THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12671

Boycott, Resistance and the Law: Cause Lawyering in Conflict and Authoritarianism

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This article examines the role of cause lawyers in conflicted or authoritarian contexts where the chances of legal victory are often minimal. Drawing upon the literature on resistance, performance, memory studies, legal consciousness and the sociology of lawyers, the paper examines how cause lawyers challenge and subvert power. The paper first explores the tactics and strategies of cause lawyers who boycott legal proceedings and the relationship between such boycotts and broader political struggles, legitimacy and law. It then examines why and how cause lawyers engage in fairly hopeless legal struggles as acts of instrumental resistance (the 'sand in the cogs'), transforming courts into sites of symbolic resistance, and using law as a form of memory work. The paper argues that boycott of and resistance through the courts can counter the use of law as an instrument of wickedness and a tool of denial and preserves a 'stubborn optimism' in the rule of law.

Keywords: Cause Lawyers, Boycott, Legitimacy, Resistance, Rule of Law, Legal Consciousness

INTRODUCTION

One of the basic precepts for lawyers working in any democratic legal system is the notion that, with the application of due legal skill and ability and a fair judge (or jury), there is at least some chance of a just outcome.[1] While lawyers are often critical of the structural failings of the legal edifice – arguing that particular laws, judges, political or policy initiatives, types of legal proceedings, and indeed core elements of a given legal culture are fundamentally unfair or

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[Correction added on 17 September 2021, after first online publication: On page 12, second paragraph, 3rd line, the text 'petitions that' has been changed to 'petitions against policies that']

1 L. Brandeis, 'The Opportunity in the Law' (1905) 3 *Commonwealth Law Review* 22.

unjust – this rarely leads them to conclude that they should refuse to engage. It is true that in the wake of 9/11 the operation of military tribunals such as Guantanamo as well as national security 'closed material proceedings' provoked some reflective soul-searching amongst lawyers in the US, UK and elsewhere.[2] Significant work has also been done on the role of the judiciary in unfair or unjust legal proceedings.[3] However, there has been comparatively little analysis of the circumstances in which lawyers either boycott legal settings or otherwise subvert them as part of a broader political and ideological strategy. This article seeks to address that gap by focusing on the work of cause lawyers across a range of conflicted or authoritarian contexts.

For a variety of reasons, considerations of boycott, legitimation or resistance were front and centre of the contexts we examined. First, this paper emerges from a comparative study of lawyers in six sites (Cambodia, Chile, Israel/Palestine, Tunisia and South Africa) – all of which had experienced (or were still experiencing) political violence, state authoritarianism or both.[4] Second, most of the cause lawyers we interviewed saw their legal work as some form of political or moral activism rather than simply providing a technical, professional service. All were highly conscious of the risks posed by participation in legal proceedings which had, at the very least, fluctuating levels of legitimacy. By examining both boycott and styles of resistant engagement in what were often hopeless legal proceedings we hope to better understand the role that law plays, not only as an instrument of struggle, but also as a resource for envisioning a better society.

The structure of the paper is as follows. After a brief overview of our research methodology, we highlight relevant themes from the cause lawyering literature. We then introduce the notion of boycott and the ways in which it has featured in the legal contexts we researched. In particular, we examine the practical, moral and political reasoning invoked by cause lawyers who decided to boycott legal proceedings. These include: the degree of organisation and commitment on the part of cause lawyers; the extent to which the system 'needs' the engagement of lawyers; relations between lawyers and oppositional forces; the role of external variables such as international power relations and

2 See further M. Cheh, 'Should Lawyers Participate in Rigged Systems? – The Case of the Military Commissions' (2005) 1 *Journal of National Security Law & Policy* 375; A. Lahav, 'Portraits of Resistance: Lawyer Responses to Unjust Proceedings' (2010) 57 *UCLA Law Review* 725; D. Prabhat 'After 9/11: Guatánamo and the Mobilization of Lawyers' (2011) 54 *Studies in Law and Politics* 213; F. Ní Aoláin and O. Gross (eds), *Guantánamo and Beyond: Exceptional Courts and Military Commissions in Comparative Perspective* (Cambridge: CUP, 2013).

3 D. Dyzenhaus, *Judging the Judges* (Oxford: Hart, 2003); J. Morison et al (eds), *Judges, Human Rights and Transition* (Oxford: OUP, 2007); L. Hilbink, *Judges Beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge: CUP, 2007); T. Ginsburg and T. Moustafa (eds), *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge: CUP, 2008); E. A. González-Ocantos, *Shifting Legal Visions: Judicial Change and Human Rights Trials in Latin America* (Cambridge: CUP, 2016).

4 In this article 'Palestine' refers to the West Bank and Gaza Strip which were occupied by Israel in 1967. Some areas of the West Bank are now under partial control of the Palestinian National Authority (PNA), while the Gaza Strip is controlled by Hamas. It was not possible to conduct fieldwork in Gaza for logistical and security reasons. The Palestinian lawyers we interviewed practiced law in the Israeli civilian or military courts and/or courts under PNA jurisdiction.

timing; the perceived legitimacy of lawyers' actions; and the need for an alternative legal vision. In the following section, we then look more closely at the resistant strategies and tactics adopted by cause lawyers who engage in unfair legal proceedings. Finally, we explore the dialectic between boycott and resistant engagement and argue that, at the core of both strategies, is a 'stubborn commitment' to law as a viable alternative to violence and authoritarianism.

DOING COMPARATIVE RESEARCH ON CAUSE LAWYERS

As noted above, this paper emerges from a comparative study in six jurisdictions. These were chosen from a long list of over a dozen with a view to facilitating 'structured, focused comparisons' and enabling us to explore a range of theoretical themes.[5] The project also built on previous work by one of the authors in Northern Ireland.[6] The rationale for selection included criteria such as: (a) countries with a history of violence, authoritarianism or which are now 'in transition'; (b) jurisdictions from the principal 'legal families' (ie the Common Law tradition, the Civil Law tradition, Islamic tradition, as well as indigenous Asian and African legal traditions);[7] (c) jurisdictions with a tradition of cause lawyering (left or right leaning); and (d) for the 'transitional' sites, jurisdictions with diverse transitional justice mechanisms.

Before fieldwork commenced, we commissioned an extensive interdisciplinary literature review on cause lawyers which drew upon scholarship from law, sociology, political science, history and other disciplines. Local researchers also completed a bespoke historical report and attended to in-field logistics. A research instrument (or interview schedule) drew upon the broader theoretical themes identified in the literature review and we made appropriate adaptations for each site. A total of 131 interviews were conducted, with an average of 22 interviews per jurisdiction. Eighty of the interviewees were lawyers, 10 were legal academics or judges (including former cause lawyers) and 20 were human rights or NGO activists. The remainder included government lawyers (discussed further below) politicians, and officials, journalists, civil society actors and a few former political prisoners. Forty of the interviewees were female, and the rest were male. Purposeful sampling identified a range of lawyers based on criteria including professional seniority, experience of politically contentious cases, and relations with a diversity of political and civil society organisations.[8] Almost all interviews were recorded and transcribed, with interviewees specifying whether

5 A. George, 'Case Studies and Theory Development: The Method of Structured, Focused Comparison' in D. Caldwell (ed), *Alexander L. George: A Pioneer in Political and Social Sciences* (Cham: Springer, 2019) 191.

6 K. McEvoy 'Law Struggle and Political Transformation.' (2000) 27 JLS 542; K. McEvoy 'What did the Lawyers do During the War?' (2011) 74 MLR 350.

7 H.P. Glenn, 'Comparative Legal Families and Comparative Legal Traditions' in R. Zimmermann and M. Reimann (eds), *Oxford Handbook of Comparative Law* (Oxford: OUP, 2006).

8 Purposeful or purposive sampling is premised on the assumption that categories of interviewees may have unique, varied or important perspectives on particular themes and samples accordingly. For analogous methodologies see S. O'Donovan-Polten, *The Scales of Success*: *Constructions of Life-Career Success of Eminent Men and Women Lawyers* (Toronto: University of Toronto Press, 2001).

they wished to be named or anonymised.[9] The data was thematically coded and analysed in NVivo using a fusion of inductive and deductive approaches.[10] Illustrative themes in the data coding included the rule of law, legal culture, cause lawyering, professional neutrality, boycott, human rights discourses, strategic litigation and the performance of legality.

As noted above, the focus of this research was explicitly upon cause lawyers practising law in difficult circumstances. Before examining the case studies in more detail, it may be helpful to recap on the ways in which cause lawyers have featured in socio-legal studies over the course of the last three decades. The important role played by lawyers in the US civil rights movement sparked a particular interest in America, as reflected in the work of McCann,[11] Sarat and Scheingold[12] and others. That interest has since extended to a broad cross section of jurisdictions.[13] Whilst acknowledging ongoing definitional debates, we see cause lawyering as a form of 'moral activism' which involves using legal skills to 'pursue ends and ideals that transcend client service.'[14] Cause lawyers are often defined in contrast to what they are not – ie conventional lawyers.[15] Cause lawyering 'implies agency and consciousness, political identification, social solidarity and goals'.[16] The 'causes' associated with cause lawyering were originally drawn from the left-leaning or liberal spectrum, including the struggle for civil and human rights, social justice, feminism, racial equality and related issues. However, in recent decades, scholarship on cause lawyers and right-leaning issues such as anti-abortion and pro-gun ownership in the US, pro-business and

9 Accordingly, some interviewees are named and others are not in this paper.

10 In broad terms, inductive coding involves a close reading of data to derive concepts, themes or models so that the 'theory emerges from the data'. See J. Corbin and A. Strauss, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (London: Sage, 4th ed, 2015) 12. A deductive approach explores whether data is consistent with existing theories, assumptions or hypotheses. In practice, most qualitative research involves both. See for example J. Fereday and E. Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5 *International Journal of Qualitative Methods* 80.

