

Viewpoint

Litigation, Legitimation and Rethinking Counter-Hegemonic Struggle for Equality

Amal Jamal*

The state is a complex modern entity. Its logic of power is best manifested through the dialectical relationship between its efforts for closure—delimiting practices that are tolerated from those that are not—and its openness for contention and competition over its control. This dialectic enables the state to employ a combination of fierce and soft characteristics as its common sense. Both characteristics promote its superiority and its control over its human and physical environments. One of the mechanisms of state power is its monopoly on the means of violence, whose use is vital to ensure the state as an order. The modern state—unlike the absolute state—is best realized through its "counter-character": namely through the hiding of its fierce character, which best explains its logic. This hiding game is best achieved through disciplining mechanisms and governmentality. It is the generality and natural presence of the state that provides it with its best mechanisms for control, which entails the grounding effect of its potential violence. This need for stealth is even more sophisticated in democratic systems, where violence does not align with the spirit of the sovereignty of the people and is therefore expressed as the guarantor of the former or the exception that ensures the rule.

The court system could be best understood when examined through the above-mentioned understanding of the state. The judiciary is a mechanism that expresses best the duality of the state by externalizing the imagined contradiction between the fundamental ferocity of the state and the manifestation of the will of the people. It is one of the sophisticated mechanisms that vindicate violence through an image that contradicts its spirit. Courts are the ultimate manifestation of soft violence that is expressed through equating law with justice. It is a refined way for the state to suppress its true ferocious features and manifest itself through its counter-character.

Judicial systems manifest themselves through discourse that establishes the legitimacy of the law, thereby their role in applying it. Their main logic of operation is to interpret the law, legislated by political agents into mechanisms of conflict

resolution. Courts establish their discourse on the principle of equality of all, including state agents, before the law. This is to hide their own role as a strong mechanism of the state. Furthermore, they do not discuss the sources of the law, but only its interpretation, based on the dominant principles of the system. Thus, the judicial system suppresses the principle of equality in the law in the name of equality before the law. When we make clear both that the law is not and cannot be equalized relative to justice and it is unequal, given its political nature, the translation of the law into the main mechanism of conflict resolution becomes a tool to promote inequality between conflicting parties, based on the dominant power relations and the hegemonic ideology in society.

This understanding of the role of the court is especially acute in culturally and nationally diverse societies, where the law is often infused with national or cultural flavors. In ethno-national states with national or cultural minorities, the judicial philosophy embedded in the court system corresponds to the power relations that favor the hegemonic nationality. Appeals to the court, even when they challenge state policies, legitimate the fundamental principles of the system—legislative and judicial. It is true that they utilize gaps in the legal and judicial philosophy in order to transform it and challenge its fairness. However, a new dialectical relationship emerges where contention and legitimation become inherently interdependent. When litigation challenges the system, it grants it the right and even the duty to intervene in disputes between its own logic and alternative ones. The result is that, through judicial act, the court system legitimates its own logic—the dominant logic of the state—even when it criticizes the policies enacted by agents of this logic. This is a catch-22 that cannot be overcome when playing by the dominant rules of the game.

Therefore, litigation is not merely limited but even counterproductive if it becomes the major strategy of struggle towards genuine civic and national equality in illiberal or ethno-national states. In order to expose these contradictions, a continuous examination of the judicial discourse is indispensable to overcoming its limitations. Litigating bodies should invest much of their energies in examining the judicial discourse and assisting in developing alternative strategies in order not to fall victim to the self-generating logic of the judicial system. There is a need to stick to challenging the hidden differentiation between policies enacted by the state and its fundamental logic, promoted by the court system.

Litigation has to be supplemented with other strategies that seek to overcome the limitations of the philosophy of “equality before the law” and promote the philosophy of “equality in the law”. Litigating bodies, especially those discriminated against in the law must make clear the differentiations between procedural and substantial litigation. When such differentiation is not ensured, approaching the courts becomes self-defeating. For litigation to be effective in its own terms, it has to be a limited tactic within a broader strategy that is mainly political. Politics is about the determination of the basic character of the state and its byproducts—policies—

so if change is the aspiration, then most of the energy of legal actors should be invested in politics. Does all this mean abandoning the courtroom? This is not what is being said. Rather new strategies are necessary to support rethinking the tendency to adjudicate political life and to reintegrate litigation in the field of politics rather than the other way around.

* **Amal Jamal** is senior lecturer of Political Science at Tel Aviv University and General Director of I'lam Media Center in Nazareth.