideration. Ethics may oblige Z to waive his right to restore the sum, but ethical requirements are one thing and the exigency of law is another. Against this backdrop, when someone says they have a certain right, this means that they are stating: "This right is mine" regardless of my religious-ethnic affiliation and no matter how I dispose of this right and for what end.

In that sense, when a person possesses some right, this means, among other things, that there is a space given to them, namely, freedom of disposition. Society cannot impose on that person how to dispose of it, be wise so as to behave for their own benefit, happiness, and welfare, or be ethical so as to increase the happiness of and provide assistance to others. Along this vein, right is an abstraction of the future because it is an abstraction of goals.[6] The same applies to rights closer to the realm of politics. Take, for example, the right to freedom of expression or right to protest. When we defend a citizen's right to freedom of expression or to protest, we actually put the issue (the subject) of expression and protest aside as irrelevant. More important is merely the right to freedom of expression. Accordingly, freedom of expression is guaranteed for individuals regardless of whether opinions are progressive or backward, liberal or conservative, defensive or repressive of women's rights, or in support of or against the occupation. This is also the case of the identity of a person, who wants to express these opinions. Freedom of expression must be safeguarded for persons, who express their views, be they Arabs or Jews, "new immigrants" or resident citizens, men or women, rich or poor, or proponents or opponents of settlement activity and occupation. In other words, the freedom of expression and protest reflect rights, which are endowed in disregard of the identity of relevant persons and independently of the positions expressed.

This abstraction will be the essence of the problem that I will discuss below. While the discourse of rights assumes the existence of an abstract legal person, the discourse of politics and identity (from now on, politics is separate from law) mostly presume the presence of a political self with its own historical context and

distinctive narrative. Law demands abstraction, but politics (in the form of national politics) requires from us not to abstract, but on the contrary: to bring history and memory back. How can both – the historical self and the abstract self – be combined? How can a combination be made up of dealing with a citizen as merely as such and considering them as belonging to their Palestinian history?

2. The discourse of rights and discourse of historical identity

Here, we touch on the essence of the problem associated with the discourse of rights. The case in point is national minorities and groups with their own collective narratives and open-ended historical profiles with the state in which they live, as is the case of Palestinians in Israel with the Israeli state. When Palestinian citizens approach the State of Israel, in their discourse, they combine their desire to seek refuge behind the discourse of rights, which is grounded in abstraction and colour blindness. In this context, Palestinian citizens demand that the state deal with them, first and foremost, as citizens without taking account of their national and religious identity and without any discrimination against them. On the other hand, they are desirous of divulging their historical profile as a whole, being present as a historical self that wants to tell its narrative in detail, and demonstrating their losses and the injustice done to them over the years. Clearly, there is unspoken tension between the desire/necessity of abstraction; that is, between the presence of Palestinians as citizens without a history or identity (i.e. to be treated as citizens and abstract legal identities) and their desire to re-examine history and identity (i.e. to be considered as a historical social beings). We, as Palestinians, sometimes opt for the abstract position and demand that the authority and court treat us as ordinary as Jewish citizens. In this case, we accuse the authority of politicisation because it takes into account our national affiliation or political stances. On other occasions, we call on the authority to take our context and history into consideration. Or take other example, we claim that violence of the poor, who protest for their livelihoods, differs from settler violence in the West Bank and Gaza. We argue that violence of Arab Palestinian citizens who take to the streets in defence of their homes and land is at odds with any other form of violence. It is a violence that aims at defending a just cause. Along the lines of this historical logic which looks into the wider context, one cannot describe violence in the abstract. There is justified and unjustified violence, and the matter is also subject to context, history and goals. There is a degree of tension between the logic of law, the logic of politics and history, the logic of tools, and the logic of goals. Sometimes we want to abstract, to be treated outside context, but at other times we want to be treated as historical selves with our own history and narrative.

Among other things, this paper aims to draw attention to this tension and to the mutual relationship be-

tween law on one hand, and politics, history, and identity on the other.

If law is premised on abstraction as discussed in detail above, identity is based on historical accumulation, narrative, conscientious moral implications, and historical meaningful symbols .

Identity is as linked to culture as it is to history. Culture is a collective act, which involves the group over the years and through generations. Everyone takes part in the making and consumption of culture. If the logic of rights is based on the ideas of individual autonomy and freedom, that is, on the notion of the autonomous and self-reliant self, culture is different. Culture serves as the moral basis, which individuals lean on and derive the meaning of their existence from. It is given present, readymade, and axiomatic forever. The importance of culture lies in its capability of relieving those who belong to it from the act of choice because it has almost ready prescriptions. Along those lines, culture is a unifying and collective factor. Its essence is, therefore, collective, rather than individualistic. It is grounded in innate disposition, not conscious choice, and in historical accumulation, not a moment of individual innovation. Hence, collective culture and identity are in a state of constant tension with the individualistic and abstract logic of law. As holders of identity and history, Palestinian individuals are historical entities with their own distinctive narratives, relationships, ties, and linkages with the collective and history. As legal persons and citizens, they are abstract individualistic beings.