11 M. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* (Chicago, IL: University of Chicago Press, 1994).

12 A. Sarat and S. Scheingold, *Cause Lawyering: Political Commitments and Professional Responsibilities* (New York: OUP, 1998); A. Sarat and S. Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford: OUP, 2001); A. Sarat and S. Scheingold, *Something to Believe In: Politics, Professionalism and Cause Lawyering* (Stanford, CA: Stanford University Press, 2004); A. Sarat and S. Scheingold (eds), *The Worlds Cause Lawyers Make* (Stanford, CA: Stanford University Press, 2005); A. Sarat and S. Scheingold (eds), *Cause Lawyers and Social Movements* (Stanford, CA: Stanford University Press 2006); A. Sarat and S. Scheingold (eds), *The Cultural Lives of Cause Lawyers* (Cambridge: CUP, 2008).

13 For example J. Krishnan, 'Lawyering for a Cause and Experiences from Abroad' (2006) 94 *California Law Review* 575; L. Kawar, 'Legal Mobilization and the Terrain of the State: Creating a Field of Immigrant Rights Lawyering in France and the United States' (2011) 36 *Law & Social Inquiry* 354. F. Munger, 'Thailand's Cause Lawyers and Twenty-First-Century Military Coups: Nation, Identity, and Conflicting Visions of the Rule of Law' (2015) 2 *Asian Journal of Law & Society* 301.

14 Sarat and Scheingold, (2004) n 12 above, 3-4.

15 L. Hajjar, 'From the Fight for Legal Rights to the Promotion of Human Rights: Israeli and Palestinian Cause Lawyers in the Trenches of Globalisation' in Sarat and Scheingold (eds), (2001) n 12 above, 4.

16 L. Hajjar, *Courting Conflict: The Israeli Court System in the West Bank and Gaza* (Berkeley, CA: University of California Press, 2005) 154.

anti-environmental activism, victims' rights, Israeli settlers, as well as of the role of cause lawyering within the state, have expanded and enriched the field.[17]

The bulk of the cause lawyering scholarship that has emerged in the last thirty years has drawn from the experience of settled democracies. However, there is now an emerging literature on cause lawyering in conflicted, authoritarian and transitional societies.[18] This explores themes such as legal strategies, relations with the state (and conventional lawyers), relations with social movements, and the intimidation and harassment of cause lawyers by the state or its proxies.[19] Our own research has sought to develop that work by focusing on gender–related issues and by examining the relationship between cause lawyers and politically-motivated violent clients.[20]

Our fieldwork highlighted that the motivation and tactics of cause lawyers varied across legal, political, social and temporal boundaries. As discussed further below, the agency available to lawyers in trying to organise a boycott also varied considerably. Whilst acknowledging these differences, we have endeavoured to draw out what Popper refers to as 'contingent empirical generalisations',[21] ie contingent because they apply usually under certain (specified) conditions, and empirical because they are derived from close analyses of small-n case studies. This type of comparative analysis presents the opportunity both to make sense of similarities and differences and to attempt what Cotterrell has described as 'cautious and reflexive theorising beyond the local experience of very diverse sites'.[22]

Finally, as will become clear, this paper draws upon a range of theoretical frameworks to underpin the arguments made. As noted above, our first step on this project was to commission an interdisciplinary literature review which directly informed the kinds of questions we asked and the ways in which the data is framed. For this particular paper, the theoretical literature on legitimacy and

17 J. Decker, *The Other Rights Revolution: Conservative Lawyers and the Remaking of American Government* (New York, NY: OUP, 2016); Y. Dotan, *Lawyering for the Rule of Law* (Cambridge: CUP, 2014); R. Dudai, 'Entryism, Mimicry and Victimhood Work: The Adoption of Human Rights Discourse by Right-Wing Groups in Israel' (2017) 21 *International Journal of Human Rights* 866.

18 G.E. Bisharat, *Palestinian Lawyers and Israeli Rule: Law and Disorder in the West Bank* (Austin, TX: University of Texas Press, 1989); Sarat and Scheingold (eds), (2001) n 12 above; Hajjar, n 16 above; T. Halliday et al (eds), *Fighting for Political Freedom* (Oxford: Hart, 2007); W. Tam, *Legal Mobilization under Authoritarianism: The Case of Post-Colonial Hong Kong* (Cambridge: CUP, 2013); N. Cheesman, *Opposing the Rule of Law: How Myanmar's Courts Make Law and Order* (Cambridge: CUP, 2015); R. Stern, 'Activist Lawyers in Post-Tiananmen China' (2016) 42 *Law & Social Inquiry* 234.

19 M. Flaherty, 'Human Rights Violation against Defense Lawyers: The Case of Northern Ireland' (1994) 7 *Harvard Human Rights Journal* 87; A.M. Nah, K. Bennett, D. Ingleton and J. Savage, 'A Research Agenda for the Protection of Human Rights Defenders' (2013) 5 *Journal of Human Rights Practice* 401; A. Batesmith and J. Stevens, 'In the Absence of the Rule of Law: Everyday Lawyering, Dignity and Resistance in Myanmar's "Disciplined Democracy"' (2019) 28 *Social & Legal Studies* 573.

20 A. Bryson and K. McEvoy, 'Women Lawyers and the Struggle for Change' (2006) 42 Australian Feminist LJ 51; K. McEvoy, 'Cause Lawyers, Political Violence and Professionalism in Conflict' (2019) 46 JLS 529.

21 K. Popper, *The Logic of Scientific Discovery* (London: Routledge, 1959).

22 R. Cotterrell, 'Comparative Sociology of Law' in D.S. Clarke et al (eds), *Comparative Law and Society* (Cheltenham: Edward Elgar, 2012) 60; See also D. Nelken, *Comparative Criminal Justice: Making Sense of Difference* (London: Sage, 2010).

resistance proved most useful and as such is threaded throughout the analysis. Our concluding discussion on cause lawyers' 'stubborn optimism' in the rule of law is informed by our understanding of legal consciousness. In addition, we draw on the relevant literature to illustrate a number of specific points discussed including law, performance and memory work. Having established the methodological and theoretical parameters of our analysis we will now explore the notion of legal boycott as a protest tactic.

CAUSE LAWYERING, BOYCOTT AND POLITICAL PROTEST

A boycott typically involves a withdrawal or refusal to engage with an individual, an organisation, a process, an institution or even an entire nation – as an expression of protest. Although the practice can be traced at least to biblical times,[23] the term was coined in Ireland in 1880 following the collective ostracisation of Charles Cunningham Boycott. Mr Boycott, an English landlord agent and former captain in the British Army, was accused of evictions and other abuses against tenants on the estate of Lord Erne in County Mayo.[24] The tactic has since been associated with high profile political, economic and consumer campaigns such as the 1955 Montgomery bus boycott (as part of the US civil rights movement); the United Farm Workers' grape boycott that highlighted poor working conditions and low wages in the 1960s; and more recently, targeted boycotts of products by major consumer companies such as Nestlé, ESSO, Nokia, Heinz and Starbucks.[25]

Boycotts have also become synonymous with attempts to put political pressure on entire political regimes, including two of the sites in which we conducted our research. During apartheid, some governments, multinationals, churches, media groups, politicians and others organised embargos on the sale of military hardware, imposed financial sanctions on trade, refused visas to South African citizens, and boycotted South African produce.[26] In addition, South Africa was the target of a fiercely contested sports boycott affecting a number of sports including cricket, rugby and the Olympic games from 1968 onwards.[27] In part inspired by the apparent success of the anti-apartheid boycott, a similarly broad-based international campaign focused on Israel was launched in 2005. Initially driven by more than 170 Palestinian civil society organisations,

23 H.W. Laidler, *Boycotts and the Labor Struggle: Legal and Economic Aspects* (London: John Lane, 1914) 27.

24 The campaign was organised by the Irish Land League as part of its broader struggle to establish the 'Three Fs' (fair rent, fixity of tenure, and free sale). The widespread media coverage of the case popularised the term 'boycott' as an effective protest tactic. See further J. Marlow, *Captain Boycott and the Irish* (London: André Deutsch, 1973) 215.

25 L. Wolman, *The Boycott in American Trade Unions* (Baltimore, MD: Johns Hopkins Press, 1916); D. Williams, *The Thunder of Angels: The Montgomery Bus Boycott and the People Who Broke the Back of Jim Crow* (Chicago, IL: Chicago Review Press, 2006); J.E. Post, 'Assessing the Nestlé Boycott: Corporate Accountability and Human Rights' (1985) 27 *California Management Review* 113.

26 R. Price, *The Apartheid State in Crisis: Political Transformation in South Africa 1975–1990* (New York, NY: OUP, 1991); S. Zunes, 'The Role of Non-violent Action in the Downfall of Apartheid' (1999) 31 *The Journal of Modern African Studies* 137.

27 D. Booth, *The Race Game: Sport and Politics in South Africa* (London: Routledge, 2012).

the Boycott, Divestment, and Sanctions (BDS) movement urges 'people of conscience' worldwide to impose boycotts, implement divestment initiatives, and encourage their respective states and organisations to impose embargoes and sanctions against Israel in protest at Israel's occupation of Palestinian territories, human rights abuses and systemic discrimination against Palestinians.[28] Boycotts are designed to socially and economically isolate a state but also to target how nations imagine themselves – thus sport (particularly rugby and cricket) in South Africa or intellectual and cultural life in Israel were/are particular targets.[29]

Lawyers elsewhere have resorted to boycott in order to highlight specific human rights, due process, or fair trial issues. For example, in the UK lawyers have periodically engaged in a boycott of legal aid work in response to cuts in fees – arguing that the cuts directly impact their ability to represent their clients and correspondingly the fair trial rights of those clients.[30] In India, lawyers have boycotted the courts over allegations of political interference in the independence of the judiciary as well as protesting what was termed the 'anti-lawyer' over-use of alternative dispute mechanisms ('lok adalat' – people's courts).[31] While these legal boycotts have typically been short in duration and scope, others have continued over extended periods with broader goals in mind. In 2007, then Pakistani dictator, President General Pervez Musharraf, suspended the Chief Justice of the Supreme Court, Iftikhar Muhammad Chaudhry, after he and two thirds of the higher judiciary refused to authorise the suspension of the constitution and were arrested. Chaudry toured the country addressing local bar associations and they responded by boycotting the lower courts, ostracising those lawyers who continue to appear, and threatening to remove their licenses.[32] These protests ultimately saw Chaudry and the other deposed judges reinstated. In a similar vein, the boycotting of courts as part of broader political struggle has historical resonance in Ireland, during the IRA campaign of the 1920s and again in the 1970s when republicans had a co-ordinated strategy of 'not recognising the courts'.[33]

28 C. Nelson, *Dreams Deferred: A Concise Guide to the Israeli-Palestinian Conflict and the Movement to Boycott Israel* (Chicago, IL: Indiana University Press, 2016).

