8

The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent

GAD BARZILAI*

I. BETWEEN SILENCE AND SPEECH—LAWYERS AND THE POLITICAL SPHERE

Contrary to numerous other professionals, lawyers are political agents in their daily professional practices. They habitually act through legalistic struggles to alter allocation of public goods (Halliday and Karpik, 1997). Frequently, they either function in politics and/or have meaning in politics (Abel, 1989, 1995; Barzilai, 2005; Eulau and Sprague, 1964; Feeley and Krislov, 1990, Feeley and Rubin, 2000; Haltom and McCann, 2004; Kagan, 2000; Lev, 2000; Sarat and Scheingold, 1998, 2001; Scheingold, 2004; Scheingold and Sarat, 2004; Shamir and Ziv, 2001). By definition of their profession, lawyers incline to legitimate the nation-state. Their professional ideology presumes crucial public constitutive functions of the legal complex and it relies on perceived state's abilities to respond rather effectively to public needs and expectations.

When lawyers practise in the legal complex—even those who voice political dissent—they act through the formal legalistic rules as those

* University of Washington: gbarzil@u.washington.edu. I would like to express my deepest thanks to Malcolm Feeley, Terry Halliday and Lucien Karpik for their very helpful and insightful comments on earlier drafts of this chapter. Lisa Hilbink sent me the notes of the Onati conference around this volume. Clark Sorensen and Patti Goedde guided me on lawyers in South Korea. The Israeli bar and the management of the Israeli courts were very cooperative and enabled me to access valuable original information. Lee Varshavsky, my research assistant from Tel Aviv University, was very helpful in assisting me to accumulate figures regarding lawyers in Israel. Gerhard O'Neill and Dan O'Connor provided me the data on Australian lawyers. Stuart Scheingold and Joel Migdal offered me their helpful comments on an earlier draft. Finally, the comments of three anonymous referees were very helpful in improving the chapter. The generosity and wisdom of all these people notwithstanding, the responsibility is all mine.

of jurisdiction, standing, justifiability, adjudication, procedures, rules of ethics and rules of evidence. Hence, both legitimisation and legalisation of the nation-state through lawyers seem to be fundamental and expected functions of lawyers through the legal complex. These two functions of lawyers may even be empowered in liberalism since it advances two foremost normative principles. The first principle is the preference rendered to individual rights over any other type of collective good. The second principle is the state's 'neutrality' and its ability to produce a procedural justice. Presumably, lawyers exercising professional knowledge of the legal complex may have a singular role in advancing these two liberal visions.

However, this chapter does not portray lawyers in the course of conventional democratic politics. Rather, it is devoted to another aspect concerning lawyers, the legal complex, and political liberalism—it argues that lawyers in a diversity of sociopolitical and economic sites in state and civil society are crucial agents of the formation and signalling the sphere of deliberations in democracies. In other terms, when lawyers talk and furthermore when they are silent in the political sphere, and yet practise as lawyers, they actually determine the boundaries of the political discourse and political deliberations. Rather than using categories of 'private lawyers', 'government lawyers' and 'cause lawyers', this chapter adds a different and yet a complimentary theoretical vantage point for better understanding the legal complex. This chapter does not look into a specific type of lawyer. Instead it is interested in comprehending the overall population of lawyers, and how the bar has mobilised, effected and affected sociopolitical forces. It focuses not only on the functions of empowering and challenging legalisation of the state but also on how lawyers are meaningful in shaping the boundaries of political discourse. More contextually, this chapter also looks into the Israeli experience and in turn it invites a few generalisations that are comparable to other case studies around our globe.

II. THE COMPARATIVE SETTING

(a) Lawyering in Proportions

With more awareness of liberal rights and individualism, significantly associated with capitalism, industrialisation and economic expansion, the number of lawyers especially in Western societies has increased. It is both important and striking to offer a comparison between those countries and Israel, which was established in 1948 subsequent to different waves of Zionist immigration mainly from East Europe and Russia to Palestine, beginning in 1882. It is important to put Israel in a comparative perspective, since if its number of lawyers is comparatively diminutive, what does

it entail for lawyers' contribution to political liberalism and its absence? Alternatively, if the number of lawyers is considerable in comparative perspective, how does it affect political discourse and how do lawyers contribute to framing it amid liberalism? The cross-national comparison may be striking, since Israel does not have historical roots of liberalism, and from this perspective its historical backdrop is significantly different from those of Western and European countries.

About 60 per cent of the Israeli demographic increase and composition since 1948 is due to immigration from non- liberal countries; North Africa and Middle East Muslim countries (mainly in 1951–61), East European countries (mainly in 1919–23; 1946–8); and from the republics of the former Soviet Union (mainly 1989–91). With no significant demographic origins of a Western liberal culture, and even considering some liberal experience since the end of the 1960s, we may hypothesise that the number of lawyers in Israel might have been rather low in a comparative perspective, and especially in comparison with Western liberal states. The praxis is counter-intuitive, however.

I have gathered a data set about lawyers in 39 countries; some are western liberal democracies and others non-liberal settings. My observation is that among European and most Western nation-states and most democracies, Israel has the highest number of lawyers per population size. In 2005 the country had one lawyer per 211 citizens, a figure which is significantly higher than in most liberal societies like the US (one lawyer per 434 citizens), United Kingdom (one lawyer per 489 citizens), Germany (one lawyer per 619 citizens), Australia (one lawyer per 672 citizens), Holland (one lawyer per 1,251 citizens), and France (one lawyer per 1,281 citizens).

As Table 8.1 above exhibits, in comparative terms and considering population size, Israel had in 2005 204 per cent more lawyers than in the US, 232 per cent more lawyers than in United Kingdom, 293 per cent more than in Germany, 593 per cent more than in Holland, and 601 per cent more lawyers than in France. Not only do West European and North American countries share a more historically entrenched political liberal tradition, but all of them (with the exception of relatively newly established democratic Portugal) have a more prosperous economy with higher GDP per capita than Israel. And yet, Israel has the highest number of lawyers per population size. It would have been plausible to assume that the number of lawyers in Israel may resemble that in a country like South Korea. Both Israel and South Korea have experienced an intensive economic development of the private sector, both do not have liberal origins and traditionally entrenched political liberalism. Further, both are under massive American political influence, and both are characterised by strong feelings of national security siege mentality. Yet, the relative number of lawyers in Israel is 30,13 times more than in South Korea, per population size.

Table 8.1 Lawyering in Comparison (2005)

Country	Population	No. Lawyers	GDP per Capita	No. Citizens per Lawyer
Israel	6,869,500	32,600	20,800	211
Spain	40,341,462	148,543	23,300	272
Liechtenstein	33,717	112	25,000	301
Greece	10,668,354	35,000	21,300	305
Iceland	296,737	690	31,900	430
US	295,734,134	681,000	40,100	434
Italy	58,103,033	128,000	27,700	454
Portugal	10,566,212	22,575	17,900	468
Luxembourg	468,571	979	58,900	479
United Kingdom	60,441,457	123,500	29,600	489
Canada	32,805,041	67,000	31,500	490
Cyprus	780,133	1,577	20,300	495
Ireland	4,015,676	7,500	31,900	535
Germany	82,431,390	133,113	28,700	619
Bulgaria	7,450,349	11,353	8,200	656
Australia	20,090,437	29,887	32,000	672
Belgium	10,364,388	14,529	30,600	713
Norway	4,593,041	5,770	40,000	796
Switzerland	7,489,370	7,289	33,800	1,027
Hungary	10,006,835	8,900	14,900	1,124
Denmark	5,432,335	4,635	32,200	1,172
Holland	16,407,491	13,111	29,500	1,251
France	60,656,178	47,354	28,700	1,281
Czech Re,	10,241,138	7,947	16,800	1,289
Slovakia	5,431,363	3,994	14,500	1,360
Macedonia	2,045,262	1,379	7,100	1,483
Turkey	69,660,559	44,221	7,400	1,575
Croatia	4,495,904	2,706	11,200	1,661
Austria	8,184,691	4,678	31,300	1,750
Poland	38,635,144	21,500	12,000	1,797
Slovenia	2,011,070	992	19,600	2,027
Sweden	9,001,774	4,321	28,400	2,083
Lithuania	3,596,617	1,382	12,500	2,602
Ukraine	47,425,336	18,000	6,300	2,635
Latvia	2,290,237	833	11,500	2,749

(*continued*)

Table 8.1 Continued

Estonia	1,332,893	447	14,300	2,982
Finland	5,223,442	1,735	29,000	3,011
Japan	127,417,244	21,208	30,400	6,008
South Korea	48,422,644	7,617	19,200	6,357

Sources:

1. For European countries data was gathered from CCBE (Council of Bars and Law Societies of Europe).
2. For Israel data was collected from the Bureau of Statistics and the Bar.
3. For South Korea the numbers were collected from the South Korea Bar Association.
4. For the US, data was collected from Internet Research Group.
5. For Canada data was collected from Trust Canlaw. www.canlaw.com/lawyers/membership.htm.
6. For Australia the data was collected through the help of the Australian Bar.
7. For Japan the data was gathered in the Japanese Bar.