Here, the challenge lies in the role which the members of the legal community, who bring cases to supreme court, who engage in defending minority rights, given that their role and the discourse they develop can have a double effect: it can bear influence on the political discourse of their own community on one hand, and on the legal discourse in the country on the other. How one can strike a balance between identity and citizenship, the individual and the collective, the past and the future, and what is said in court and in political encounters in front of their people?

On one end, members of the legal community, particularly lawyers who argue cases in Israeli courts, are under the pressure of formulating a legal discourse that interacts with the mainstream legal discourse and is grounded in the constituent linguistic norms that govern this discourse. Several matters cannot be accounted for before courts insofar as they are facts irrelevant to the merits of the legal dispute in question. Persistent reference to history and context can turn the case into a political and ideological one and the court might not be ready to listen. This is a matter that the legal and judicial community seeks to keep away from. Oftentimes, lawyers find themselves required to comply with the legally "relevant" facts of the case. In other words, some statements cannot be made in court because they are "irrelevant".[7] One example can be cited of the criminal file of a citizen from an unrecognised village, who built his home "without a building permit". Let alone the

impossibility of obtaining a building permit and the lack of this procedure in the first place, all indicators of the existence of unrecognised villages prior to the establishment of the State of Israel seem to be irrelevant to the case and more of a vain historical, ethical, or political discourse. This is not at the heart of the legal discourse, which centres on one question: Did the defendant build the house? Did he have a legal permit to do so? Accordingly, lawyers arguing the case are unsure to what extent they can "conspire" with the abstract language of law and put in operation self-control, which enables a "professional" presentation of their cases at the expense of eradicated history and simplistic context. Sometimes to present the case in legal terms the lawyer must give up on some history and some context i.e to formulate his narrative in a way that is to be accepted legally.

2.1 Law and identity: An institutional and social framework

Here, one or two occurrences can take place. First is the possibility of transmitting the infection of legal abstraction to the world of politics. By virtue of their presence and activity, lawyers influence the language and discourse of their community. The symbolic linguistic violence exercised by the court and legal discourse may infect the realm of politics. That is, individuals may look at their political world from the legal perspective, language of law, and legal discourse which prefers the abstract to the particular-historical, the individual to the collective, and the present to history. All this can produce a parallel political language. In this process politics is subjected to the legal logic – something not without consequences. In order for a Palestinian to appear as a citizen and legal person in the Israeli legal space, they must divest themselves of residual history wholly or partly. In other words, they have to forget a bit of their narrative so that they can enter into the discourse of citizenship and gain access to an the narrow margin of the legal discourse. In such cases, lawyers, rather than politicians, are at the forefront and in charge for formulating the claims for the Palestinian Community. While legal action is just a tool, instead of setting objectives by politicians, it becomes the other way round: lawyers and the legal logic play the primary role in drafting and controlling claims. One problem is that the language of law has its own rules, which require a particular typology of vocabulary, vocabulary and formulations. Of these, discourse should be submitted to the language of law. Hence, anything that cannot be drafted in the language of law remains out of the question. Many facts, circumstances, accounts of history, and narratives are considered by court as irrelevant and, consequently, of no effect on the legal decision making process. Against this background, the court forbids petitioners from recounting these statements because they are of no legal relevance. To that effect, the abstract language of law places limitations on the potential to articulate the narrative and history. These restrictions on the narrative/history-telling could be

internalised and transform into some form of self-control, or self-censorship over the narrative. In this case, lawyers are candidates to play the role of an agent who helps internalise such self-control over the narrative, inadvertently contributing to suppressing the Palestinian memory and narrative.

By contrast, those lawyers may play an opposite role if they attempt to introduce particular changes to the mainstream legal discourse. This discourse would alter some of its vocabulary in order to qualify for accommodating and taking into account the Palestinian historical narrative. Put differently, instead of legalising politics, law is politicised and historical and political considerations are introduced the legal text and discourse. The issue is not as much related to individual capacities and personal talents as it is to a prevalent political legal climate, which allows such changes to the legal language, discourse, and vocabulary. For example, one can argue that the years ensuing the Oslo Agreement and relative political breakthrough were accompanied by a new language at the Israeli High Court. On the other hand, the years since the second Intifada have witnessed some decline in the Court's willingness to intervene in government decisions. In this context, one has to admit that the outcome of this conflict is not resolved neither in perpetuity nor in advance. It is essentially a question of the power of these national groups, how adherent legal elites are to the struggles of these groups, and the nature of the relationship between legal elites and social and political movements.[8]