29 S.F. McMahon, 'The Boycott, Divestment, Sanctions Campaign: Contradictions and Challenges' (2014) 4 *Race and Class* 65; J. Nauright, *Sport, Cultures and Identities in South Africa* (Leicester: Leicester University Press, 1997) 25; A.A. Ghazi-Bouillon, *Understanding the Middle East Peace Process: Israeli Academia and the Struggle for Identity* (London: Routledge, 2009) 5-6.

30 H. Quirk, *The Rise and Fall of the Right to Silence* (London: Routledge, 2016); A. Flynn, J. Hodgson, J. McCulloch and B. Naylor, 'Legal Aid and Access to Legal Representation: Redefining the Right to a Fair Trial' (2016) 40 *Melbourne University Law Review* 207.

31 K.S. Sudhi, 'Lawyers to Boycott Lok Adalat: Protest Against "Anti-Lawyer" Developments in the Legal Sector' *The Hindu* 13 December 2019 at https://www.thehindu.com/news/national/kerala/lawyers-to-boycott-lok-adalat/article30300858.ece (last accessed 31st May 2021).

32 See S. Ghias, 'Miscarriage of Chief Justice: Judicial Power and the Legal Complex in Pakistan Under Musharraf (2010) 35 *Law & Social Inquiry* 985, 1008; S. Shafqat, 'Civil society and the Lawyers' Movement of Pakistan' (2018) 43 *Law & Social Inquiry* 889.

33 See McEvoy, n 6 above. In the 1920s Irish republicans – including republican lawyers – boycotted British courts as well as establishing alternative 'Sinn Féin' or 'Dáil' courts at parish, district and national level. As the principal legal historian of the time notes, 'Officials in Dublin Castle [the seat of British rule in Ireland] and Irish peers warned the government that these "courts" were doing far more harm to its administration in Ireland than the armed violence raised against it.'

In the course of our research, we put questions on boycott to all of our interviewees but it resonated more strongly in some jurisdictions than others. The collective strike, court boycott and related public protest by Tunisian lawyers between December 2010 and January 2011 (echoing the experience of Pakistan in the 2000s and Ireland in the early 1920s) made a direct contribution to the collapse of the Ben Ali regime.[34] In addition, there is a long history of boycotting Israeli military courts amongst Palestinian lawyers and this has resurfaced periodically as a debate amongst Israeli cause lawyers – to less effect in both cases. Cause lawyers in the other sites had no comparable tradition of boycotting legal proceedings. However, as is discussed further below, they did develop innovative strategies to subvert legal proceedings in contexts where material victories were scarce. In this section we will therefore focus on legal boycotts in Tunisia and Israel/Palestine.

In the Tunisian context there is a significant tradition of lawyers' boycotts and strikes. Following independence from France in 1956, Tunisia endured a one-party state dictatorship led first by Habib Bourguiba until 1987, and then by Zine El Abidini Ben Ali until 2011.[35] As one cause lawyer told us: 'There were boycotts in the 1990s in protest against the lack of judicial independence, but we lawyers always felt a responsibility to defend our clients, to support the victims of the regime.'[36]

The tradition of activism amongst some Tunisian lawyers was due in part to the fact that the regime attempted to exert tight control over the legal profession. Under both Bourguiba and Ben Ali, the Tunisian Bar was carefully monitored to identify potentially subversive members. Both regimes furthermore attempted to co-opt the Tunisian Bar Association (TBA), fix bar elections, abolish local branches and to allow judges to charge lawyers with the criminal offence of 'bad faith' if advancing arguments they disliked in court.[37] Committed cause lawyers within the Tunisian legal profession increasingly pressed the TBA to stand up for the rights of lawyers and over time the TBA became more willing to do so.[38]

In the early 2000s the governing council of the TBA called for a boycott of Tunisian courts in protest against the abuse and harassment of lawyers. Similarly, in 2005 the arrest of one oppositional lawyer, Mohammed Abbou, provoked a 'sit in' protest at Lawyers House (Maison de l'Avocat) opposite the main courthouse in Tunis which lasted over fifty days.[39] Abbou had criticised the invitation from Ben Ali to then Israeli Prime Minister, Ariel Sharon, to attend the World Summit on the Information Society, calling both men corrupt human

M. Kotsonouris, *The Winding Up of the Dáil Courts 1922-1925* (Dublin: Four Courts Press, 2004) 9-10.

34 E. Gobe, 'Lawyers Mobilizing in the Tunisian Uprising: A Matter of "Generations"' in M.M. Ayyash and R. Hadj-Moussa (eds), *Protests and Generations: Legacies and Emergences in the Middle East, North Africa and the Mediterranean* (Leiden: Brill, 2017) 73.

35 See C. Alexander, *Tunisia: From Stability to Revolution in the Maghreb* (London: Routledge, 2016).

36 Interview with Tunisian cause lawyer, 16 June 2014, Tunis, Tunisia.

37 E. Gobe, 'Tunisia: A Political Profession?' in R. Abel et al (eds), *Lawyers in 21st-Century Societies* (London: Hart, 2020).

38 F. Champy and L. Israël, 'Professions et Engagement Public' (2009) 73 *Sociétés Contemporaines* 7.

39 E. Gobe and L. Salaymeh, 'Tunisia's Revolutionary Lawyers: From Professional Autonomy to Political Mobilization' (2016) 41 *Law & Social Inquiry* 311.

rights abusers. He was subsequently charged with 'publishing false news capable of disturbing the public order' and 'libelling the justice system' and sentenced to three years and half years.[40] Although the sit-in failed in its objective to secure Abbou's release, it was viewed as a success by the cause lawyers involved, focusing international attention on the regime's human rights and censorship record and mobilising diverse groups of lawyers. As one interviewee involved told us:

> The Abbou protest was important because it was the first properly organised lawyers' 'sit-in' against the Ben Ali's regime. It involved lawyers with diverse affiliations including Islamists, nationalists and leftists. It put pressure on the Bar who had to support it … Journalists were coming from all over the world. Our three mottos were: release political prisoners, freedom of organisation and assembly and judicial independence. We knew we would get a lot of attention.[41]

This tradition of boycott, strikes and protest by lawyers came to the fore as the Ben Ali regime began to unravel. In 2010, following the suicide by self-immolation of an unlicensed fruit and vegetable seller, Mohamed Bouazizi, cause lawyers helped organise the ensuing protests. Lawyers marched in their robes, the police responded with violence and lawyers in turn organised sit-ins in front of the courts – urging the public and their legal colleagues to join them and boycott the courts.[42] The focus of the protests included not only the repression of lawyers but also human rights abuses such as arbitrary detention, the torture of prisoners, lack of free speech, corruption and ultimately the regime itself.[43] Slogans at these protests mixed political and professional goals: 'No to dictatorship'; 'yes to an independent legal system' and 'lawyers are the first lines of defense of people's rights.'[44] Increased police violence against lawyers inside and outside the courts, and a general strike by the Tunisian trade union movement, ultimately persuaded the initially reluctant TBA to call for 'a lawyers general strike across all courts on Friday 14 January to show solidarity with victims and in support of protestors' claims'.[45]

The general strike and sit-ins by lawyers were designed to make the courts unworkable. As in Pakistan, the images of lawyers leading protests in their professional attire of black suits, white shirts and black ties spread rapidly via social media and was picked up by the international broadcast and print

40 Human Rights Watch, *False Freedom: Online Censorship in the Middle East and North Africa* (New York, NY: Human Rights Watch, 2005).
41 Interview with Tunisian cause lawyer, Ayachi Hammami, 16 June 2014, Tunis, Tunisia.
42 Interview with Tunisian cause lawyer and politician, Tunis, Tunisia, 19 June 2014; interview with Tunisian cause lawyer, Tunis, Tunisia, 20 June 2014.
43 Interview with Tunisian cause lawyer and politician, Tunis, Tunisia, 17 June 2014.
44 Gobe and Salaymeh, n 39 above, 325.
45 Tunisian Bar Association Announcement, 12 January 2011 quoted in Gobe and Salaymeh, *ibid*, 311, 328. See further S. El Gantri, *The Role of Lawyers as Transitional Actors* (Belfast: QUB Law School, 2015) at https://lawyersconflictandtransition.org/themainevent/wp-content/uploads/2014/07/THE-ROLE-OF-LAWYERS-AS-TRANSITIONAL-ACTORS-IN-TUNISIA-ENGLISH.pdf (last accessed 31 May 2021).

media.[46] Led by experienced cause lawyers, hundreds of Tunisian lawyers encircled the Ministry of the Interior on 14 January 2011 shouting 'Ben Ali Dégage' (Ben Ali Clear Off).[47] After twenty-three years of dictatorship and one month of popular protest, Ben Ali fled Tunisia. The lawyers involved had caught the general mood of regime breakdown and played a significant role in its demise. As one interviewee who was at the iconic Ministry of Interior protests told us:

> … there were two lawyers that climbed the wall and window of the Ministry of the Interior, shouting slogans to the crowd and those inside. That's when we started thinking that it was over for Ben Ali. One of the doors of the ministry opened and somebody from inside gave a megaphone to the lawyers so that their voices could reach farther.[48]