Now, knowing that the number of lawyers in Israel is so high in comparison to that in many other countries invokes a crucial question. What does such a large professional group mean to political liberalism, the legal complex and political power? Accordingly, the next section attempts to explore why Israel has had such a high number of lawyers. Then I argue that while lawyers have been agents that propelled some facets of political and economic liberalism, they have also constituted a structure of a limited political discourse, which has legitimated and legalised the silence of dissent against some fundamental narratives of the nation-state.

How may we explain the existence of a large professional body of lawyers that is rather passive in the political discourse? How are lawyers meaningful, if at all, to political liberalism, the legal complex, and state–society relationships? If my solution to the puzzle is correct, we need to introduce the concept of *silence*, alongside *voice* for better understanding of collective action, state–society relations, and lawyers. In other words, this chapter invites one to look at lawyers not only as agents of mobilisation, legislation, regulation and litigation. Additionally, we are best advised to comprehend and theorise lawyers as framers and markers of voice, silence and political absence. If my argument is solid, it should assist in further exploring why lawyers may be both agents of social changes and agents of social maintenance in the very same legal complex. However, my solution may constitute an imagined community of lawyers. To avoid that methodological and epistemological slope this chapter distinguishes between various types of lawyers. In politics like in any space of language and behaviour there are different types of voices and silences.

(b) A Word on Legal Words

Language is a sociopolitical construct, with no in-depth meanings to its rules, unless mythical social certainty and deceptive social consent are investigated as lingual sources (Wittgenstein, 1958: 225–9; Wittgenstein, 1969; Wittgenstein, 1974: 188). Law is an epiphenomenological constitutive language that has its structure of norms and a grammar, ie, rules of interpretations and rules of logic (Wolcher, 2005). I narrate lawyers as structures and agents of the legal language; lawyers are embedded in legal words as their world. They create it, generate it, and often present it as certain and consensual. Lawyers may talk and they may be silent and use these lingual facets of silence and talking as types of collective action towards the state and within its power foci.

III. LAWYERS AND THE STATE BEYOND ISOMORPHISM

At the outset of the twenty-first century, most nation-states are non-liberal, yet most democratic nation-states have some liberal characteristics as part of their institutional arrangements and national cultures. In comparative perspective, liberalism means a civil society, including political opposition groups, that somewhat moderates the state and may replace its governing bodies through practices that are based on individual rights, NGOs' activities, a relatively limited state intervention in society, state protection that significantly guarantees individual rights, and plurality of recognised religious practices, even if the state, like in Spain or England, renders preference to a specific religion. In various contexts various states would be characterised by different degrees of liberalism.

Israel falls into the category of a nation-state that is deeply involved in society and strongly promotes a republican interest of being prominently a 'Jewish and Democratic State'. Notwithstanding, it is experiencing strong effects of mainly an American liberal culture, among both its Jewish (81 per cent) and Arab-Palestinian (19 per cent) citizens. Israel is a mixture of non-liberal and liberal characteristics of the nation-state and its legal complex.

It is non-liberal in a few facets. First, the state prefers constitutionally and practically one religion (Judaism) as its state formal religion. While the state's preference of one religion is a common phenomenon in world politics, including in Western Europe, in Israel such a Jewish republican preference also constitutes the dominant legalistic basis of allowing immigration into the country and bestowing citizenship. Furthermore, Judaism as state religion is also the basis of constituting differential expressive and implicit, formal and informal, public policy treatments of various groups and imposing constitutional and practical thresholds on access to electoral procedures, political rights, cultural rights, socioeconomic rights and land acquisition.

Secondly, through blocking and elevating the costs of using alternative channels of personal and collective fulfillment, the state compels non-Orthodox Jews to practise Orthodox habits in a diversity of facets of life like marriage, divorce, conversion, daily religious practices of worshiping, and burial. Thirdly, the state is highly involved in its citizens' lives, and is very central in most civil activities. Such an active state facilitates itself through an extensive maze of economic regulation and high taxation, centralised national education, a wide range of compulsory military service, and strong disciplinary ideological mechanisms around the legal ideology of Israel as a 'Jewish and Democratic State'. Fourthly, the Arab-Palestinian minority in Israel and the Palestinians in the 1967 occupied territories have significantly and systematically been discriminated against Israeli Jews in various legal, political, socioeconomic, and cultural dimensions. Thus, public goods have discriminatorily been allocated for Jews against Arab-Palestinians, despite some liberal adjudication and involvement of the judiciary. Fifthly, national security symbols are so salient and the military is the most central institution in social life, as to infringe upon basic human rights such as freedom of expression, freedom of movement, and property rights. Beyond the issue of state-sanctioned religion, Israel has not fully responded even to a minimal definition of liberalism (Halliday and Karpik, 1997). It neither allows equal expression of voices and practices, nor has it been characterised by equal tolerance towards various minority groups and non-ruling communities.

However, Israel has also experienced some significant liberal characteristics and therefore it should be denoted as a country that has experienced political liberalism. First, there has been an increasing legal construction and exercise of basic freedoms and individual rights within procedures of electoral democracy. While there is almost no written entrenchment of individual rights and human freedoms in constitutional legislation, heretofore, there is a constitutional judicial review of those (mainly judge-made) rights by the Supreme Court. The Supreme Court project of developing individual rights has been intensified following the legislation of Basic Law: Human Dignity and Freedom 1992, and Basic Law: Freedom of Vocation in 1992 (later reenacted in 1994). Secondly, after the mid-1990s more than ever before, national public policy towards minorities has somewhat recognised individual rights, primarily in issues such as budget allocations, land distribution, language and social and medical welfare. Thirdly, civil society has been expanded including among Israeli Arab-Palestinians, a process characterised, inter alia, by increasing the number of NGOs. Thus, as will be exhibited, the numbers of law offices and lawyers have increased and, as will be analysed, below, the engagement of lawyers in various venues of public debates has been enlarged, as well. Fourthly, some privatisation of economy and religion has further been generated, and it has incited more practices of non-state economic organisations and pluralisation of religious

practices. Fifthly, especially after the mid-1980s, the state has become more restrained, more moderate, as far as its direct intervention in the society is concerned, and its power structures have become more fragmented and in conflict with each other.

Akin to other nation-states, the contribution of lawyers to national experiences of political liberalism has thus far been more central than merely importing and exporting liberal values that lawyers are presumed to advance. While Israeli lawyers, even in the early 1950s, had argued in courts and outside the judiciary for implementing some liberal legal rights as freedom of expression and freedom of association, only to identify Israeli lawyers with promoting liberal values might be irreducibly simplistic, as is the case in other nation-states. Theoretically we should better comprehend lawyers not merely as individual agents who promote liberalism; rather we should conceptualise lawyering as a site of collective action in the context of dynamics in political power and public discourse.

Israeli lawyers, like lawyers in some of the post-Soviet republics, were using their professional knowledge in order to be engaged in politics towards and during the establishment of the state in 1948. There is no way to comprehend the formation of the 'Jewish state' and processes towards its legalisation and legitimisation—both domestically and internationally—without considering the contributions of Zionist lawyers to the legal construction and approval of the Zionist political project (Likhovski, 2002; Shamir, 2000). The interactions between the legal profession and the political founders of Israel were intimate and intensive as part of structuring and engendering the state's political power. The legal complex was a constitutive epiphenomenological entity that had reflected and generated a Zionist collective desire to establish a Jewish state. Some of the state's political founding fathers (eg, David Ben-Gurion, Itzhak Ben-Zvi, Moshe Sharett) studied law. Later, they were significantly assisted by government and private lawyers in order to advance three massive national endeavours that took place, primarily, between 1939 and1954. These projects were the confiscation of lands inhabited by Palestinians untill the 1948 war over Palestine/Eretz-Yisrael; the construction of Israel as essentially Jewish; and the creation of the state's apparatuses of collective violence (Barzilai, 2003).