The relationship between legal elites and human rights associations on one hand, and the community they intend to represent on the other, is like any one between a "lawyer" and a "client". It is governed by the power relations as well as by the organising, clear vision and objective, and resources at the disposal of each party. There is a distinction between a large company that employs a lawyer to provide a legal review of relevant agreements (in this case, the client in the most powerful party and the lawyer is anything but a common service provider who can be dispensed with) and a client who is a refugee in a foreign country, while the lawyer offers his services free of charge to that refugee. It pretty obvious that, in the former case, the client is in immense control of the course of events and the decisions made by the lawyer. In the latter case, the client does not have much freedom and options. The same applies, albeit by different criteria, to the legal elites who defend vulnerable individuals or groups in society. The relationship of a human rights organisation concerned with refugee rights is different from that of a consumer rights association. The latter's power relations with its clients differ from those of a legal organisation that defends citizens' right to good governance, and so on. In some instances, legal elites take the initiative and make the decision, particularly when the "client" is unorganised, vulnerable, and lacks budget resources and capacities. Therefore, they set the agenda and priorities.[9]

To a certain extent, this was the case, for example, in the USA in the 1950s. The National Association for the Advancement of Colored People (NAACP), an elitist organisation, decided which cases to take to court for

legal considerations, which were essentially related to potential success and easy proceedings. The NAACP set the priorities as the black community in the USA did not have strong representative organisations at the time.[10] Accordingly, the NAACP determined the general agenda of the black community. A similar incident occurred with consumer protection societies. Legal associations used to select cases of interest because consumers were not visible, nor had institutions to represent them.

In this type of elitist legal associations, legal elites are in control of the course, content, and agenda of the struggle. By contrast, in another model, lawyers are just employees at institutions, which provide representation to minorities, interest groups, or protest movements. In such a case, law is reduced to one of many arms of social groups. The lawyer is primarily an activist in social change movements, using his legal skills from time to time. However, the logic that governs action as a whole is that of the social movement and its institutions. Here, recourse to court is one among many procedures that may be initiated by that movement; e.g. petitions, demonstrations, awareness raising, sit-in protests, etc. This form leaves no margin for manoeuvre and freedom to legal elites. It submits their action to fundamentally political and social considerations and interests.

In the case of Palestinians in Israel and legal organisations that defend their rights, one can argue that these include strong and independent institutions (e.g. the Legal Centre for Arab Minority Rights in Israel (Adalah)), legal departments or consultants employed by essentially non-legal associations (e.g. the legal section at the Mossawa Centre: The Advocacy Centre for Arab Citizens in Israel), or organisations clearly under the umbrella of some political movements (e.g. Al-Mezan Association for Human Rights). Adalah is an independent, elitist legal body, which completely relies on foreign institutions for funding. Although it is never obliged to win their satisfaction, Adalah still morally needs representative institutions and bodies just to support its legitimate status.

Turning now to the "client", namely Palestinians in Israel insomuch as their rights are the subject of research and struggle, one can posit that the picture is complex. In relation to representative bodies, such as the High Follow-Up Committee for Arab Citizens of Israel and National Committee of the Heads of Arab Local Authorities, it can be said that these are largely marginalised and more like coordinating bodies than representative frameworks in view of their methods of elections, operations, and decision making processes. In addition, compared to such an association as Adalah, budget allocations to these bodies are extremely limited. Still, in spite of the institutional and financial weaknesses of these representative bodies, legal organisations, including Adalah, do not function in a vacuum at all. They are inevitably compelled to take account of the wishes, moods, and policies of those representative bodies as well as the positions of Arab members of the Knesset.

Hence, legal organisations, such as Adalah, work within a general context that enjoys consensus, but the margin for manoeuvre of legal elites is so wide.

The second consideration is the growing role of the High Court as a point of reference for Palestinians in Israel to resolve their disputes with the state. Worthy of attention, in this vein, are some issues. To being with, excessive recourse to the High Court would make it a mediator or neutral arbiter between us and the state, grating it an authoritative moral status that prevails over disputes. Accordingly, the High Court will be considered by the Plaestinin community as competent to dispose cases in dispute. In other words, the High Court is given full legitimacy as an arbitrator to settle disputes between Palestinians and the state. In this context, we need to acknowledge that going to the High Court has been in place since the first day the State of Israel was established. It did not commence with the emergence of human rights organisations, which have been active over the past two decades. It is, therefore, unfair to blame these organisations alone for this "decision", which predated their emergence dozens of years earlier. In this context, however, it should be noted that recourse to the High Court has clearly been on the rise both qualitatively and quantitatively. In terms of quantity, resorting to the Court does not only involve cases of defence or a reaction to an arbitrary measure taken by the state, but is also part of an informed strategy, which believes that the High Court can be utilised and recruited to achieve collective goals and devise a social, economic and political change to the situation of Palestinians in Israel. This is somewhat different from the case in previous years. Additionally, in recent years, representative bodies and institutions, including the High Follow-Up Committee for Arab Citizens of Israel and National Committee of the Heads of Arab Local Authorities, have submitted petetions the High Court through various relevant associations. This excessive approach to the High Court has a bearing on society at large. It raises the level of its expectation of the High Court, while society remains in a pending state, waiting justice to be delivered to them.