The Israeli/Palestinian context has a similar tradition of legal boycotts and strikes – although arguably with less tangible results. Following the six-day war in 1967 and the Israeli occupation of the West Bank and Gaza, the Israeli government supplanted the Jordanian civil courts which had previously operated in Jerusalem and the West Bank with Israeli courts and established a series of military courts in the newly occupied territories.[49] From the outset the Israeli authorities encouraged Palestinian lawyers to appear in the new military courts in the West Bank and Gaza[50] but Palestinian lawyers who lived in Jerusalem could only practice in the new Israeli courts if they passed the Israeli bar.[51] Palestinian lawyers thus declared a 'strike' or boycott of both the civil and military courts. As members of the Jordanian Lawyers Union, striking lawyers were paid a stipend from the Union – a responsibility which ultimately passed to the Jordanian government. Those who refused to strike were expelled from the Jordanian Bar. Premised on the notion that the occupation was a temporary phenomenon, the boycott was widely respected by Palestinian lawyers.[52] The Israeli authorities responded by authorising Israeli lawyers to appear in the military and civilian courts.[53]

As the reality of the enduring occupation continued, Palestinians were forced to engage with the Israeli courts in the West Bank and Gaza either as

46 A. Aleya-Sghaier, 'The Tunisian Revolution: The Revolution of Dignity' (2012) 3 *The Journal of the Middle East and Africa* 18; S. Lowrance, 'Was the Revolution Tweeted? Social Media and the Jasmine Revolution in Tunisia' (2016) 25 *Digest of Middle East Studies* 155.

47 See 'Dégage Ben Ali' 15 January 2011 at https://www.youtube.com/watch?v=y69icq7-O-o (last accessed 31 May 2021).

48 Interview with Tunisian cause lawyer, Tunis, Tunisia, 20 June 2014.

49 M. Geva, 'Military Lawyers Making Law: Israel's Governance of the West Bank and Gaza' (2019) 44 *Law & Social Inquiry* 704.

50 G. Bisharat, 'Courting Justice? Legitimation in Lawyering Under Israeli Occupation' (1995) 20 *Law & Social Inquiry* 345, 362. Hajjar notes that the four Palestinian lawyers who worked in the Israeli military courts in Gaza at the outset of the occupation were escorted to and from court by Israeli military vehicles. Hajjar, n 16 above, 171.

51 Bisharat, n 18 above, 146-147.

52 Bisharat claims that only two Palestinian lawyers violated the collective boycott in its initial phases, a number that was confirmed to us several times by older Palestinian and Israeli cause lawyers, *ibid*, 147.

53 R. Shehadeh and J. Kuttab, *The West Bank and The Rule of Law* (Geneva: International Commission of Jurists, 1980).

defendants or litigants. In 1969 fourteen Palestinian lawyers began to appear before Israeli Courts in the West Bank and in 1971 the union formally split between boycotting and working lawyers, with seventy Palestinian lawyers appearing before the military courts.[54] Practising Palestinian lawyers formed their own professional associations in the early 1980s – the Arab Lawyers Union in the West Bank and the Lawyers Society in Gaza. By 1986 the number of Palestinian lawyers appearing before the Israeli military courts had risen to between 80 and 100.[55] As one Palestinian interviewee told us:

> The fraying of the first boycott was inevitable. The occupation was clearly here to stay for the foreseeable future and the strike wasn't having any discernible impact. Clients were engaging with the Israeli courts because they had to. Some of the original leadership had retired, died or emigrated and new lawyers were graduating but not allowed to practice. Moreover, they weren't really offering a viable alternative to the Israeli system … In some ways it was remarkable it sustained as long as it did.[56]

Following the outbreak of the first *intifada* in 1987, there were further periodic boycotts of the military courts. For example, lawyers in Gaza went on strike for a further eleven months in 1989, followed by several month-long strikes in protest against due process failings in the courts.[57] However, these too were called off in response to public pressure to provide legal services for those being arrested.[58] There have also been sporadic boycotts of the military courts in 2017, 2018 and 2019 by Palestinian prisoners and their lawyers protesting interference with legal visits to hunger-striking prisoners, the Israeli use of administrative detention (internment without trial), and harassment of lawyers.[59] Moreover, as is discussed further below, the fact that conviction rates in the Israeli military courts are above 99 per cent raises very obvious questions about the basic fairness of such proceedings.[60]

54 M. M. Qafisheh, 'Ethics of the Legal Profession in Palestine' (2018) 42 *Fordham International Law Journal* 553, 562.

55 Hajjar, n 16 above, 172.

56 Interview with Palestinian human rights activist, Ramallah, Palestine, 22 May 2014.

57 These failings included problems with translation of case materials into Arabic, difficulties establishing where clients were being held, increased repression by soldiers, restrictive security measures within the courts, as well as erratic sentencing and failures by judges to take defence witness testimony. Hajjar, n 16 above, 175. See also M. Rishmawi, The Lawyers' Strike in Gaza' (April 1988) Centre for the Independence of Judges and Lawyers (CIJL) Bulletin no 21, 23-25; Lawyers' Committee for Human Rights, *Boycott of the Military Courts by West Bank and Israeli Lawyers: Background Memorandum* (New York, NY: Lawyers Committee for Human Rights, 1989).

58 *ibid*.

59 'Palestinian Lawyers Boycott Military Courts; Women Prisoners Begin Protest Steps' Samidoun Palestinian Prisoner Solidarity Network, 19 April 2017 at https://samidoun.net/2017/04/palestinian-lawyers-boycott-military-courts-women-prisoners-begin-protest-steps/ (last accessed 31 May 2021); 'Lawyers Boycott Military Courts' Addameer, 24 January 2019 at https://www.addameer.org/news/lawyers-boycott-israeli-military-courts (last accessed 31 May 2021).

60 N. Ramati, 'The Rulings of the Israeli Military Courts and International Law' (2020) 25 *Journal of Conflict and Security Law* 149.

Israeli lawyers have also engaged in periodic debate about boycotting occupation-related litigation before the Israeli High Court (Supreme Court). Despite a mixed record on actually preventing human rights abuses (discussed further below), recourse to the Israeli High Court has long been viewed by Israeli cause lawyers as the default option for occupied territories-related litigation.[61] At a conference to discuss litigation strategy in June 2007, an army Brigadier General and head of civil administration in the occupied territories told the activists that they were prolonging the occupation, concluding 'the system cannot function without you.'[62] He suggested that their legal activism did little other than 'soften the sharp edges' of military repression and domination by providing the fig leaf of legality.[63]

Following the conference, a group of cause lawyers from the main Israeli human rights NGOs drafted a document which suggested that NGOs should 'not submit High Court petitions against policies that violate human rights in the Occupied Territories.' Due to difficulties in reaching a consensus, the draft boycott document left room for 'individual petitions' on broader 'public interest petitions'. One of the lawyers involved, Michael Sfard, felt that this loophole rendered the strategy, 'very difficult, if not impossible.'[64] In any event, the compromise failed when the Executive Board of one the most established NGOs (ACRI) rejected it and the initiative was shelved.[65] As one of the ACRI lawyers told us:

> Our initial conclusion was that we should boycott the court as lawyers working for human rights organisation in Israel. However, it was not approved by the organisation so it was never taken up. Also when we met the Palestinian lawyers they said 'no', we cannot stop now because in individual cases like house demolitions or arrests, it's the only tool that helps … I wasn't disappointed though – the conversation itself was amazing, thinking through the purpose and effect of litigation – even if in the end the conclusion wasn't very dramatic.[66]

61 See for example R. Shamir, '"Landmark Cases" and the Reproduction of Legitimacy: The Case of Israel's High Court of Justice' (1990) *Law and Society Review* 781; D. Kretzmer, *The Occupation of Justice: The Supreme Court of Israel and The Occupied Territories* (New York, NY: State University of New York Press, 2002); M. Mautner, *Law and the Culture of Israel* (Oxford: OUP, 2011); N. Sultany, 'Activism and Legitimation in Israel's Jurisprudence of Occupation (2014) 23 *Social & Legal Studies* 315.

62 M. Sfard, *The Wall and the Gate: Israel, Palestine and the Legal Battle for Human Rights* (New York, NY: Metropolitan Books, 2018) 21. When the legendary cause lawyer, Felicia Langer, left Israel after twenty-five years of advocacy for Palestinians rights she declared that she had decided that she 'could no longer be a fig-leaf for the system', quoted in J. Diehl, 'Israeli Defender of Arab Rights quits in "Despair and Disgust"' *Washington Post* 13 May 1990.

63 Sfard, *ibid*, 32.

64 *ibid*, 31.

65 The Association for Civil Rights in Israel (ACRI) is Israel's oldest human rights organisation, and the only one dealing with the entire spectrum of rights and civil liberties issues in Israel and the Occupied Territories.

66 Interview with Israeli cause lawyer, Jerusalem, 11 May 2014. As this debate re-emerged amongst Israeli NGOs in 2020, particularly in light of the efforts by some to engage the International Criminal Court regarding the Occupied Territories (which would require demonstrating for example that the Israeli military courts system is unable or unwilling to properly investigate or prosecute allegations of war crimes or crimes against humanity), one senior lawyer from Hamokek (a legal aid NGO) responded 'We don't have the right to tell victims of the Israeli

As is developed further below, it is hardly surprising that lawyers should incline towards engagement with law and the courts. Boycotts are relatively rare because lawyering is, by definition, what lawyers do. If lawyers in general and cause lawyers in particular are not in their offices preparing to challenge injustice or in court fighting against it, then to paraphrase Scott Cummings, 'what good' are they?[67] Taking this as a given, we have identified a number of overlapping themes in cause lawyers' perspectives on legal boycotts.