We should better understand how legal knowledge is immersed in processes of constituting state power foci. All these efforts to consolidate the state's national power were embedded in legislation and regulations that were aimed to legalise the new state and to entrench its professed essence as a Jewish republic. In this context, the legal complex had been crucial. Government lawyers were responsible for legalistically engineering these projects, while private lawyers were mostly with no aspiration systematically to challenge the mobilisation of professional knowledge for national purposes. Lawyers submitted only very few appeals to courts against these national projects. Generally, in the 1950s lawyers were either agents of

the state or silent about its policies. Most Israeli legal scholars, mainly concentrated in the only law school in the country until 1958, the Hebrew University, Jerusalem, were occupied with issues concerning preparing drafts of a possible written constitution. Alternative models for the legal construction of the state were not debated in professional legal venues, and critical challenges to massive confiscation of Palestinian lands were almost never raised. Legal challenges to military rule over the Arab-Palestinian minority (1948–66) had been rare and rather futile.

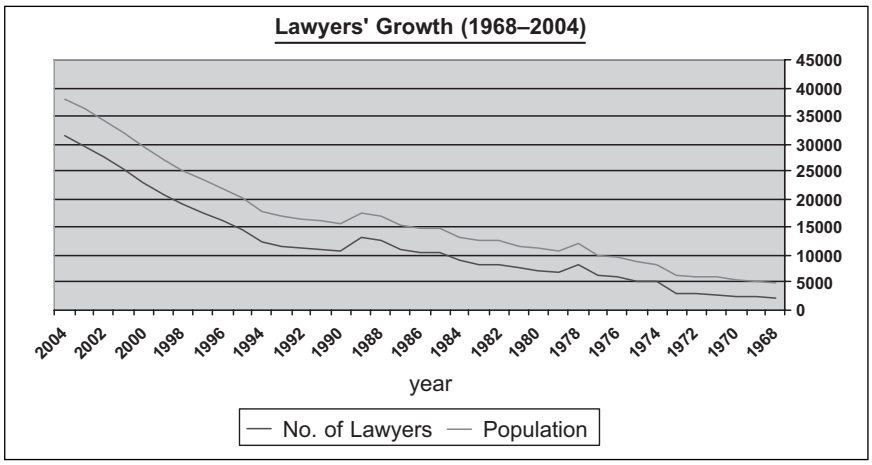
While the trend of absence of lawyers from public debates had continued well into the 1960s, another characteristic of Israeli lawyers has evolved since the 1970s, as part of alterations in state political power foci. At the same time as lawyers were involved in shaping the state's political power, they also became more engaged in politics as agents of liberal economy and have significantly contributed to the economic liberalisation of the state and afterward to its interactions with the global economy. Economic privatisation of currency, financial institutions, governmental agencies, public services, and the labour market has altered the basic relations between state power foci and lawyers, since the liberal maze of economic transactions requires the veil of certainty that legal knowledge may provide. Hence, under conditions of more economic pluralisation, the legal profession may expand in numbers, as in England, the US and Russia (after the end of the Cold War), or it may incite strong states to limit the number of lawyers who are registered at the bar so as to coopt a smaller number of lawyers. This was the case in Japan and South Korea until the 1990s. Amid economic liberalisation the state may conceive lawyers as a menace to its domination and in turn suppress the growth of the profession, or it may use lawyers as vehicles of economic entrepreneurship in order to have a better economically developed, but not disobedient, civil society. Lawyers may be perceived by a state's power foci as a challenging professional elite or as a vehicle further to boost the economy.

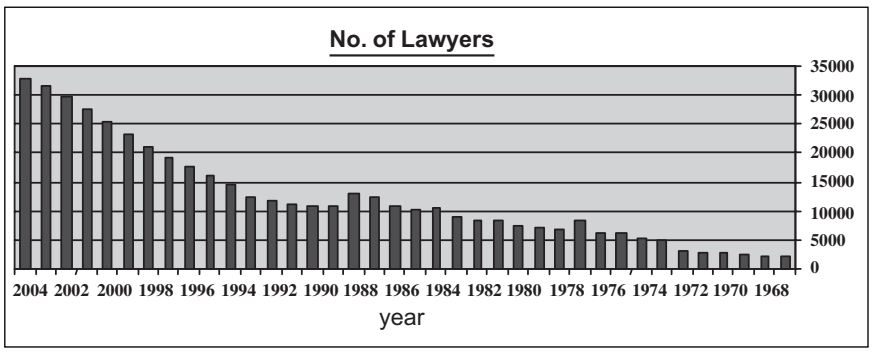
Israeli lawyers were perceived by the political elite as an obedient professional group of entrepreneurs. Mainly since 1967, and the colonisation of the 1967 occupied territories, lawyers have become agents of liberalism in the state and through it. The number of private law offices and their gradual expansion in Israel and abroad has increased. Since economic growth and economic transactions require legalisation, and since the legal profession may economically benefit from such an economically legalised growth, lawyers have enjoyed the expansion of the Israeli economy that was blooming partly due to the exploitation of Palestinians in the Israeli labour market. Accordingly, lawyers have taken a rigorous role in the liberalisation of the Israeli economy and have transformed legal knowledge into economic and political strongholds. Thus, traditionally, the established law schools at the Hebrew University, Jerusalem, and Tel Aviv University, have been antagonistic to the establishment of private law colleges. They have used the elitist argument that the level of studies might be severely

diminished once the criterion of admittance was associated with luxurious private tuition. Yet, under the market pressures of an increasingly liberal economy, which created a perceived need for more lawyers, private law colleges have been established since the mid-1980s, and the number of lawyers has dramatically increased since the 1970s.

Table 8.2 Lawyers' Growth in Israel (1968–2005)

Population	No. of Lawyers	Year
2,841.1	2100	1968
2,929.5	2300	1969
3,022.1	2500	1970
3,120.7	2800	1971
3,225.0	2900	1972
3,338.2	3100	1973
3,421.6	5000	1974
3,493.2	5200	1975
3,575.4	6100	1976
3,653.2	6300	1977
3,737.6	8400	1978
3,836.2	6900	1979
3,921.7	7300	1980
3,977.7	7600	1981
4,063.6	8400	1982
4,118.6	8400	1983
4,199.7	9000	1984
4,266.2	10400	1985
4,331.3	10300	1986
4,406.5	10900	1987
4,476.8	12500	1988
4,559.6	13000	1989
4,821.7	10764	1990
5,058.8	11054	1991
5,195.9	11164	1992
5,327.6	11687	1993
5,471.5	12300	1994
5,612.3	14480	1995
5,757.9	16080	1996
5,900.0	17530	1997
6,041.4	19100	1998
6,209.1	20848	1999
6,369.3	23127	2000
6,508.8	25415	2001
6,631.1	27574	2002
6,748.4	29509	2003
6,869.5	31311	2004
6,990.7	32600	2005





As Table 8.2 above and the Figure demonstrate, the number of lawyers during the years 1968 to 2005 has increased by 1552 per cent, while the population growth has increased by 246 per cent. Accordingly, demography may explain some of the growth in number of lawyers, however the increase in number of lawyers has been five times larger than what may be statistically expected based solely on population growth. Most of that dramatic increase, as shown above in Table 8.2 and the Figure, was absorbed by legal departments in commercial banks, insurance companies, municipalities, and by the state attorney general and general prosecutor offices, which have employed many lawyers. Yet, the private market of lawyers has noticeably been expanded as well. Since the late 1980s, as part of international capital flow onto and from Israel, a phenomenon of mega law offices (law offices that have included several dozen lawyers) has been developed. Several law offices have established branches overseas, eg, in London and New York City. Indeed, the Israeli economy has become more liberal and lawyers have been one major vehicle to incite it and to benefit from it.

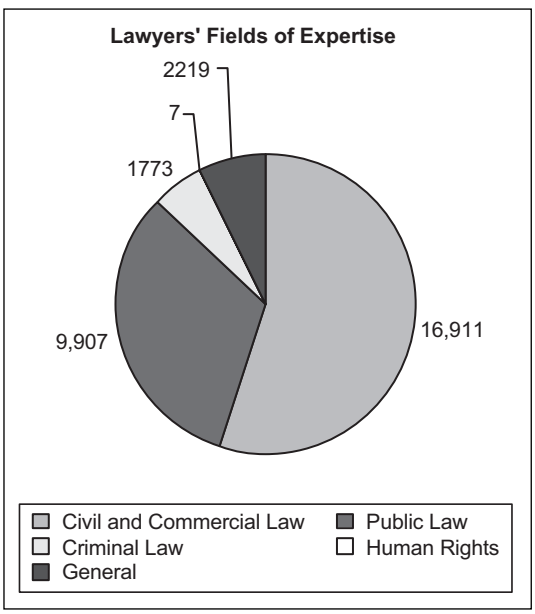
As Table 8.3 and the Figure below demonstrate, most lawyers in Israel in 2005 have defined their main legal expertise in private commercial and civil law (about 55 per cent), while only very few have identified themselves as lawyers who deal with human rights. Since the statistics of the bar are based on how lawyers would like to be defined in the market place, commercialised and advertised, the statistics exhibit to what a very significant degree most lawyers prefer to benefit financially from a liberal economy and accordingly be engaged in and be identified with issues of economic aspects in state law.