The third problem is associated with going to the High Court is an alternative of political struggles. Though requiring thorough examination, preliminary observations are made along this vein. It is a phenomenon that Palestinians in Israel deal with the High Court more than they do with Israeli society and political relam. To a certain extent, dealing with the Court is easier than engaging with Israeli society at large, namely, the political perspective, parties, and government. The author opines that this is attributed to several reasons. In the first place, it should be acknowledged that the Court has sometimes done justice to Palestinian petitioners given the fact that it is bound to hear their cases. Compared to other power structures within Israeli society, the author is of the view that the Court is among the liberal forces and institutions that are open to listen to Palestinian citizens, especially when it comes to individual cases. This explains ongoing recourse to the Court

(in spite of a clear decline in the Court's role and response to Palestinian claims). The second reason lies, from author's point of view, in the nature of the High Court as a body that is incompetent of negotiation and bargaining as a representative of broader Israeli society. The Court either accepts or rejects petitions. On the other hand, petitioners are not required to make concessions or reach long-term binding agreements with the state institutions. Put differently, the logic of petition does not bind Palestinians, as a collective, to make any explicit and clear concessions in order to obtain rights enshrined in the Israeli constitution and judicial system. Beyond doubt, certain concessions need to be made through petitions filed to the Court. However, the nature of these concessions are unclear and inexplicit. As mentioned above, they pertain to the need to adapt the discourse and narrative in a manner that is comely to the Court.

However, the logic of litigation differs from the logic of contract-consent that prevails in politics, which might take place between elected official representatives of Palestinians and the state. Here, the author would risk saying that the fact an elected representative body of Palestinians in Israel is lacking is not only attributed to the state's opposition, but also to Palestinians' apprehension of such a body, which can enter into negotiations with the state on behalf of all Palestinians in Israel. This body can, of course, register achievements, but it is eligible to make concessions too. To some extent, the state is not interested in such a body in fear of making concessions on behalf of the state. On the other hand, Palestinians are apprehensive because they are concerned about the necessity that they make concessions in the name of the Palestinian community, which they did not, and cannot, be decisive about at this stage.[11] Put differently, in certain cases, the Court provides a space enabling Palestinians to score some achievements, but these would not be part of a bargaining process with the state. They would not be required to make symbolic concessions or reach historical compromises relating to recognition of Israel as a Jewish state. As a litigator you are not explicitly asked to agree to accept Israel as a Jewish state. In that sense, the philosophy of litigation is different from the philosophy of contract-consent that prevails in politics. The latter is based on engaging in a dialogue with Israeli society as a whole and reaching understandings that are sometimes driven by bargaining. In this vein, a clear and express bargain means engaging in political and historical talks and coming up with historical compromises with the state. It is obvious why Palestinian leaders and decision makers prefer the path of litigation to a contractual approach. However, we need to pay attention to the energy drain of the litigation process. It leads us to lose sight of the need for focused strategic work with the Jewish community and public opinion. The author does not claim that Israeli society is ready and prepared for such a dialogue. The responsibility for the absence of a serious dialogue is not only borne by the Palestinian leadership in Israel. It should be noted that, because of the legal structure which is relatively separate from political discourse in Israel, the political discourse of Palestinians in Israel is also decontextualized and indifferent to contextual impacts on the Israeli public.

Also worthy of note is that the nature of achievements made by means of litigation is discrepant from those scored by way of the social contract. Contractual achievements are grounded in potentially long-term inherent convictions. By contrast, litigation accomplishments might be instantaneous as if they were imposed on the Jewish community by the High Court of Justice. They also seem to be temporary and instantaneous to Palestinian lawyers insofar as the Court has not signed nor is bound to those accomplishments in a clear and explicit manner. Rights discourse and litigation in this sense simply postpones the need for political agreements and historical compromises.

2.3 From individual to collective rights

A question might be raised in this context. The discussion and analysis above might be valid when individual rights are in question. However, what about collective rights? Are not collective rights by themselves a political achievement? Do not they reflect a recognition of the distinctive Palestinian history, narrative, and identity?

This observation is significant because collective rights are in large part are better carriers of questions of history, identity, collectivity, and difference. They also attempt to draw a link between the individual and the collective, and between sameness and the difference.[12]