First, there are practical considerations. As in any form of collective action, the extent to which lawyers can organise and sustain collective action is key. Social movement theorists have long argued that the logic of participation in such processes is *contingent* on the organised actions of others, either creating bespoke structures and networks or working through pre-existing ones.[68] In the Tunisian context pressure from local branches and prominent cause lawyers eventually led the Bar Association to support the general strike in 2011 and boycott the courts. In the case of the Palestinian lawyers' boycott of the Israeli military courts after the 1967 war, the fact that these lawyers were organised by a collective entity – the Jordanian Bar – and financially supported by the Jordanian government was crucial. Conversely, the fact that other lawyers (first Israelis then other Palestinians) were willing to do the work undermined the collective power of the boycott. Unsurprisingly, this latter point – 'if we boycott, other lawyers will do the work' – was raised in the other sites we researched where there was no tradition of legal boycotts. Often it was allied with a concern that defending politically motivated clients in political trials would otherwise be done by lawyers who were more pliant or sympathetic to the regime.

A second important variable was the relationship between boycotting lawyers and the social or political movements opposed to the regime. As noted above, in the context of the Irish revolution of the early 1920s or indeed the post-1967 war in Gaza and the West Bank, lawyers' boycotts were framed as part of the broader struggle. In both Pakistan and Tunisia, boycotts by lawyers were historically focused on legal and professional issues (for example independence of the legal profession or judiciary) but ultimately merged with broader demands for an end to the regime. In Tunisia, while not necessarily the leaders of the movement that saw Ben Ali topple, lawyers undoubtedly played an important practical and symbolic role in highlighting injustice and expressing a 'shared narrative' of the anti-regime social movement.[69] The lawyers' court boycott and prominence in public protests represented a clear deployment of lawyers'

occupation that we will not help them', at https://www.mekomit.co.il/ 9 August 2020 (last visited 31 May 2021).

67 S. Cummings, 'Introduction' in S. Cummings (ed), *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge: CUP, 2011) 1. As Sfard argues, 'It is difficult, maybe even impossible, to persuade a human rights lawyer not to use an open legal path on behalf of an individual whose rights are violated.' M. Sfard, 'The Price of Internal Legal Opposition to Human Rights Abuses' (2009) 1 *Journal of Human Rights Practice* 37, 49.

68 M. Olson, *The Logic of Collection Action: Public Goods and the Theory of Groups* (Cambridge, MA: Harvard University Press, 1971); M. Diani and D. McAdam, *Social Movements and Networks: Relational Approaches to Collective Action* (Oxford: OUP, 2003).

69 F. Kaboub, 'The Making of the Tunisian Revolution' in I. Diwan (ed), *Understanding the Political Economy of the Arab Uprisings* (Singapore: World Scientific Publishing, 2014) 64.

symbolic 'cultural capital'.[70] Moreover, in both contexts, the leadership of the legal profession (the Pakistani and Tunisian Bar Associations) and not just cause lawyers were involved. Such bodies are often reluctant upholders of their purported function as the 'collective conscience' of the profession.[71] If a national Bar Association becomes sufficiently radicalised to engage in boycotting the courts a political regime may be in some trouble.

Third, beyond the relationship between lawyers and social or political movements, the efficacy of legal boycotts is inevitably shaped by international power relations. For example, the Musharraf regime in Pakistan was susceptible to international political pressure from the United States in particular and this was crucial in the ultimate success of the boycotting lawyers.[72] Conversely, while the support of Arab states (particularly Jordan) and civil society was obviously key to the longevity of the Palestinian lawyers' boycott, the realities of the United States 'special relationship' with Israel meant that the boycott never really tilted the axis there.[73]

A fourth and closely related theme in understanding the success or otherwise of legal boycotts is the issue of timing. Political scientists rightly urge that all disciplines should 'take time seriously'.[74] For example, historical institutionalists are often drawn to examine 'critical junctures', periods in history which are regarded as 'turning points' when 'wilful actors' can help shape outcomes which would not otherwise occur.[75] Similarly, social movement scholars discuss processes of 'cracking' or 'rupture' where ostensibly stable regimes can be challenged or subverted.[76] The timing for the boycotting lawyers in Tunisia in 2011 was right – Palestinian lawyers have never been as fortunate.

Fifth, the aims of the boycott must be clear and, at some level, realisable. Boycotting lawyers must be able to impact upon the functioning of the legal system and, by extension, the regime must care about the functioning of that system. If the lawyers' aims are comparatively narrow (for example focused on the administration of justice, the treatment of lawyers, access to or support for clients), the legal or political authorities may seek to engage with lawyers

70 Y. Dezalay and M.R. Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law' (2012) 8 *Annual Review of Law and Social Science* 433.

71 K. McEvoy and R. Rebouche 'Mobilising the Professions: Lawyers, Politics and the Collective Legal Conscience' in J. Morison, K. McEvoy and G. Anthony (eds), *Judges, Transition and Human Rights* (Oxford: OUP, 2007).

72 Z. Shahab and M. Stephan 'Fighting for the Rule of Law: Civil Resistance and the Lawyers' Movement in Pakistan' (2010) 17 *Democratization* 492, 507. See also National Lawyers Guild Delegation to Pakistan and LUMS Rule of Law Project, *Defending Dictatorship: US Foreign Policy and Pakistan's Struggle for Democracy* (New York, NY: NLG, 2008).

73 Bisharat, n 50 above, 389.

74 P. Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton, NJ: Princeton University Press, 2004).

75 J. Mahoney, *The Legacies of Liberalism: Path Dependence and Political Regimes in Central America* (Baltimore, MD: Johns Hopkins University Press, 2002) 8. See also G. Capoccia and R.D. Kelemen, 'The Study of Critical Junctures: Theory, Narrative and Counterfactuals in Historical Institutionalism' (2007) 59 *World Politics* 341, 348.

76 D. della Porta 'Protests as Critical Junctures: Some Reflections Towards a Momentous Approach to Social Movements' (2020) 19 *Social Movements* 556.

to resolve such disputes if it is a price worth paying.[77] However, if a lawyers' boycott is more explicitly political and the space for engagement/resolution is narrowed, much depends on the stability of the regime at that particular time. For example, in the case of Israel/Palestine, very ambitious political boycotts linked to 'ending the occupation' or in support of the first *Intifada* – even when allied to broader military and social pushes against the occupation – failed because of the asymmetrical nature of the Israeli-Palestinian power-relations.[78] In contrast, the lawyers' boycotts referred to in 1920s Ireland, Pakistan and Tunisia – all of which were allied to broader military, social and political campaigns that arguably carried more clout – were more successful.

A sixth important theme for lawyers considering whether or not to engage in a boycott concerns legitimacy. As noted, comparatively few authoritarian states completely abandon their (ostensible) commitment to some variant of the rule of law.[79] Indeed, in many instances law becomes the delivery mechanism for authoritarian impulses.[80] As discussed further below, the role of legality in enabling and legitimating repressive political projects can be seen in: giving prominence to constitutions; holding political trials; expanding emergency laws; and engaging in overtly racist social and political engineering through law (for example during apartheid in South Africa).[81] By definition, law requires lawyers to make it work and conventional lawyers will often represent clients in a legal setting regardless their inherent unfairness. For politically committed cause lawyers, the 'existential dilemma' (as Sfard has described it)[82] is whether *their* participation in a particular legal forum goes too far in 'involuntarily legitimating' what is a manifestly illegitimate legal process.[83]

The version of legitimacy work done by cause lawyers in such contexts is by definition dialogical in nature rather than judged solely by more abstract concepts such as fairness or adherence to the rule of law.[84] As one of the authors has argued elsewhere, many cause lawyers were involved in complex debates about what was or was not a legitimate course of action, up to and including engagement in illegal activity.[85] Such legitimacy work, what Barker has termed 'self-legitimation', is an ongoing process designed to 'to demonstrate, as much

77 See further N. Ziv, 'Navigating the Judicial Terrain Under Israeli Occupations: Palestinian and Israeli Lawyers in the Military Courts' (2018) 42 *Fordham International Law Journal* 729.

78 D. Peretz, 'Intifada: The Palestinian Uprising' (Boulder, CO, London: Westview Press, 1990).

79 D. Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* (Oxford: OUP, 2010). For a discussion on how authoritarian regimes develop bespoke localised understandings of the rule of law see S. Whiting, 'Authoritarian "Rule of Law" and Regime Legitimacy' (2017) 50 *Comparative Political Studies* 1907; W. Chen and H. Fu (eds), *Authoritarian Legality in Asia: Formation, Development and Transition* (Cambridge: CUP, 2020).

80 Ginsburg and Moustafa, n 3 above.

81 O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (Princeton NJ: Princeton University Press, 1961); A. Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (Pittsburgh PA: University of Pittsburgh Press, 2005); T. Ginsburg and A Simpser (eds), *Constitutions in Authoritarian Regimes* (Cambridge: CUP, 2014).

82 M. Sfard, 'The Human Rights Lawyer's Existential Dilemma' (2005) 38 *Israel Law Review* 154, 167.

83 S. Ellmann, 'Struggle and Legitimation' (1995) 20 *Law & Social Inquiry* 339.

84 A. Bottoms and J. Tankebe, 'Beyond Procedural Justice: A Dialogic Approach to Legitimacy in Criminal Justice' (2012) 102 *Journal of Criminal Law and Criminology* 119.

85 McEvoy, n 20 above.

to themselves as to others, that they are justified in the pattern of actions that they follow.[86] In this sense the dialogue is not just with the regime (will I participate or not in your 'rigged system') but also with other cause lawyers who are making similar choices and whose opinions matter. These 'prestigious others' as Barker terms them, were crucial for Tunisian, Palestinian and Israeli cause lawyers considering boycott since such decisions were typically taken collectively, in the wake of long and protracted debates.[87]

The final theme which emerged from our consideration of boycott was what one Israeli human rights activist termed the 'vision thing'.[88] If cause lawyers are going to rationalise to themselves, their clients or fellow lawyers a decision to boycott a particular court, it only makes sense if it is part of a broader strategy. As one Israeli cause lawyer told us, considering a boycott reminds us that 'litigation is only one leg in every struggle'.[89] Obviously for some – such as those involved in the boycott of courts in revolutionary Ireland, Pakistan, Tunisia or in contemporary Palestine – the 'vision' was an alternative political order. For others, the 'vision' associated with the decision to boycott was more obviously about legality – enhanced human rights protections, the independence of the judiciary or legal profession – a 'real' version of the rule of law. The importance of such longer-term vision is a theme to which we will return in the conclusion. In the next section we consider the more immediate resistant strategies and tactics of cause lawyers who engaged in unfair legal systems in full knowledge that the chances of success were slim.