This condensed genealogy of the legal complex unveils only one facet of the story about liberalism and lawyers in Israel and beyond. Until this

Table 8.3 Lawyers' Fields of Expertise (2005)

Lawyers' Fields of Expertise (2005)	
Civil and Commercial Law	16,911
Public Law	9,907
Criminal Law	1,773
Human Rights	7
General	2,219
Total	30,817

Source: Israeli Bar



point, my research demonstrates the strong association between *economic liberalism* and the increase in number of lawyers. We are still required to explicate the interactions between lawyers and *political liberalism*. We have to look more circumspectly into the legal complex not as a unified space, but rather as a field in which different institutions, and various trends, even dialectical trends, have been interlinked to create a compound phenomenon. More specifically, we have to investigate how the liberal economic ontology and expansion of the legal profession have affected the political role of lawyering in shaping the boundaries of the public discourse. Lawyers have been an important component of economic liberalism, since they have been propelled into politics by it and stimulated it. But they have also been an important part of political liberalism, engaged in shaping its boundaries. Correspondingly, the rest of this chapter explores how lawyers have *talked* and have been *silent* concerning public issues of democracy, individual rights and human rights, and what role they have played in claiming and disclaiming the state.

IV. VOICES OF AMBIVALENCE: TALKS, SILENCE AND DISSENT

(a) On Speech and Silence: Lawyers as Sociopolitical Markers

While silence is a behavioural form of language, it may be a central mode of voice in the generation of public discourse and collective action. Thus, Wittgenstein has pointed out that silence is a very meaningful part of language (Ostrow, 2002: 13–15). Silence is a politically meaningful facet of absence from expressive lingual formation and generation of the public discourse. Nevertheless, despite its being an articulation of absence, silence may be more meaningful for legitimisation than an expressive voice. The meaning of silence is essentially contextual. Thus, if lawyers refrain from litigation but encourage their clients to disobey the law, their silence has a meaningful voice of dissent. Absence from actively and rhetorically constructing the public discourse might be a form of dissent through which opposition is aired. Alternatively, if lawyers have passively supported a public policy and governmental actions, their silence has had a legitimating consequence. If silence is a form of accepting a norm of status quo with no challenging hermeneutics, it becomes a functional absence, since the dominant norm is being legitimatised with no political opposition.

While talks engender some confidence around the contents of discourse (Baker and Hacker, 1985: 243–51; Wittgenstein, 1969), silence may undo a space of uncertainty as around one's attitudes. Hence, silence inclines to perpetuate the dominant attitudes and norms in a given public discourse. It may not defy hegemony and it may hinder counter- hegemonic forces. If a lawyer litigates an issue s/he may challenge hegemony, however futile and confined it may be in the public discourse. Litigation may be only one type

among various facets of collective action that may confront hegemony and public policy. Moreover, if a government is expecting an explicit consent of the public, silence may be a voice of opposition. Silence may constitute a strong articulation of dissent, amid a discourse in which one's expressive consent is being required or expected.

Notwithstanding these exceptions that are rare in public debates and political discourse, silence induces, whether intentionally and unintentionally, the generation of support of hegemonic attitudes and public policy. Silent lawyers, who are defined not through their formal professional positions and expressive professional functions, but through their practices as lawyers in the public discourse, are important agents of marking the public discourse. However, they are not always conscientious of their social responsibilities. Their silences legalise and legitimatise hegemonic attitudes concerning issues of human rights and the 'rule of law'. Since lawyers are by definition political actors, the phenomena of professional silence and silent lawyers should be further elucidated as a major issue in collective action and liberalism.

Analytically we may distinguish between several origins of silence. First, one may be unaware of a specific topic in public discourse. Lack of awareness of an explicit topic or significant lack of information regarding a topic and its various facets may often result in silence. In the context of this chapter, unawareness of legal political issues is a rather implausible variable to explain silence among lawyers, especially since the topics that I discuss below have acquired a high public profile and their saliency in the media has been high. Secondly, absence of social consciousness may be another independent variable that explains silence. Lawyers may be aware of a specific problematic issue concerning human rights and the 'rule of law', and still they may not be aware of the meaning of their silence and its ramifications on the public discourse. In Israel, legal education, especially until the mid 1990s, has ostensibly neglected to emphasise the sociopolitical role of lawyers and their social responsibilities.

Thirdly, indifference and alienation towards the state or its political establishment may be another source of silence. Lawyers may know of a problematic issue in a certain public policy but be alienated towards the state and its political establishment or they may be indifferent as to possible ramifications of their silence. Fourthly, lawyers may oppose a specific policy and be aware of possible negative ramifications of their silence in the political sphere, and yet they impose upon themselves censorship for various reasons. Inter alia, they may presume that professional criticism concerning national security affairs is unpatriotic or may inflict damage on their ties with the political establishment. Such considerations may be powerful in silencing private and government lawyers. Fifthly, lawyers may also agree with government policy, above being loyal to the regime's national narratives, and conceive silence as the intentional legalisation of a

concrete public policy. I typify such conformity as silence, not because it is necessarily a wicked phenomenon, but due to the fact that silence hinders lawyers from having an active role in publicly debating and forming issues linked with human rights.

The subsequent parts of this chapter drill into spheres in which lawyers have been vocal and talkative in public life, and spheres in which they have been silent. This nexus of silence's talk explicates how lawyers have formed and marked the public sphere, beyond being agents of economic liberalism. I explore how lawyers were framers and markers of the public sphere without dramatically altering state and society relations. Thus, lawyers have propelled expansion of liberalism and have hindered its transformation into sociopolitical criticism of the nation-state. Through silence and speech they have been both the reformers of sociopolitical order and the guardians who have maintained some structured antinomies of liberalism in a non-liberal nation-state.

(b) A Liberal Symphony

The legal profession—with its multifaceted functions in the legal complex—has been a vehicle to affect public discourse and to somewhat moderate the state, primarily concerning issues that have not been considered as 'national security' and have not challenged the Zionist state to reconstruct its basic essence and ideology. Until the early 1990s such a professional monopolisation of public civil debates had largely been a characteristic of Jewish lawyers, who have constituted the ruling hegemonic group in the legal complex. Then, with the graduation of more Arab-Palestinian Israeli lawyers in Israeli and US law schools their expressive partaking in public discourse has also become more prominent. Accordingly, lawyering, that has aimed to dominate and shape public discourse through talkative rhetoric of legal knowledge, has had several aspects.

First, the scope of civil society, both Jewish and Palestinian, has been expanded and institutionalised due to the dramatically rising number of NGOs that have been watching, reporting, educating, lobbying and litigating human rights in Israel and its 1967 occupied territories. Lawyers have established NGOs to struggle against governmental corruption and to force upon the government more transparency and accountability. Other lawyers have become prominent members and leaders of NGOs that have focused on litigation for human rights in the occupied territories and civil rights in Israel in its pre-1967 borders. Furthermore, lawyers have become leading figures in NGOs that have struggled for social justice, some of whom have been affiliated with legal clinics in law schools. These extra-parliamentary activities through NGOs and legal clinics have been embedded in US liberal experience and have been imported into Israel by US law school graduates, both Jews and Palestinians. Those lawyers were trained in US law

schools such as Harvard, Yale, Stanford, Columbia, NYU and the American University, returned from the US to Israel and applied their legal education. Hence, it is hardly conceivable to imagine how the setting of human rights NGOs could have been developed without the major contribution of lawyers. In this context, legal knowledge has certainly been politicised and mobilised through NGOs.

It is barely comprehensible how such a trend of litigious and legalistic advocacy in the legal complex could have been generated without basic liberal beliefs in individual rights, such as individual equality, human dignity, property rights, freedom of expression, freedom of religion and freedom of information. These beliefs and the legalistic presumption that litigation may be an effective type of political action have resulted in numerous salient issues that were litigated in courts through legalistic NGOs. One may mention, inter alia, affirmative action for minorities, gender equality in military service, torture, prohibitions on unification of Palestinian families, civil supervision of the security services, military actions in the occupied territories, political appointments, budget allocations, political partisan corruption, the status of the Arabic language, land distribution, the status of internal Palestinian refugees and unrecognised Palestinian villages, religious conversions, and civil marriage. These issues were constructed, framed and conveyed through lawyers as salient topics in the public sphere and the mass media. Lawyers have been both agents and the structure. They have reflected liberal beliefs and constituted legalistic venues for debates and action framed through the media as crucial for decision-making processes.