Here, we need to be careful, however. Collective rights are controversial in every society, and within Israeli society as well. It is impossible to achieve gains at the level of collective rights by filing petitions to the High Court. By is very nature, this pursuit is political. The Court does not consider that this falls within its jurisdiction or that it plays this role. It should be noted that Palestinians in Israel do have some collective rights, but all of these are not relevant to legal proceedings or litigation at all. They are just political and legal arrangements. The first of these rights is, for example, the Arabic language of instruction at Arab schools. This achievement was not made as a result of legal proceedings, but was unanimously approved by early governments of the state. This, therefore, seems to be a firm accomplishment. A similar case in point is exempting Arabs from conscription. It is true that the state has many considerations, but this exemption is eventually some sort of a right(though it is not really formulated as a right, but as mere exemption), which reflects an implicit agreement within the government. Also, the Arabic language has been a legal heritage since the Mandate period. Still, the status of Arabic has seriously and largely declined after the Nation-State Law was endorsed in 2018, revoking recognition of Arabic as an official language. Another case in point in the relative independence given religious courts. Furthermore, even when we speak of collective rights, claims that can be raised are only those which can be formulated in a legal language. Anything that is not fit with or part of the language of law

and the discourse of rights cannot be elaborated as such, and cannot therefore be claimed. The language of law is one that can offer at most a reform of the existing structure; it does not reach the point of changing the structure as a whole. Group rights usually aim to suggest a certain change in the structure and litigation is not able to achieve that.

1.3 What are the prospects of litigation and legal discourse in the state of the Jews?[13]

Some conceptual clarifications need to be made in this context. Initially, one needs to draw a distinction between two interlinked, but different, questions. First, is it possible by means of legal proceedings to score achievements or claim legal victories, which would change the overall legal landscape? Impliedly, this question means: Is it possible to devise a change or achieve a breakthrough in law by way of litigation and argument of cases before the High Court? These combine one question.

The second question is substantially different from the first: Can a change in society and politics be introduced by making a change or a breakthrough in law? While the first question examines our ability to change the law by means of legal proceedings, the second looks into the capability of law – in case it is altered – to devise a change in society and politics. These two questions are completely different, albeit interconnected.

In essence, the first question is legal. It addresses the nature of the legal discourse and to what extent the current discourse together with its intrinsic anomalies can be used. Accordingly, it can be brought in line with the claims of a particular category or group by way of arguing relevant cases in the High Court. On the other hand, the second question is of another character; it is essentially socio-political. It presumes that the Court has given redress to petitioners. The question remains whether the Court decision is competent of changing the socio-political reality. Let us give examples from Israeli and American legal systems.

Take, for instance, the well-known Brown case,[14] which deliberated the issue of school segregation. Schools attended by white students were segregated from those of the black community. A petition was lodged to the court to revoke the laws and practices, which consolidated segregation insofar it contradicted the constitution and values of equality enshrined in the constitution.

In this case, two questions needed to be answered when the petition was filed. These were the questions mentioned above.

The first (legal) question concerned an assessment of how likely the case would be successful before the

court. That is, to what extent the court is legally competent to adopt the petitioners' position and acknowledge that school segregation was at odds with the principle of equality as provided for by the constitution? As for the second question, for the sake of argument, let us suppose that the court had accepted the petition, to what extent would such a decision be capable of devising a tangible change to the socio-political reality? To what extent can the decision be executed in the US society, taking into account the deep-rooted racist attitudes towards the black community? To this avail, one might come to the conclusion that law can be changed by way of legal proceedings. The law by itself, however, is neither capable nor competent of changing the socioeconomic reality itself.

A similar case in point is Israel. Take, for example, the High Court decision on the Ka'adan case and residence in the settlement of Katsir.[15] In this context, two different questions had been posed when the petition was instituted. Firstly, how likely was it that the court accepted the petition? If the case were accepted, one would have to assess whether such acceptance could change anything in the socio-political reality and settlement practice. The decision on the Ka'dan case demonstrates that, even if there is a possibility for success before the High Court, changing the reality is not as easy, taking into account that enforcement of the decisions is underpinned by good faith of the institution. A decision from the High Court does not suffice to the devise a change to the de facto situation.

Against this backdrop, any petition to the Court needs to take into consideration two questions. It is not adequate that we ask ourselves what the likelihoods of success before the court are. Rather, we have to inquire about the possibilities for success in terms of changing the situation on the ground , in the everyday material life of people. The answer to each question might be different, although it would undoubtedly share a certain relationship with the other.

The second observation has to do with the role of lawyers acting for a political cause. Here, one needs to distinguish between two courses of action. On one hand, lawyers essentially argue cases in constitutional courts, or before the High Court in the case of Israel, in order to bring about legal achievements. In this case, the petitioner seeks redress from the court. On the other hand, lawyers may carry out other activities that are irrelevant to filing petitions to the High Court. These activities might take more than one form. Of these, legal education can reveal the truth, and provides an analysis and review of the implications and prejudices of the legal situation, to political activists and the broader public. This from of civil society action is designed for awareness raising, incitement, and provocation, but without a concomitant recourse to court with a view to changing the legal state of affairs.