CAUSE LAWYERS, ENGAGEMENT AND RESISTANCE

As noted above, the basic instinct of most lawyers is to engage in the legal process. However, within the cause lawyering literature, the effectiveness of law as a tool of resistance or social change has long been questioned. Early litigation successes in the US on due process, civil rights and reproductive rights gave way to a sustained critique on the efficacy of litigation as a driver for social change.[90] For example, Scheingold has argued persuasively that the cause lawyers active in the civil rights era on issues of race, native peoples' treaty rights, and labour reform effectively 'co-opted' these campaigns. He contends that the dominance of lawyers in these struggles dulled their political potential and 'reinforced support for the political system by legitimating the existing order', promoting a notion of these struggles as 'one on one conflicts within the framework of the adversary system'.[91]

86 R. Barker, *Legitimating Identities: The Self-Presentations of Rulers and Subjects* (Cambridge: CUP, 2009) 30.
87 Sfard, n 62 above.
88 Interview with Israeli legal academic and human rights activist, Jerusalem, 15 May 2014.
89 Interview with Israeli human rights lawyer, Tel Aviv, Israel, 14 May 2014.
90 C. Menkel-Meadow, 'The Causes of Cause Lawyering: Toward and Understanding of the Motivation and Commitment of Social Justice Lawyers' in Sarat and Scheingold (eds), (1998) n 12 above.
91 S.A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (Ann Arbor, MI: University of Michigan Press, 2nd ed, 2004). As discussed further below, Scheingold did offer

In addition to distracting social movements and diverting energy and resources, some critics have also argued that a fixation on litigation can provoke a 'back-lash', wherein a conservative judiciary may apply a narrow legal concept of rights to the extent that either future litigants are substantively worse off or that a hostile political counter-reaction is provoked.[92] Still others expressed concerns about the 'double agent' ethical challenge in cause lawyering litigation – questioning how one can effectively represent the interests of an individual client whilst at the same time seeking strategically to advance a political or social cause.[93] It is true that more recent scholarship on cause lawyering in settled democracies has unsettled some of these critiques – suggesting that cause lawyers are less blinkered about 'the myth of rights' than sometimes assumed, that they often collaborate with or indeed follow the lead of social movements rather than seek to dominate strategy, and that they can find mutually beneficial accommodations with clients and social movements.[94] Even in these more hopeful accounts, as one would expect, politicised cause lawyers tend to ask themselves hard questions about the efficacy of law as a tool of social change.

This was certainly the case with regard to the cause lawyers we interviewed in conflicted and authoritarian societies. Unsurprisingly, few of our interviewees appeared to have illusions about the 'myth of rights'. As detailed elsewhere, the cause lawyers we spoke to were very aware of the dangers of litigation diverting resources from broader social or political movement struggles. Many had worked closely with human rights NGOs, labour unions and other civil society groups. Indeed a number argued that strong social movements (for example the women's movement in South Africa) provided a buttress against 'trigger happy' litigating lawyers.[95] Others in Israel referred approvingly to the deliberate relegation of cause lawyers to ancillary positions in the Israeli housing protests of 2011.[96] Many also referred to the additional complexity of representing politically motivated violent clients who were sensitive to how legal strategies intersected with a broader struggle.[97] Cause lawyers were also well aware of the risks of 'litigation backlash' – discussing it frequently in the fieldwork.[98] As one Palestinian cause lawyer told us:

a more hopeful account of the political (if not legal) effects of litigation across a number of struggles. For a bleak classical account, see G. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago, IL: University of Chicago Press, 2nd ed, 1991).

92 For example M.J. Klarman, 'How Brown changed Race Relations: The Backlash Thesis' (1994) 81 *The Journal of American History* 81.

93 D. Luban, *Lawyers and Justice: An Ethical Study* (Princeton, NJ: Princeton University Press, 1988) 319.

94 See generally Sarat and Scheingold, (2006) n 12 above; S.L. Cummings, 'Rethinking the Foundational Critiques of Lawyers in Social Movements' (2017) 85 *Fordham Law Review* 1987.

95 Bryson and McEvoy, n 20 above, 69.

96 Interview with legal academic, Tel Aviv, 13 May 2014; Interview with cause lawyer, Tel Aviv, Israel, 13 May 2014. For an interesting discussion on these protests and the impact of the peripheral role of lawyers see S. Almog and G. Barzilai, 'Social Protest and the Absence of Legalistic Discourse: In the Quest for New Language of Dissent' (2014) 27 *International Journal for the Semiotics of Law* 735.

97 McEvoy, n 20 above.

98 Interview with Israeli cause lawyer, Tel Aviv, Israel, 13 May 2014.

> Backlash is an argument that is sometimes levelled against us – that some of the most racist Israeli laws are as a result of our successes in the court. The government lose, they go back to the Knesset and develop worse laws…but what else do you do? Do you say armed struggle is the only answer? I don't think so.[99]

In spite of low expectations of justice in general, there was widespread recognition that law had a role to play in such contexts. Having noted that he 'never' expected to get justice during apartheid, one South African cause lawyer added: '…. but the courts became a hell of a site of struggle.'[100] As with our analysis of lawyers' perspectives on boycott, we have carefully reviewed our interview data to identify overlapping themes that highlight the different ways in which cause lawyers turned courts into sites of struggle. We have grouped these under the following headings: courts as a site of instrumental resistance, courts as sites of political resistance and courts as sites of memory making.

Courts as sites of instrumental resistance: the 'sand in the cogs'

As noted above, law often plays a central role for authoritarian states both as a delivery mechanism for repressive practices and as a symbolic means of 'naturalising' and legitimating a particular political order.[101] Gramsci has argued that, in addition to its obvious repressive capacity, law is one element of the broader hegemonic process by which ruling elites weave 'institutions, discourses and technologies of rule into the fabric of the everyday life of subaltern groups'.[102] A key question for us was, as Merry has asked, whether law is 'too complicitous in relations of power to constitute a site of resistance?'[103] Even when at its most brutish as an instrument of state sponsored 'terror', across the six sites we noted instances where (as with E.P. Thompson's analysis of the infamous Black Act of 1723) the law was made to instrumentally 'matter' by imposing some limits in some circumstances on some aspects of state power.[104]

We asked interviewees to elaborate on the factors influencing legal outcomes in such contexts. Cause lawyers pointed to a range of variables including the type of case, different legal settings (for example military courts versus the Supreme Court), the political or historical context in which a case was heard

99 Interview with Arab cause lawyer, Haifa, Israel, 12 May 2014.
100 Interview with politician and former cause lawyer, Cape Town, South Africa, 10 August 2014.
101 Ginsburg and Moustafa, n 3 above.
102 A. Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci* (London: Lawrence and Wishart, 1998) 52.
103 S.E. Engle Merry, 'Resistance and the Cultural Power of Law' (1995) 29 *Law & Society Review* 11, 15. Gramsci also admitted the potential for subaltern resistance in 'sites of contention' such as the court room, although argued that such sites were designed to maintain 'unstable equilibria' of compromise in which the interests of the dominant ultimately prevail, Gramsci, *ibid*, 182.
104 Diverting somewhat from the prevailing Marxist orthodoxy, Thompson argues that, in addition to detailing the terror involved in the legal asserting of the property rights of the ruling class, law had to, however infrequently, thwart the powerful – 'to display an independence from gross manipulation … indeed on occasion, by actually being just – rendering rulers (unwittingly) prisoners of their own rhetoric'. E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Penguin, 1975) 238, 263. See also D.H. Cole, '"An Unqualified Good": E.P. Thompson and the Rule of Law' (2001) 28 *Journal of Law and Society* 177.

and the disposition of particular judges. Their experiences were consistent with the academic and policy literature across each of the sites. For example, a number of scholars have documented how lawyers in South Africa enjoyed limited success in exploiting loopholes in the pass-laws, exposing murder and torture by the security forces, challenging forced removals, labour rights and trade union recognition.[105] As Abel argues, while law resulted in very 'modest' gains, it occasionally could 'slow the project of grand apartheid until politics could reverse it.'[106] In Tunisia lawyers successfully litigated certain gender-related issues including divorce, inheritance law, and the custody of children – albeit in a context where the commitment to 'state feminism' was used internationally to mask abuses against those deemed a threat to Ben Ali[107] – including women affiliated to opposition movements.[108] In Chile, even during the worst periods of the Pinochet regime when over 3,000 people were murdered or disappeared and over 40,000 were tortured with little effective check by the legal system, lawyers still managed to have some death sentences commuted to exile before the military courts.[109] In Cambodia the authoritarian Hun Sen government is characterised by an appalling human rights record and endemic corruption and the law is used by elites to accumulate land and resources and by the state to crush political, legal and civil society opposition.[110] Again, however, discrete pockets for legal resistance have been identified, including in traditional village-led dispute resolution processes,[111] which some of our Cambodian lawyer interviewees encouraged their clients towards, in effect 'turning away business' because they too distrusted of the legal system.[112]

105 R. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (New York, NY: Routledge, 1995); S. Ellmann, *In a Time of Trouble: Law and Liberty in South Africa's State of Emergency* (Oxford: OUP, 1992); J. Meierhenrich, *The Legacies of Law: Long-Run Consequences of Legal Development in South Africa, 1652-2000* (Cambridge: CUP, 2008).

106 Abel, *ibid*, 522.

107 In 2006, at a conference in Washington DC to commemorate the 50th anniversary of Tunisia's Code of Personal Status (the legal basis of much gender-based protections under Tunisian law), US Supreme Court Justice Sandra Day O'Connor described Tunisia as 'a model for other countries in the Islamic World regarding gender legislation.' See M.M. Charrad, 'Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation' (2007) 64 *Washington and Lee Law Rev*iew 1513, 1516.