Secondly, in addition to the hectic facet of NGOs' actions in the legal complex, lawyers have become prominent in public bodies, eg, governmental agencies, political parties and state institutions, like the State Comptroller. The legal profession has expanded itself beyond the more apparent functions of representing clients, either private or public. Based on a somewhat transnational and intergenerational myth about the virtues of their legal profession, lawyers have assumed managerial and leadership positions, outmatching any other professional group in the Israeli public sphere, with the exception of senior military officers. There is a strong causal relationship between changes in social stratification amid economic liberalism, fragmentation of political power, and lawyers' talk. Lawyers have benefited from the mounting liberal trust in legal knowledge that has incrementally replaced the declining confidence in dwindling legislative and governmental agencies. They have further been empowered through enlargement in the scope of the middle class that has conceived lawyers as agents of dispute resolution in the protection of property rights and privacy, while the parliamentary and partisan political setting has dramatically become polarised and fragmented.

Thirdly, alongside being economic entrepreneurs via their involvement in constructing economic transactions, lawyers have also become political

entrepreneurs. Identified with the idea of political stability as conducive to economic equilibrium and prosperity, lawyers have hectically voiced public expectations, especially since the late 1980s, for reforms in the parliamentary system and have vociferously demanded direct elections for the prime ministership. A public presumption constructed by leading lawyers asserted that a fragmented parliament with severe polarisation of attitudes cannot ensure stability. Lawyers have vigorously voiced the argument as if political stability through a semi-presidential system is preferred over political representation through the parliamentary system.

Throughout public debates and parliamentary deliberations concerning electoral reforms and possibilities of enactment of a written constitution, the US political model was influential, though not carefully studied. On the one hand, it may be sensible to anticipate lawyers' participation in deliberations on enacting a constitution, especially since Israel is perceived as one of the very few democracies that does not have an all-encompassing written constitution that entrenches human and individual rights. On the other hand, in the process of these debates lawyers marginalised all other professional experts, such as political scientists and sociologists. They have constructed fundamental issues of state and society relations as if those are formalistic legalistic matters that may be resolved solely through relying on legal knowledge. Those lawyers were significantly empowered in a legal complex dominated by a very adjudicative, assertive, rather liberal Supreme Court, which after 1986 has repeatedly enunciated its aspiration to expand its judicial constitutional review, and has systematically articulated that nurturing individual rights is its main vision.

Fourthly, the status of the Israeli bar has been altered. Since all Israeli lawyers must be examined and licensed by the very same national bar, it has acquired national, monopolist, and almost unchallenged public power of exclusive professional authorisation of lawyers. Traditionally, the bar has had four main functions in exerting its monopoly and aiming to discipline lawyers: examination, authorisation, and annual registration of lawyers; ethical supervision over lawyers' professional conduct; informing lawyers and providing them with professional complementary education; and finally, nominating the bar delegates to the Judicial Appointment Committee (JAC) that selects all judges and justices to the Israeli judiciary. Until the end of the 1990s, however, the Supreme Court justices were the most saliently important dominant institution in the legal complex, and the more the parliament has lost its political power, the more sway the justices have radiated.

Through letters of recommendation in professional academic committees, justices were involved in academic promotions in law schools, their concepts of the 'rule of law' generated the education of jurists in law schools, and they were the most significant body in the JAC. But since the end of the 1990s, the bar has somewhat altered the balance of power in

the legal complex and beyond. The mounting esteem of lawyering has made the bar an important venue of political struggles. Elections for the bar's governing bodies have gained high public visibility, a national media event, and often a platform to those lawyers who were looking for political careers in the parliament, the government and the bureaucracy. The bar has always been of some political significance for political parties, but the growth in the number of lawyers, its complete monopolistic status and its affluence have made it more ambitious regarding its public rank. A very assertive and adjudicative Supreme Court has further encouraged litigation as a mode of political action at all levels of the Israeli judiciary.

Table 8.4 Litigation in Israel Judiciary

HCJ	Circuit	District	Year
N/A	35271	4715	1948
N/A	54938	5719	1949
N/A	70925	7462	1950
316	89348	10461	1951
339	112353	13292	1952
238	108398	14334	1953
238	133907	13909	1954
197	143140	13249	1955
222	156093	16436	1956
236	161394	18112	1957
221	190288	20845	1958
221	181324	23129	1959
331	211015	26124	1960
377	190122	26996	1961
340	222012	29969	1962
334	220644	35815	1963
334	241180	34219	1964
382	272654	39992	1965
382	302195	46078	1966
404	294143	47584	1967
342	295688	50375	1968
359	257128	50711	1969
381	246329	54668	1970
502	259805	55210	1971

(*continued*)

Table 8.4 continued

534	278288	57311	1972
487	238604	54221	1973
536	243652	60122	1974
657	334166	65142	1975
633	378407	61926	1976
714	368346	60500	1977
897	402805	61377	1978
760	447726	65539	1979
827	467749	70526	1980
707	443077	75860	1981
726	435211	75244	1982
808	498140	82929	1983
958	557139	90695	1984
1139	613390	101798	1985
1483	553613	101189	1986
1466	599639	99108	1987
1438	585846	96438	1988
1642	652131	98301	1989
1577	665501	99807	1990
1785	653744	106055	1991
1727	656753	106115	1992
2059	725381	109099	1993
2059	730822	114211	1994
2059	742870	114988	1995
1578	835755	110289	1996
1732	796118	102229	1997
1847	795962	163347	1998
1691	819994	169262	1999
1688	851377	190156	2000
1866	846836	196566	2001
2094	902475	205350	2002
2564	852500	198498	2003
2338	925132	232054	2004
2110	798993	228353	2005

Remarks:
1. HCJ—High Court of Justice
2. District Courts—including Family Courts
3. Circuit Courts—including Transportation Courts
4. Data above does not include Labor Courts

The figures in Table 8.4 above summarise data on litigation in the Israeli judiciary between the years 1948 and 2005. Litigation in circuit courts has grown by 2265 per cent, in district courts it has increased by 4843 per cent, and in the High Court of Justice (HCJ) by 667 per cent. In all categories of the judiciary, litigation has increased more rapidly than the pace of demographic growth. It points to the expansion of litigation associated with economic and political liberalism, and with fragmentation of political power foci. Based on my research, in a country of 6,869,500 citizens (2005), the number of files in active litigation has reached about 1,127,226, in all branches of the judiciary, including the branches of the Supreme Court (not just the HCJ), and labour courts. Namely, as part of a general proclivity over time, one in every six citizens in Israel has litigated a case in the courts. The military occupation of the 1967 territories has certainly inflamed part of the litigation, since Palestinians from the occupied territories could and in fact did litigate in Israeli courts. The occupation was embedded in Israeli economic expansion and also in the fragmentation of its political power foci.

Vigorous litigation has been constituted, constructed, articulated and generated through popular commercialisation and further politicisation of legal knowledge as instrumental know-how to resolve public issues. Lawyers have been empowered by the state civil bureaucracy and civil society as articulated political and economic agents, and they aspired to have their public voice heard more compellingly. Accordingly, the bar representatives in the JAC have become more vocal in expressing their stance on public issues, even in opposition to the attitudes of the Justices and Justice Minister. From 2004 until 2006 the bar had conducted a national survey among all Israeli lawyers who were asked in structured questionnaires for their evaluations of the judges and justices' efficiency and judicial faculties. The survey referred to all courts, including the Supreme Court. Since 2004 the detailed results have been published in the media noting the lawyers' evaluations of each one of the judges and justices, identified by their names. Yet, once the eminence of the bar in the legal complex had been transformed into a straight institutional challenge to the Supreme Court, a conflict erupted. The reaction of the Supreme Court was infuriated and an institutional crisis was unfolding.

The President of the Supreme Court, Aharon Barak, had ostensibly and abruptly cancelled all his commitments to meet with the bar's governing bodies. He further cancelled his traditional speech to the bar's annual meetings (2004 and 2005). Barak overtly criticised the bar for what he had regarded as an undemocratic move that was intended to contravene judicial independence and inflict biased pressures on the judiciary, particularly the Supreme Court. The institutional crisis in the legal complex has finally been resolved by a new equilibrium. Only after Barak's consent to set up a public Ombudsman to scrutinise public complaints against judges/justices,

and under intense pressure from all branches of the judiciary, did the bar announce its abandonment of the feedback questionnaire. As in most other democracies, the Israeli judiciary has dominated the legal complex, but the bar has acquired significantly more public voice as part of political and economic liberalisation.