Legal action, sometimes, also has the potential of popular and political mobilisation among the public in general, and within political parties and the parliament in particular, with the aim of changing the provisions of a law enacted by the parliament itself. In this case, the role of lawyers is to offer advice, propose alternative laws, prepare bills, and write down justifications for these bills. As is the case of legal proceedings before the constitutional court, the aim is to introduce a legal change. However, the legislature or parliament, rather than the High Court, is the body anticipated to devise this change. Accordingly, legal action is one thing. Arguing cases and initiating legal proceedings in court is another thing. The former is not confined to the latter. Lawyers' role is not restricted to arguing cases in and instituting petitions before the High Court. In fact, however, filing petitions and arguing cases in court is usually the case when disappointment is caused by the legislative and executive powers. Hence, recourse is made to constitutional and administrative courts with a view to introducing changes in favour of the minority.

A distinction needs to be drawn between the various roles played by lawyers and the multiple types of desired change. If one wishes to answer the question on how effective and efficient it is to have recourse to the High Court in order to bring about legal changes ab initio, and social, political and economic changes at a later stage, it is difficult to come up with a theoretical answer without reference to, and close examination of, relevant cases. Some are of the view that a mere recourse to court is unethical. The author disagrees with this perspective. It might be necessary to boycott the High Court on other grounds. For instance, political benefits and achievements that can potentially be attained by resorting to the Court might be less than the damage it causes. In other words, the outcome of the process is negative. An account of profits and losses should, therefore, govern our position. Others might claim that the strategy of legal action necessarily leads to minimising legal action and collective popular movement. These are good claims, but a relevant answer remains analytical, rather than theoretical.

Finally, the importance of filing petitions to the High Court needs to be stressed for reasons other than the possibility for success or immediate change. Two significant aspects underpin the preparation and institution of petitions relating to a particular case. The first is documentary: when they submit a petition, a lawyer is informed by an investigation of facts and evidence and transforms these into a legal text. Along these vein, the lawyer documents the violation at hand together with respective testimonies, details, evidence, and facts. This, in and by itself, is of paramount importance. Secondly, legal proceedings oblige Palestinians to speak a language that the Israelis can understand. Litigation compels us to formulate our problems in a language that is capable of penetrating an audience, other than the Palestinians who directly suffer from the government policy. This means that commitment to the language of law is able to turn the question of Palestine into a

universal language that can be communicated to the whole world. This linguistic need is important in the context of political struggle both locally and internationally. It obliges us to define our legal and moral goals and criticisms of Israel's policies against us.

3.2 The limits of law: An attempt to propose a conceptual framework

In view of the above, below is a paradigm to help understand the limits and relationship between the legal discourse and overall political structure of the state. This paradigm is not an alternative, but an entry point, to the diagnosed material historical analysis. Importantly, the following observations should be viewed as research proposals or an analytical framework that does not substitute for the need for in-depth details. Within this analytical framework, one can refer two basic models, which analyse the role of law in politics and in social change.

The first is a structural model, which looks at law as a shadow or smooth surface of a more solid and coarse reality beneath it. Put differently, it is an interface controlled by forces located outside the realm and language of law. Along the lines of this understanding, law reflects the interests of dominant classes and groups of society. This viewpoint is called the structural approach. The second model views law as independent and capable of surprising us and introducing changes to social power balances. This is termed the liberal perspective.

The structural approach features several narratives. One is the Marxist account, which sees law as the shadow of economic relations that govern society. Should Marxist terms be used, one can say that the key infrastructure of society is reduced to the nature of production relations. There, real power relations are concentrated in society. Politics, and later law, are nothing but manifestations and a reflection of these power relations. Law is a shadow of economic and social power relations prevailing in society.[16] Through this, the potential for change is extremely limited because law was originally found to serve the interests of socially dominant powers, not to undermine their control.

However, the structural logic of law and its role are not confined to Marxist theories per se. The majority of ideological and essentialist approaches are similar in their performance orientation towards law. This approach considers law as a mere tool or superstructure that reflects deeper structural interests.[17] Accordingly, one can envisage a structural approach which, for example, insists that the possibility for law to introduce a change to power relations in Israel are almost nil. In Israel, law reflects the essence of the state as a Jewish state. The judicial system in its entirety is nothing but an expression of this structure. It is, therefore, ineligible to overcome that essence because it a prerequisite for its existence in the first place. In line with this structural

logic, law remains hostage to the logic of politics (and, in this case, hostage to the logic of ethnic, national Jewish settlement activity). The meagre legal achievements made in favour of Palestinians in Israel are just breakthroughs, which are incapable of introducing substantial changes to the structure of key power relations within Israeli society. Among these power relations are scarce resources, including land, water, security, and considerable capital mobility. According to this approach, any liberal and progressive legal discourse will be unable to create a gap in these power relations. Hence, achievements scored through the legal structure will continue to be remarkably limited, and cosmetic at best.

In contrast to this structural nightmare, the liberal dream is premised on the hypothesis that law is independent and capable of effecting changes in society and the state. These changes might be far-reaching, extending to the foundations of society and economy as a whole. Here, law emerges in its relatively independent visage and as an articulation of firmly established noble values of society.[18] Against this backdrop, the court seems as a last resort of redress for affected parties to remove injustices and introduce profound changes and accomplishments within society. In this context, some might make reference to achievements of the Supreme Court of the United States in the Brown case vs. Board of Education of Topeka mentioned above, Mabo case in Australia in relation to indigenous land rights,[19] or other historically significant cases that contributed to shaping the US and Australian societies and cultures.