108 In a context where 1200 cases of torture were documented by local and international human rights groups between 1999-2009, it was reported that only seven criminal convictions for acts of torture and ill-treatment were handed down to law-enforcement and prison officials. UN Human Rights Council, 'Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, J.E. Méndez' 2012, 8 at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G12/103/22/PDF/G1210322.pdf?OpenElement (last accessed 31 May 2021); D. Lutterbeck, 'Tool of Rule: The Tunisian Police under Ben Ali' (2015) 20 *The Journal of North African Studies* 813.

109 C. Collins, 'Human Rights Trials in Chile During and After the "Pinochet Years"' (2010) 4 *International Journal of Transitional Justice* 67.

110 S. McCarthy and K. Un, 'The Evolution of Rule of Law in Cambodia' (2017) 24 *Democratization* 100; K. Un, *Cambodia: Return to Authoritarianism* (Cambridge: CUP, 2019).

111 S. Springer, 'Illegal Evictions? Overwriting Possession and Orality with Law's Violence in Cambodia' (2013) 13 *Journal of Agrarian Change* 520; C. Morris, *Justice Inverted: Law and Human Rights in Cambodia* in K. Brickell and S. Springer (eds), *The Handbook of Contemporary Cambodia* (New York, NY: Routledge, 2017).

112 Interview with a group of public interest lawyers, Phnom Penh, Cambodia, 10 March 2014.

In the case of the Israeli military court system, with its 99 per cent plus conviction rate, the space for instrumental resistance would appear limited. Almost all military court cases are resolved through plea-bargaining, a process rationalised by the lawyers we interviewed as doing the best possible for their clients. The litigation strategy before the Israeli High (Supreme) Court on key occupation-related issues such as challenging illegal settlements on Palestinian land has been described by prominent cause lawyer Michael Sfard as a 'colossal failure'.[113] Nonetheless, the Israeli High Court has in previous decades interfered with the policy of 'deporting' Palestinian activists, rebuked the Israeli security forces for their use of torture, improved prison conditions, and granted thousands of Palestinians relief on issues such as land rights, travel permits and other issues in non-binding out of court settlements – what Kretzmer terms 'the shadow of the court.'[114] Again these 'small victories' have come in the context of a 'broader defeat' (to borrow Dudai's terms) wherein the court has overseen the institutionalisation of the occupation, developed 'oppression-blind jurisprudence' and rarely questioned the 'security needs' of the state.[115] As one Israeli human rights activist told us:

> In the context of the Occupation, we're fighting a losing battle. At best, and quite infrequently really, litigation is an annoyance, it's the sand in the cogs of the machine, slowing things down, making the state work harder, having to justify or rationalise what they are doing, delaying a policy for a year or two or having to tweak it, hoping something will come out of nowhere.[116]

The importance of these legal versions of resistant 'foot-dragging' should not be underestimated.[117] As discussed further below, legal challenges to state power in conflicted or authoritarian contexts occasionally manifest as what Scott refers to as the 'public refusal' to acquiesce with existing power-relations.[118] In other instances, they are what he refers to as 'everyday' or 'hidden' resistance, the mundane and grinding work of hopeless appeals, procedural challenges, attritional blocking tactics – what the Israeli interviewee above referred to as 'lawyers fucking up the system with a straight face.'[119] Often in such contexts these instrumental forms of resistance are a form of 'divide and rule from below',

113 Sfard, n 62 above, 195.

114 Kretzmer, n 61 above, 89. In her review of Occupation-related litigation before the Israeli courts, Montell notes that in reviewing 1100 petitions to the High Court challenging refusals to allow a Palestinian to travel abroad, 96 per cent were resolved in out of court settlements after the petition was lodged. J. Montell, *Learning from What Works: Strategic Analysis of the Achievements of the Israel-Palestine Human Rights Community* (Swedish International Development Cooperation Agency, SIDA, 2020) 20. See also Mautner, n 61 above for a discussion on the more interventionist period of the Israeli High Court's history.

115 R. Dudai, 'Israel: Litigation, Human Rights and the Occupation' (Belfast: QUB Law School, 2015). See also N. Sultany, 'Activism and Legitimation in Israel's Jurisprudence of Occupation' (2014) 23 *Social and Legal Studies* 315.

116 Interview with legal academic and human rights activist, Jerusalem, 15 May 2014.

117 J.C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (New Haven, CT: Yale University Press, 1998) 217.

118 *ibid*, 202-203.

119 See further J.C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* (New Haven, CT: Yale University Press, 1985) and J.C Scott, *Domination and the Arts of Resistance: Hidden Transcripts*

appealing to the professional integrity of judges that they are being played or disrespected by the system or to prosecutors or state lawyers that they are being embarrassed by poor police or military work – micro-resistance with few illusions as to the 'big picture' rule of law.

To paraphrase Foucault in his analysis of the micro-techniques of power, the more all-pervasive the exercise of that power, the more important 'small' acts of resistance can be in exposing its limitations.[120] Moreover, using law in this way gives resistance a 'face' – it individualises and humanises those on the receiving end of state power as well as offering some (however fleeting) dignity and self-respect to those who are willing to challenge that power. Across all of the sites we studied cause lawyers repeatedly told us of their sense of moral responsibility to provide precisely that for their clients – what one South African cause lawyer described as 'giving a person dignity … speaking to the accused person as a human being.'[121] Waldron has described dignity in legal processes in terms of 'standing' – 'the formal legal standing or perhaps, more informally the moral presence', reassuring an individual of their value and that they have a story to be heard.[122] Affording dignity is itself an act of resistance. Courts in such contexts are more than places of instrumental resistance against repression and support for clients. They are also sites of political and symbolic resistance wherein both the power of the state can be subverted and the resistant capacity of those opposed to a regime can be demonstrated to audiences beyond the client and the court.

Courts as sites of political resistance

The notion of the court as a site of resistance is long-established in socio-legal studies. As Kirchheimer argued in his classic account of political trials, they can embody the fight for domination and offer resistors an opportunity to 'upset, fray, undermine or destroy' existing power relations.[123] As noted above, in politically fraught contexts where the chances of material success are slim, the symbolic importance of the court as a site of defiance, rupture or subversion is all the more important. Law can provide both a 'locale' for resistance and a

(New Haven, CT: Yale University Press, 1990). Interview with legal academic and human rights activist, Jerusalem, 15 May 2014.

120 Discussing prison resistance in sites where the power of the state often appears unchecked, Foucault notes 'what has sustained these [resistant] discourses, these memories and invectives are indeed minute material details', M. Foucault, *Discipline and Punish* (London: Penguin, 1979) 30.

121 Interview with former cause lawyer and political prisoner, Cape Town, South Africa, 12 August 2014.

122 J. Waldron, 'How Law Protects Dignity' (2012) 71 *Cambridge Law Journal* 200, 201. See also Luban, n 93 above.

123 Kirchheimer, n 81 above, 49. Kirchheimer suggests that there are three types of political trial: (a) The trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from its successful prosecution; (b) the 'classic' political trial where a regime attempts to incriminate its foe's public behaviour with a view to evicting him from the political scene and (c) the 'derivative' political trial where the weapons of defamation, perjury or contempt are manipulated in an effort to bring disrepute on a political foe.

language in which issues are framed and wherein the legitimacy of domination can be symbolically challenged – 'named' for what it is.[124] As detailed below, such resistance is often designed to reach a diverse range of audiences including supporters of the opposition movement, the 'public' within a particular country, and international stakeholders. Central to the objective of reaching audiences is the way that resistance is 'performed'.

There is a rich literature on the relationship between law and performance. One strain associates performance with artificiality or 'showiness', warning of the dangers of law degenerating into 'mere theatre'.[125] For example, Arendt was famously critical of precisely this trait in the rhetorical flourishes of the Israeli prosecutor who linked the case of Adolf Eichmann to a grander meta-narrative of anti-Semitism rather than the sombre task of holding him responsible for individual acts of wickedness.[126] Minnow and Osiel have levelled similar criticisms at efforts to use the theatrical elements of major trials in post-authoritarian or post-conflict contexts as pedagogical tools of collective memory.[127] As Osiel argues, 'what makes for a good morality play tends not to make for a fair trial.'[128] For others (and in fairness Arendt acknowledges this point), legal hearings involve professional 'actors' who are working to a script and often with an audience and therefore such processes are 'essentially theatre'.[129] From this perspective, as one interviewee concluded, court work inevitably has a 'theatrical component' and lawyers are well aware of this as they do their technical work.[130] In the common law tradition in particular, the rules of the legal hearings including the adversarial format, the 'narrativity and theatricality of advocacy' and the public nature of most legal hearings all frame the ways in which law and indeed power is performed.[131] In such contexts, a trial may become 'the stage where the different actors adopt and act out strategies with the aim of convincing their target audiences in and outside the courtroom of their narrative of injustice.'[132] The performative dimensions of resistance in such contexts are geared to subvert, rupture or otherwise transform the legal setting.

As we and others have argued elsewhere, lawyers sometimes work closely with politically motivated clients to enable them to use their trial as a

124 Merry, n 103 above.

125 P.W. Murphy, 'There's No Business Like …? Some Thoughts on the Ethics of Acting in the Courtroom' (2002) 44 *South Texas Law Review* 111; K. Leader, 'Bound and Gagged: The Performance of Tradition in the Adversarial Criminal Jury Trial' (2007) 11 *Philament* 1.

126 H. Arendt, 'Eichmann in Jerusalem: A Report on the Banality of Evil' (New York, NY: Penguin, 1994). See also L. Maxwell, *Public Trials: Burke, Zola, Arendt, and the Politics of Lost Causes* (Oxford: OUP, 2015) ch 4.