Having about 32,600 registered lawyers (2005), supported by affluent law offices, being at the core of a bourgeoisie ideology and economic interests that form the legal profession as of great virtues and power, the bar has aspired to have new and improved political strongholds in political life. A striving Supreme Court that has inflated its jurisdiction and accumulated institutional power through challenging the government, its bureaucracy, the religious establishment, the security services, political parties, and the parliament, has incited a coalition between the bar and partisan politicians (some of whom were bar members) who have desired to tame the Court.

These characteristics of a talkative lawyering point to the effects of political fragmentation and experience of liberalism on making Israeli lawyers, both Jews and Arab-Palestinians, more saliently and vocally engaged in political life. However, their voice has predominantly been raised concerning possible reforms in the political rules of the political game. Most lawyers in Israel, with the exception of only a few, have allowed the status quo in some major issues of public policy. While lawyers have been active as liberal agents in the economic sphere, they have largely been advocates of the basic legal ideology and national narratives. The stillness of Israeli lawyers has been particularly prominent regarding 'national security' issues. Hence, lawyers (including Arab-Palestinian lawyers) have shaped the political discourse through legalising the state and its ideology and by advancing public debates about the rules of the political game. In practice, however, it was a rhetorical veil to the silence regarding national ideology, legal ideology and national security. Below, I elucidate the political language of silence as constructed by lawyers.

(c) The Clamour of Silence

The political proclivity of lawyers, as agents who mark public debates, has been very supportive of the political establishment and its Zionist ideology. It has prevailed even when a public policy might have been abusive of human rights. Generally, lawyers have not questioned the fundamental ideological principles of the state. It was mainly evident in the absence of debates initiated by lawyers around the legitimacy and legality of Israel as a Jewish republic, the place of the Arab-Palestinian minority in this context, and national security issues. Thus, despite international protest against torturing Palestinians who were under suspicion of planning terrorist activities, the bar has never warned the Israeli government of the legal

and humanitarian problems surrounding tortures, even once those very questionable tortures were widely reported by salient human rights NGOs such as Amnesty International. The declared government policy of targeted killings incited debates in the bar but most lawyers supported that policy of extra-judicial killings. In a survey conducted during April 2004 among Bar members (N = 767), 69 per cent responded that the policy of targeted killings was legal, 11 per cent thought that it was legal under very specific conditions, and only 20 per cent considered the policy unlawful.[1]

The general tendency among lawyers has been to settle economic liberalism with some political conservatism. When surveyed about the International Court of Justice's ruling (July 2004)[2] on the illegality of the 'wall of separation' along the West Bank (N = 283), 40 per cent argued that the International Court had no jurisdiction to decide the issue, while 27 per cent defined the ruling as discriminatory against Israel. Only 33 per cent justified the ruling.[3] Lawyers have not challenged the status quo and have not raised criticism concerning problematic issues on the junction of national security and human rights. Generally, they have been silent regarding the military occupation as a whole. Referring more specifically to the bar, denoting itself as a professional body it has stayed remote from any public criticism of the military occupation.

Government lawyers have had a foremost role in that context of silence. On the one hand, in internal debates, far from the public eye, some government lawyers protested against the continuation of the military occupation that has created an intolerable situation in which lawyers were compelled to advocate massive abuse of human rights. Officially, however, government lawyers have censored themselves and as part of state power foci they have continued to legalise the military occupation with only a few instances of a public protest.[4]

Merely two groups of lawyers have constituted an exception to silence. They have both utilised liberalism to contest prevailing public policies. One group is composed of Jewish lawyers who are dissenters to the Zionist enterprise. The other group includes Arab-Palestinian Israeli lawyers who have opposed Zionist ideology and its emphasising of the Jewish hegemonic essence of the state. The first group consisted of a few lawyers and NGOs who charged fees from their clients, and yet selected 'proper' legal cases in

[1] See www.israelbar.org.il/survey.asp?catId=263 (in Hebrew).
[2] See www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm.
[3] *Ibid*.
[4] One of the exceptions was the special report written by Attorney Talia Sasson, Head of the Criminal Division in the General Prosecution Office, who has criticised the phenomenon of illegal settlements in the 1967 occupied West Bank. However, Sasson was nominated by the government to write the report. Later, in March 2005, it was formally adopted by the government. Sasson could have talked since the government allowed her to raise a voice in a way that had served Ariel Sharon's governmental policy at that time.

order to break the silence and dispute some of the Zionist regime's political fundamentals and prevailing public policies. Inter alia, they litigated cases against non-separation between the state and Jewish Orthodoxy (in issues such as marriage and religious conversions), discriminatory state and corporate ownership of lands, unfair employment conditions of foreign workers, compulsory military service in the 1967 occupied territories, human rights abuses in the 1967 occupied territories, illegality of Jewish settlements in the West Bank, strict restrictions on the unification of Palestinian families, military censorship on the development and deployment of nuclear and biological weapons, and torture.

Those lawyers and NGOs have presumed that criticism of the state through litigious efforts to de-legalise its distortions may legalise alternative modes of public policy and generate public discourse around them. Being expressive dissidents amid silence, those lawyers have not aspired to incite a sweeping sociopolitical mobilisation. Rather, they have conceived that relying on legal liberal arguments and instigating adjudication may result in dismantling some discriminatory public policies. Thus, liberal legalistic terminology was employed to de-legalise state policies and unveil their discriminatory essence through arguments such as freedom of/from religion, gender equality, sexual preference equality, distributional justice, human dignity, equal citizenship, and freedom of expression. Accordingly, dissident lawyers have stimulated the Supreme Court judicially to frame and reconstruct individual rights.

Nonetheless, since litigation is a court-centred collective action, which relies on the judiciary as state agent, the aspiration of lawyers with different political affiliations to reform the political regime and its underlying concepts and policies has resulted only in very limited success. Being somewhat receptive to liberal arguments, and obedient to the state's narratives, the courts have been careful not to alter state ideology and the basic principles of its public policies. Since litigation is an in-power activity, ie, within the framework of the established political power arrangements (Barzilai, 2005), state political power has prevailed, especially and predominantly where state ideology has particularly been immersed alike in issues concerning national security and the social, religious and national boundaries between Jews and Palestinians. Liberal litigation has rendered a few legal victories for liberal proponents but could not have altered fundamental public policies and legal ideology. Thus, an Israeli Arab-Palestinian family was allowed by the Supreme Court to settle land registered under the ownership of the Jewish Agency. The HCJ, however, has emphasised in its ruling the Jewish essence of the state, and Jewish control over its resources, including its lands. The judiciary has intensified the state's non-Orthodox supervision over religious councils and it has pluralised religious services and religious conversions. Yet, it has underscored the special legal status of the Jewish religion as the state's formal national religion. Namely, fracturing the silence has had a

meaning of equalising only some localities of discrimination. Similarly, the Supreme Court has adjudicated appeals regarding the military actions and rule in the 1967 occupied territories, but has also legalised government authority to rule over these territories. Hence, defying silence through litigation has also further legitimated the state, its main narratives, and state courts as markers of state and society relations.

Israeli Arab-Palestinian lawyers have been another group to rupture the silence. The phenomenon of Arab-Palestinian lawyers publicly litigating in predominantly Jewish courts for political purposes has existed in Israel for many years. However, only from the mid-1990s an organisation of ideologically motivated Palestinian lawyers named *Adalah* (Justice based on equality) has commenced operation. It has institutionalised Israeli Arab-Palestinian appeals to the courts in order incrementally to recover the socio-economic political conditions of the minority. This proclivity of litigation among the minority has been deployed by relatively young Arab-Palestinian lawyers, who grew up in Israel under the military rule imposed upon the minority (1948–66), and later were educated in Israeli and American universities (Barzilai, 2003, 2005; see also Ziv, 2000). They prefer to speak Arabic, but they are fluent in Hebrew and English. Personally, they have been affiliated with Arab-Palestinian political bodies in Israel. They are critical of the Jewish-Zionist regime for excluding Arab-Palestinians from national power foci, notwithstanding that as lawyers they believe, with some doubts, in their professional calling and its ability to challenge the silence around formal and informal discrimination against the minority (Barzilai, 2003).