The author is of the opinion that there is no clear obvious answer to the question on the potential of the legal discourse to make achievements on the ground. Answers vary depending on the nature of the different states, political structure and legal history of these states, and the nature and type of cases considered by the court. For instance, in the Israeli case, it is easier that the court adjudicates cases involving political freedoms and freedom of expression. The court can also stand by the government insofar as those cases do not cost state much. On the other hand, cases involving members of the Knesset and freedom of expression are brought into the light both locally and internationally. Israel can make some profit out of these cases, without having to pay an exorbitant price. By contrast, land cases pertain to the very essence of the conflict. Hence, one expects that the Court will not intervene in such cases in favour of Palestinian citizens, at least in the near future. Still, this option is not overruled in the event conducive political conditions are created, making it possible. At any rate, the author does not see such a conducive political situation looming on the horizon at all. On the contrary.

In this context, a critical observation can be made on those structural theories, which view law as just a smooth and beautiful surface, obscuring a coarse and painful reality. One has to admit that if this surface is a cover hiding the coarse reality, law must inevitably be non-transparent; that is, it should not serve as a mere

reflection of the coarse reality. If that were the case, law would lose its ideological role and ability to beautify the ugly reality. For law to play its cosmetic role, it has to be beautiful, or at least promise us that it will be so. Otherwise, the beautiful smooth surface will be not be different from the ugly coarse economic reality that it is trying to hide. Logically, law sometimes criticises the institution which it serves because such criticism is the secret of its vitality and beauty. Without this criticism, law would remain a dead body. It would neither change nor add anything to the regime of hegemony, which presumes that law is part and parcel of it.

For law to play its role as part of the process of justifying the current regime, it has at times stand against and be critical of that regime. In other words, in order to stand by the regime at the strategic level, law needs to stand at odds with this regime from time to time. To be faithful and loyal to the regime it represents, law should sometimes "betray" the regime itself. If there were any role for law and legal proceedings to play, it inevitably lies in that space between the law's desire to maintain power relations and its incapability of carrying out this task without making certain concessions. To what extent are these concessions significant, fundamental, and far reaching? The answer to this question must be both concrete and studied case by case and a country by country. Hence, the position laid out here is also critical of the liberal approach, which believes that the court and legal discourse can introduce deep-rooted changes within society. It is also critical of the structural position, which perceives law as a shadow of politics only. It is possible to criticise the liberal logic in the case of Israel, by arguing that at a certain point, the regime is ready to unveil its ugly face. It is not concerned about concealing its racial, ethnic, and supremacist character. Put differently, that regime is not willing to attempt to beautify itself at any price. If it has to choose between being beautiful, risking the privileges on the majority, or being ugly while maintaining deep interests of the majority and governing institution, it will in all probability opt for keeping these interests, even if it seems to have lost some of its grandeur and beauty. A review of the High Court decisions in recent years, and a review of the political discourse in Israel, demonstrates that the Court views with complete disregard its beauty and does not pay much attention to its elegance. This is particularly the case given the international, global and local circumstances and climate, where there is a tendency towards an intolerant national/religious discourse that is hostile to human rights and feeds into the national/religious groups.

Endnotes

1 Karl Marx, "On the Jewish Question." In: *Marx Early Writings*. (Penguin Books,1992). pp. 211-242.

2 Henry Maine accounted for this transition. This has been a well-known and commonplace statement today; namely, transition from feudalism to capitalism as a shift from the logic of status to the logic of contract. See Henry Maine. 1861. *Ancient Law: Its connection with the early history of society and its relation to modern ideas,* (London: John Murray, 1861).

3 In the 21st century Israel, a residue of this bygone system is still in place. To date, various laws apply to individuals belonging to different denominations in all that relates to personal status cases. This is a relatively exceptional case in modern states, however. Israel has inherited the Mandatory law, which vests different religious courts with the exclusive right to consider personal status cases (see Articles 47-54 of the Mandate for Palestine). Israel has maintained, and later developed, this logic because it suits its needs as a state that attaches a degree of importance to religious affiliation in the public political and legal space.

4 There is a long history of the relationship between the idea of money and the precept of citizenship inasmuch as both reflect an abstraction. The author is of the opinions that this history starts with the publications of German theoretician of law, Carl Von Savigny, at the beginning of the 19th century. Then, young Carl Marx was a student of Savigny, and was undoubtedly influenced by his writings. However, a clear development was marked by Evgeny Pashukanis' book of 1924: *The General Theory of Law and Marxism*, (Transaction Publishers, 2003). In critical literature of the late 20th century, this legacy which compares the legal form to the commodity form has been revived. See Isaac Balbus, "Commodity Form and Legal Form: An Essay on the Relative Autonomy of Law." *Law and Society,* Vol. 11 No. 3 (1977), pp. 571-588.

5 Albeit highly common and dominant, this debatable hypothesis presumes that the private civil law (laws on property, contracts, and torts) are premised on the principle of restorative justice. This branch of justice is bipartite, involving the injured party and the wrongdoer. The private civil law is not concerned with distributive justice (as this is the task of administrative law and tax laws). The latter has to do with the distribution of wealth among all citizens on grounds of criteria, which take needs as a key benchmark.

6 This logic of the philosophy of right is premised on a dominant perception, which is influenced by Immanuel Kant's philosophical legacy. The latter draws an inherent link between the notion of right and that of individual freedom or individual autonomy. According to Kant, the essence of right is to defend this space. This perception is outlined in Immanuel Kant, *Metaphysics of Morals.* Translated by Mary Gregor. (Cambridge: Cambridge University Press. 1996). However, Kant's theory on the philosophy of right is not the only one. By contrast, in his postulations, Jeremy Bentham links the precept of right to the defence of interests, rather than to freedom. In the 20th century, views of the philosophy of law were divided on this issue. The Kantian legacy is expressed by, e.g., H. L. A. Hart, "Are there any natural rights?" In Jeremy Waldron (ed.) *Theories of rights.* (Oxford: Oxford University Press,1984), pp. 91-109. On the other hand, Bentham is best articulated by Joseph Raz publications. See Joseph Raz, *Right Based Morality"?* In Jeremy Waldron (ed.) *Theories of rights.* (Oxford: Oxford University Press,1984), pp. 182-200.

7 This is one of the subjects that have always preoccupied me as a lawyer and as a partisan political activist. On this tension as well as what can and cannot be said in court, see Raef Zreik, "When winners lose? On legal language." *International Review of Victimology*. 17 (1) (2010), pp 49-68, and Raef Zreik, "On law and the reshaping of space." *Hagar: International Social Science Review*, vol. 1, No 1, (2000), pp. 168-177.

8 This issue has been addressed by many recent studies. See, for example, Anna-Maria Marshall and Daniel Hale "Cause lawyering", *Annual Review of Law and Social Science*, vol. 10 (2014), pp. 301-320. Also see Austin Sarat and Stuart Scheingold (eds.), *Cause Lawyers and Social Monuments.* (Oxford University Press, 2006).

9 On the relationship between lawyers and legal elites on one hand, and social movements on the other, see Michael McCann and Helena Silverstein, "Rethinking Law's Allurements: A Relational Analysis of Social Movement Lawyers in the United States". In Austin Sarat and Stuart Scheingold*, Cause Lawyering: Political Commitments and Professional Responsibilities*, (Oxford University Press, 1998), pp. 261-291.

10 Marshall and Daniel Hale, p 304.

11 See Raef Zreik. "Palestinian Question: Themes of Power and Justice.,« *Journal of Palestine Studies*. vol. 33, No 1 (2003), pp. 42-54.

12 Many attempts have been made in this regard. Among the most significant of these, see Will Kymlicka, *Liberalism, Community and Culture*. (Oxford: Oxford University Press, 1989).

13 On the role of the resistance role of law and potential of using law as part of the resistance strategy, see Elian Weizman. "Cause Lawyering and Resistance in Israel Cause Lawyering and Resistance in Israel: The Legal Strategies of Adalah". *Social and Legal Studies*, vol. 25, Issue 1 (2015), pp. 43-68.

14 Brown vs. Board of Education of Topeka, 347 U.S. 483 (1954), Proceedings, Supreme Court of the United States.

15 See H.C. 6698/95, Aadel Ka'adan vs. Israel Lands Administration, 54(1) P. D. 258. On various aspects of this case, see Adalah, *Dafater Adalah*, Issue 2, Autumn 2000.

16 See Karl Marx, *The German Ideology,* (Prometheus Books Amherst 1998). Also see Karl Marx, "On the Jewish Question." In: *Marx Early Writings*. (Penguin Books,1992). pp. 211-242.

17 On the role of critical legal thought and understanding of the relationship between law and politics, see David Kairys (ed.), *The Politics of Law*, (Basic Books. 1998), particularly pp. 23-53, 641-662.

18 On the significance of the rule of law, which is viewed as a universal liberal value, see Jeremy Waldron, "The Concept and the Rule of Law", *Georgia Law Rev*, vol. 43.1 (2008), p. 1. For a critique of the qualitative value of the principle of the rule of law, see Robin West "The Limits of Process" in James E. Fleming (ed.), *GETTING TO THE RULE OF LAW: NOMOS L*, (New York University Press, 2011), pp. 32-51. For a treatise with the view that law and the principle of the rule of law are capable of transforming politics and society, see Richard Kluger, *Simple Justice*, (New York: Vintage books, 1977).

19 Mabo v. Queensland HCA 23 (1992) 17 S CLR1.