Adalah lawyers have had some faith in the power of legal talks and rhetoric of liberal rights to render some significant legal alterations in the status quo, which in turn may impel some sociopolitical reforms. Their litigious tactic has been to apply liberal terminology of equality that compels the state either overtly to acknowledge entrenched established discrimination or to offer legal remedies for minority members. Strategically, in the context of political liberalism, litigation has been perceived as political collective action that may turn a series of individual rights into a reality of group rights, even cultural and national autonomy for the minority. With some economic liberalisation and a growing middle class, the Arab-Palestinian community, partly more attentive to potentialities of litigation, partly more confident in its economic and political power (Ghanam, 1997), has become more acquiescent to activities of NGOs in the legal complex.

The quandary among Arab-Palestinian lawyers, in between lights and shadows of political liberalism, has not been whether an appeal to court might be upheld or dismissed, but whether breaking silence through adjudication by Jewish Zionist state institutions may not result in de-legitimacy of the minority's national identities. Indeed, litigation is not necessarily considered in terms of achieving legal victories (Feeley, 1992; McCann, 1994;

Barzilai, 2005). In the case of Israeli Arab-Palestinians, litigation has been aimed at realising political, socioeconomic and symbolic benefits, other than being perceived triumphant in the narrow litigious manner.

Talking liberalism in state courts has been a contentious issue among minority members. What Robert Kagan coined as 'adversarial legalism' (Kagan, 2000), namely—a prevailing norm of resolving sociopolitical, cultural and economic issues through litigation, has been a disputable matter among minority lawyers and minority human rights activists (Esmeir, 1999; Jabareen, 2000). Thus, Arab-Palestinian feminist organisations, which have constituted a prominent portion of Arab-Palestinian NGOs, have inclined to another type of language, as a venue of negotiating society and state relations. They have searched for other avenues to shatter silencing forces around domestic violence and multifaceted social subjugation of Arab-Palestinian women, who have suffered from intersectional discrimination in Jewish society as Palestinians and Arabs, particularly as Muslims, and in their own community, as women. Such NGOs have initiated grassroots activities, like assistance to raped and battered women and rescuing women from being murdered due to 'family honour' (Barzilai, 2003).

Litigation in state courts, on the other hand, has often been considered superfluous and costly action with no tangible sociopolitical, cultural and economic benefits for the community. Silence should be shattered not through articulating in state courts isolated events of abuses of power. Those isolated events would be legalised and transformed into narrow issues of rights and obligations Instead, collective action should be focused on de-constructing the status quo, and forming an egalitarian social consciousness via daily grassroots practices. Even following the *Kaadan* affair,[5] in which the Supreme Court ruled that discrimination against Israeli Arab citizens in matters of land allocation is unlawful and prohibited, many Arab-Palestinian activists have perceived state law as Jewish, Zionist, and in turn discriminatory against the minority.[6] Though some Arab-Palestinian grassroots organisations have not completely negated litigation in state courts, but rather have conceived it as secondary and only complementary to their grassroots activities.

Adalah has voiced expectations to benefit from the emerging liberal rhetoric in the judiciary, particularly among Supreme Court justices. The polarised and fragmented *Knesset,* with significant Jewish Orthodoxy and nationalist effects has not been considered as conducive to attaining equality, while judicial professionalism has been perceived as less discriminatory and more attuned to liberal talks around egalitarianism. During the 1990s, *Adalah* lawyers were professionally socialised in a more open Israeli society,

[5] HCJ 6698/95 *Kaadan v The State of Israel* (8 Mar 2000) 57 *Dinim* 573.

[6] See debates at the Hebrew University, Jerusalem, Minerva Centre for Human Rights, Apr 2000; Debates in the Association of Public Law, Jerusalem, June 2000.

networking with Jewish NGOs and the academia, under some cultural effects of liberal discourse of civil and human rights. Hence, they have conceived state law not merely as a set of coercive restrictions and regulations, but as a potentially dynamic and fragmented fabric. The fact that nation-states are fragmented aggregations of power foci is central for understanding state and society relations (Migdal, 1988, 2004). Lawyers have aspired to take advantage of the fragmented state and the dominance of its Supreme Court in the legal complex for generating some individual rights, and in turn to produce opportunities for minority members to redeem their socio-economic and political predicaments within the complex boundaries of the state's political power.

Adalah has acted in resemblance to Western policy-oriented NGOs, which have mobilised liberal law by litigating in state courts and submitting their grievances to the state's political power (Epp, 1998; McCann, 1994). Those organisations have not been revolutionaries but rather pragmatist. They have accepted the prevailing legal terminological environment, and opted to utilise it for their needs and interests. *Adalah*'s Founder and General Director, Hassan Jabareen, explained to me, in a personal interview, how liberal rhetoric of rights may be relevant for the minority: 'The Israeli Supreme Court has already recognised the existence of women and reformist Jews as groups in Israeli law. There is no such acknowledgement of Israeli Arabs. We have tried to change the Court's language.'[7] It should be underscored that the *Kaadan* ruling, as explored above, did not conceive Arab-Palestinians as a community, as well. It articulated a liberal perspective of individual (citizen) rights in the Jewish state and accordingly recognised Arabs in Israel as equal individuals but not as a distinct non-ruling community (Barzilai, 2003).

In its appeals to the Supreme Court, *Adalah* neither addressed a plea to reform the structure of the political regime, nor directly criticised national narratives of Judaism and Zionism. The appeals used conventional and very concrete liberal legal causes, such as discrimination between citizens, within the rules of the political game. The organisation has aspired to break the silence and to narrow the spaces between Israeli Jews and Arab-Palestinians by using the liberal experience in state law. Among others, *Adalah*'s appeals have included demands to produce road signs in Arabic as an additional formal public language; to provide public transport for Arab students from their villages to their schools; to render state assistance to Arab students with learning difficulties in accordance with formal criteria applied on Jewish students; and to allocate budgets for the minority in proportion to its share in the overall population, (for more details see: Barzilai, 2003). In this respect, *Adalah* has significantly assisted in breaking the silence around systematic state discrimination against Arab-Palestinian citizens

[7] Personal interview with Attorney Hassan Jabareen, 25 Jan 1999.

of Israel. It has employed a liberal language of equality in rights to unveil discriminatory citizenship.

By using the same language of equality and discrimination as Jewish litigants have exercised in courts, *Adalah* could have constructed and generated state law as equally applicable to the minority. Subsequent to Iris Young's distinction between challenging the state's power and challenging its allocation of resources (Young, 1990), *Adalah* has not contended for reforming and restructuring the state's political power, as it might have been expected facing its political affiliations with national Israeli Arab-Palestinian groups. Rather, since *Adalah*'s lawyers have appealed to state courts, and have conceived litigation as a main means of collective action, they have challenged policy, not meta-narratives, which incited discriminatory allocations of public resources. As Hassan Jabareen explained to me: 'we are using legal terminology in a way that the justice will feel that s/he may be seen as politically incorrect [if the appeal is dismissed]'.[8]

Such an approach of talking liberalism through litigation has been effective to some extent. Thus, in the period between 1997 and 2000, *Adalah* had submitted 25 appeals to the Supreme Court. Its rate of success was 50 per cent if all legal cases, including pending appeals, were taken into account; and 67 per cent of success if only 18 legal cases that had already been decided were being considered. Yet, in most legal cases (75 per cent of the successful appeals that were upheld in Court) the final legal result was based on out-of-court settlements.[9] In these legal settlements, the organisation achieved some of its requested legal remedies, whilst state organs (eg, the courts, government, public bureaucracy, the military, police, and the legislature) did not conceive those arrangements as substantial alterations in the status quo. For both political actors, the state and *Adalah*, out-of-court settlements have been a rather utilitarian means to preserve legitimacy.

For the state, out-of-court settlements, framed within the legal terminological environment, have been better options than granting a complete formal equality through acknowledgement of the community's rights. Dotan and Hofnung (2005) explored several hundred legal cases of out-of-court settlements in other matters, in which the Supreme Court had preferred some narrow compromises, with no or minimal publicity, over salient and sweeping rulings. Thus, the Court could deliver some limited legal remedies according to some expectations of minority members, without endangering the hegemonic political culture of the Jewish majority.

For *Adalah*, out-of-court settlements have been an avenue to moderate discriminatory practices of the Jewish state. These legalistic settlements have also delivered a symbolic success, which has been functional for

[8] *Ibid.*

[9] For details see G Barzilai, *Communities and Law: Politics and Cultures of Legal Identities* (Ann Arbor, Mich, University of Michigan Press, 2003).

its organisational maintenance in the community as an organisation of lawyers. As neo-institutional studies have shown, organisations, particularly professional organisations of lawyers have constructed law as their symbolic capital in order to survive and to generate themselves in the legal complex and public life in general (Edelman, Uggen and Erlanger, 1999; Sarat and Scheingold, 1998). *Adalah* has aspired to exhibit some degree of legal success in its adversarial strivings. Such a legal success in moderating the state through exercising liberal language has assisted *Adalah* in framing itself as an effective communal organisation that operates in the intersection of sociopolitical and legal complexities.

Additionally, these litigious achievements have given rise to concrete (albeit very restricted) public benefits, such as an incremental process of formally framing more equality, and possible grounds for the good reputation of *Adalah* in the hectic spheres of human rights activists and competitive Israeli NGOs. Since 2000, *Adalah* has demonstrated its organisational abilities to monopolise parts of the minority discourse through advocating for the families of 13 Israeli Arab-Palestinians who were killed by the Israeli police during violent demonstrations by Israeli Arab-Palestinians in October 2000 in reaction to the then opposition leader, Ariel Sharon's visit to the Temple Mount. *Adalah* coordinated the legal defence of hundreds of detainees under police custody, and the communal demands that policemen who were responsible for the killings would be criminally indicted.

Breaking the silence does not necessarily have practical ramifications. In practice, however, litigation in the context of political liberalism has had only a minor effect on the mobilisation of Israeli Arab-Palestinians. None of *Adalah*'s appeals to courts incited the mobilisation of parliamentary and extra-parliamentary forces. *Adalah*'s appeals neither have incited the community's political struggles against the political establishment, nor have they fostered large internal reforms inside the community. *Adalah's* relative legal effectiveness in gaining confined legal remedies and moderating the state notwithstanding, its ability to generate sociopolitical changes has been very doubtful.

The main realisation of *Adalah's* litigation up to the end of 2006 has been in forcing the Jewish state's institutions to equalise some individual rights between Israeli Arab-Palestinians and Israeli Jews. Such a not insignificant reform, with all its limitations, could not have been attained through silence and without an expressive tactic of liberal rights talk in the legal complex and beyond.

V. CONCLUSION

This chapter theorises lawyers as agents of collective action who mark boundaries of state and society relationships through silence. It has analysed and theorised double-edged ramifications of liberalism on lawyers and how

they have shaped public discourse as both political agents of liberalism and its generators. It is theoretically and empirically explicated why and how lawyers as political actors in the legal complex who use political liberalism may shape through silence and talks the boundaries of the political sphere. On the one hand, while doing so lawyers challenge allocation of public goods and often promote privatisation and even more legal pluralism. On the other hand, lawyers in the liberal age not only localise global neo-liberal markets through maintaining and legalising capital flows. They also legitimate state legal ideology that is carried through the legal profession and lawyers. Lawyers are a constitutive part of narrations and neo-institutional arrangements in the legal complex that enable them to dissent, but only to a limited degree.

They generally talk in the framework of dominant ideologies and not less often they are silent regarding prevailing public policies. In Israel they are mainly silent concerning the hegemony of the state as Jewish and regarding national security issues. Once they are choosing vocally to raise a dissent as part of their profession they are trapped in their own mythologies and constraints and have to challenge the status quo only to a limited degree. As in Greek legends they may use their profession and fly, but not too high lest their power be melted and dissolved. They can talk, but their talks are limited within the institutional and cultural boundaries of the very same ideology that enables them to have a voice. The Israeli experience of Jewish and Arab-Palestinian lawyers invites some comparable insights into the wonders and paradoxes of the legal profession as a means of political rhetoric and practices.

REFERENCES

Abel, RL (1989), *American Lawyers* (New York, Oxford University Press).

—— (1995), *Law in the Struggle against Apartheid: 1980–1994* (New York, Routledge).

Baker, GP and Hacker, PMS (1985), *Wittgenstein: Rules, Grammar and Necessity* (Oxford, Basil Blackwell).

Barzilai, G (2003), *Communities and Law: Politics and Cultures of Legal Identities* (Ann Arbor, Mich, University of Michigan Press).

—— (2005), 'The Evasive Facets of Law: Litigation as Collective Action', 10 *Adalah Newsletter,* available at www.adalah.org/newsletter/eng/feb05/feb05.html.

Dotan, Y (1999), 'Judicial Rhetoric, Government Lawyers, and Human Rights: The Case of the Israeli High Court of Justice During the Intifada', 33 *Law and Society Review* 319.

Edelman, LB, Uggen, C and Erlanger, HS (1999), 'The Endogeneity of Legal Regulations: Grievance Procedures as Rational Myth', 105 *American Journal of Sociology* 406.

Epp, CR (1998), *The Rights Revolution* (Chicago, Ill, University of Chicago Press).

Esmeir, S (1999), 'Litigation, Legal Discourse and Identity', 1 *Adalah Newsletter* 12.

Eulau, H and Sprague, D (1964), *Lawyers in Politics: A Study in Professional Convergence* (New York, Bobbs-Merrill).
Feeley, MM (1992), 'Hollow Hopes, Flyerpaper, and Metaphors' in *Symposium—The Supreme Court and Social Change,* 17 *Law and Social Inquiry* 745.
—— and Krislov, S (1990), *Constitutional Law* (New York, HarperCollins).
—— and Rubin, EL (2000), *Judicial Policy Making and the Modern State: How the Courts Reformed America Prisons* (Cambridge, Cambridge University Press).
Ghanem, A (1997), *Israeli-Arab Political Participation* (Haifa, Haifa University Press) (in Hebrew).
Halliday, TC and Karpik, L (eds) (1997), *Lawyers and the Rise of Western Political Liberalism* (Oxford, Clarendon Press).
Haltom, W and McCann, M (2004), *Distorting the Law: Politics, Me and the Litigation Crisis* (Chicago, Ill, The University of Chicago Press).
Hofnung, M and Dotan, Y (2005), 'Legal Defeats- Political Wins: Why do Political Representatives Go to Court', 38 *Comparative Political Studies* 75.
Jabareen, H (2000), 'Toward a Critical Palestinian Minority Approach: Citizenship, Nationalism and Feminism in Israeli Law', 9 *Plilim—Israel Journal of Criminal Law* 53 (in Hebrew).
Kagan, RA (2000), 'Adversarial Legalism: Tamed or Still Wild?', 2 *New York University Journal of Legislation and Public Policy* 217.
Lev, DS (2000), *Legal Evolution and Political Authority in Indonesia: A Study in the Political Bases of Institutions* (The Hague, Kluwer Law International).
Likhovski, A (2002), 'Colonialism, Nationalism and Legal Education: The Case of Mandatory Palestine' in R Harris, A Kedar, P Lahav and A Likhovski (eds), *The History of Law in a Multi-Cultural Society* (Aldershot, Ashgate Dartmouth).
McCann, M (1994), *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, Ill, University of Chicago Press).
Migdal, J (1988), *Strong Societies and Weak States: State Society Relations and State Capabilities in the Third World* (Princeton, NJ, Princeton University Press).
—— (ed) (2004), *Boundaries and Belonging: States and Societies in the Struggles to Shape Identities and Local Practices* (Cambridge, Cambridge University Press).
Ostrow, MB (2002), *Wittgenstein's Tractatus: A Dialectical Interpretation* (Cambridge, Cambridge University Press).
Sarat, A and Scheingold, SA (eds) (1998), *Cause Lawyering: Political Commitments and Professional Responsibilities* (Oxford, Oxford University Press).
—— (2001), *Cause Lawyering and the State in Global Area* (New York, Oxford University Press).
Scheingold, SA (2004), *The Politics of Rights: Lawyers, Public Policy, and Political Change*, 2nd edn (Ann Arbor, Mich, The University of Michigan Press).
—— and Sarat, A (2004), *Something to Believe In: Politics, Professionalism, and Cause Lawyering* (Stanford, Cal, Stanford University Press).
Shamir, R (2000), *The Colonies of Law: Colonialism, Zionism, and the Law in Early Palestine* (Cambridge, Cambridge University Press).
—— and Ziv, N (2001), 'State-Oriented and Community Oriented Lawyering for a Cause: A Tale of Two Strategies' in A Sarat and S Scheingold (eds), *Cause Lawyering and the State in Global Area* (New York, Oxford University Press) 287.
Wittgenstein, L (1958), *Philosophical Investigations* (London, Basil Blackwell).

—— (1969), *On Certainty* (Oxford, Basil Blackwell).
—— (1974), *Philosophical Grammar* (Berkeley, Cal, University of California Press).
Wolcher, LE (2005), *Beyond Transcendence in Law and Philosophy* (London, Birkbeck Law Press).
Young, IM (1990), *Justice and the Politics of Difference* (Princeton, NJ, Princeton University Press).
Ziv, N (2000), 'Group Rights, Identity and Equality: Lawyering for Palestinians in Israel', paper presented at the Law and Society meeting, Miami.