127 M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (Boston, MA: Beacon Press, 2000); M. Osiel, *Mass Atrocity, Collective Memory and the Law* (New Brunswick, NJ: Transaction Publishers, 1997).

128 *ibid*, 59.

129 M.S. Ball, 'All the Law's a Stage' (1999) 11 *Cardozo Studies in Law and Literature* 215.

130 Interview with international prosecutor at the ECCC, Phnom Penh, Cambodia, 14 March 2014.

131 M.M. Umphrey, 'Law in Drag: Trials and Legal Performativity' (2011) 21 *Columbia Journal of Gender and the Law* 114, 122.

132 B. de Graaf and A.P. Schmid (eds), *Terrorists on Trial: A Performative Perspective* (Leiden: Leiden University Press) 2.

platform to advance their political cause and to critique the prevailing regime.[133] This is precisely what happened in iconic cases such as the Rivonia trial of Nelson Mandela and his co-defendants.[134] The defence strategy was specifically designed to allow Mandela in particular to 'enhance the symbolism of his role' and to 'showcase the ANC's moral opposition to racism'.[135] While such political resistance in the courts of South African is well known, we found evidence across all six of our sites of, not only defendants but also cause lawyers themselves, turning legal settings into sites of 'contentious performance'.[136]

In Tunisia a number of cause lawyers referred to what they termed efforts to 'rupture' the façade of legality during the Ben Ali regime. One cause lawyer referred to this process as trying to 'denounce the regime, to put the regime itself on trial using its own system.'[137] Another Tunisian interviewee told us:

> In political cases, we engaged in a strategy of 'rupture'. In front of the judge, we would say: 'we know we have instructions, we are here to represent our clients but we are also here to denounce the regime'.[138]

Defence lawyers working in the Extraordinary Chambers in the Courts of Cambodia (ECCC) found similar ways to make the authoritarian context of the trial play to the advantage of their former-Khmer Rouge clients.[139] ECCC defence lawyers repeatedly told us that it was nearly impossible for their clients to have a fair trial given their previous Khmer Rouge-profile and the horror of the crimes being tried. Nonetheless, as one prosecutor noted with grudging admiration:

133 See for example I.D. Balbus, *The Dialectics of Legal Repression: Black Rebels Before the American Criminal Courts* (New York, NY: Russell Sage Foundation, 1977); J.N. Shklar, *Legalism: Law Morals and Political Trials* (Cambridge, MA: Harvard University Press,1986); McEvoy, n 6 above.; A. Allo (ed), *The Courtroom as a Space of Resistance: Reflections on the Legacy of the Rivonia Trial* (London: Routledge, 2015); McEvoy, n 20 above.

134 See Allo, *ibid*.

135 N. Mandela, *The Long Walk to Freedom* (London: Little Brown, 2013) 201.

136 C. Tilly, *Contentious Performances* (Cambridge: CUP, 2008). Tilly analyses the ways in which those involved in collective efforts at contentious political claims-making draw upon certain 'performances' drawn from repertoires of tactics and strategies designed to further their cause. The performances of contention he analyses ranged from armed actions, riots, creating political parties to defacing, cheering, throwing flowers, singing songs and carrying heroes on shoulders (*ibid*, 5, 44).

137 Interview with former cause lawyer and politician, Tunis, Tunisia, 16 June 2014.

138 Interview with former cause lawyer, Tunis, Tunisia, 17 June 2014.

139 The ECCC is a hybrid court involving international and local Cambodian judges and lawyers. It was established following negotiations between the United Nations and the Cambodian government to try a small number of Khmer Rouge Leaders for genocide and other crimes committed between 1975 and 1979 when at least two million people were murdered. The Cambodian Prime Minister is himself a former Khmer Rouge battalion commander who split from the Khmer Rouge and allied himself with the invading Vietnamese army. He was appointed by the Vietnamese as Deputy Prime Minister after they overthrew the Pol Pot regime in 1979. He became Prime Minister in 1985 and has held that position since. As noted, Cambodia is widely regarded as an authoritarian and corrupt regime. Cambodian judges in particular are very sensitive to the views of the Hun Sen government. See D. McCargo, 'Cambodia: Getting Away with Authoritarianism?' (2005) 16 *Journal of Democracy* 98; L. West, 'The Limits to Judicial Independence: Cambodia's Political Culture and the Civil Law' (2018) 26 *Democratization* 537.

> Some defence counsel were quite clever at playing to the press. We were talking about the use of joint criminal enterprise in these cases and this one defence lawyer was saying, 'Look, you can't use joint criminal enterprise here because it didn't really exist as a concept back in 1975. Also, then he started to name the Prime Minister and ministers and said they were all in the Khmer Rouge, and to say they were all part of that enterprise. So it was a tactic to make the judges fearful and it worked, it got the attention of the media, the politicians etc.[140]

Central of course to the analysis of courts as sites of drama and performance is the notion of audience. Much of the literature on law and audience focuses on judges – in particular the extent to which the notion of judicial audiences (for example the media, politicians, lawyers, the public or other judges) may help us better understand judicial behaviour.[141] The various audiences judges perform *to* or *for* is thus examined as a way of providing insights into judicial behaviour – what they do, say, write and decide.[142] While the analogous literature on lawyers and audiences is less well developed, the audiences which are discussed in the cause lawyering literature (in addition of course to judges – and juries in common law systems) include clients, social and political movements, other cause lawyers and different 'publics'.[143] For lawyers in general, there is an extensive literature in the US in particular on what is called 'litigation public relations' – the ways in which lawyers deliberately use print media, television news, chat-shows and more recently social media to enlist support for their clients.[144] Some the themes discussed in that literature resonated for the cause-lawyers we interviewed. For example, Israeli and Palestinian cause lawyers were clearly aware of the influence of the media on different audiences in the context of the legal setting, politics outside the court, and the intersection between the two. One prominent right-leaning cause lawyer bemoaned the relatively narrow audience for his clients in their settler-facing litigation:

> Some of them, the more radical settler activists, they don't care how they look, they do what is right. Their view is, 'if you don't like how it looks then don't look at us'. For example, I represented a client against the Ministry of Education. My client had had their school license removed because rabbis were accused of publishing a racist book and for encouraging violence and violent activities of students. They wouldn't speak to the media, no journalists. They have their own news site and

140 Interview with ECCC prosecutor, Phnom Penh, Cambodia, 12 March 2014.

141 See L. Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton, NJ: Princeton University Press, 2006) for an overview.

142 See T.J. Miceli and M.M. Cosgel, 'Reputation and Judicial Decision-Making' (1994) 23 *Journal of Economic Behavior and Organization* 31; F. Schauer 'Incentives, Reputation and the Inglorious Determinants of Judicial Behavior' (2000) 68 *University of Cincinnati Law Review* 615; Baum, *ibid*; T. Ginsburg and N. Garoupa, 'Judicial Audiences and Reputation: Perspectives from Comparative Law' (2008) 47 *Columbia Journal of Transnational Law* 451.

143 See for example R.G. Pearce, 'The Lawyer and Public Service' (2001) 9 *American University Journal of Gender Social Policy and Law* 171.

144 See for example J.C. Watson, 'Litigation Public Relations: The Lawyers' Duty to Balance News Coverage of Their Clients' (2002) 7 *Communication Law and Policy* 77; S. Seidenberg, 'Seduced: For Lawyers, the Appeal of Social Media is Obvious. It's Also Dangerous' (2011) 97 *American Bar Association Journal* 49.

> that's all they speak to … my clients didn't care. It was very frustrating and we lost, of course.[145]

In contrast, a Palestinian NGO director and cause lawyer told us how he used court proceedings to reach a broader international audience in a context where the international media were not present on the ground:

> We took four or five cases on Israeli house demolitions. The army were enforcing a siege throughout the West Bank, the media could not enter so we started to document it. We wrote it up in English – sent it to CNN, Al Jazeera, the BBC, the New York Times, the Guardian etc. Then we go to court – the state must respond, so you have a drama around the court, the media are there and then the Israeli media also get interested because of the international noise …[146]

In a similar vein, another high-profile anti-occupation Israeli cause lawyer was explicit about the relationship between his framing of particular cases and engagement with different audiences beyond the court:

> One of the major battles that the cause lawyer is involved in is the battle over narrative, narrative and branding as well as audience … In settlement cases – outpost cases - the diplomatic core is very important and I try to convince them to come to all of the cases. And, if they come, to announce that they're there because the fact that there is someone that looks European is not enough. We want the court to know that a delegation from the Swiss or Belgium or Irish Embassy is here … In the past I would tell them that the way to do it is by handing a note to the clerk and then the clerk notifies the judges. Today they are less willing to do so – so then I do something else. I ask the court for permission to have an interpreter – our own private interpreter in the courtroom (local consultant interjects: 'to translate from Hebrew to Swedish'; [all laugh]) … yes, and then they understand.[147]

In Chile, the first actions of the Pinochet regime included strict censorship of the print media, closing down radical outlets, detaining critical journalists, and imposing direct military control over television and radio broadcasting.[148] Access to the courts by what was described as the 'anti-Chile' international media was also strictly controlled.[149] Even in such a context where reaching an outside audience was extremely difficult and where the chances of 'getting justice' appeared quite hopeless, lawyers still sought to resist. One Chilean lawyer became quite emotional as he told us of his forlorn efforts during the early years of the coup to harness the emotional power of relatives of the disappeared to awaken the moral conscience of a complicit judiciary:

145 Interview with right-wing cause lawyer, Jerusalem, 13 May 2014.
146 Interview with Arab cause lawyer, Haifa, Israel, 12 May 2014.
147 Interview with Israeli human rights lawyer, Tel Aviv, Israel, 14 May 2014.
148 E Tironie, G. Sunkel and R. Gunther, 'The Modernisation of Communications: The Media in the Transition to Democracy in Chile' in R. Gunther and A. Mughan (eds), *Democracy and the Media: A Comparative Perspective* (Cambridge: CUP, 2000).
149 S.J. Stern, *Battling for Hearts and Minds: Memory Struggles in Pinochet's Chile 1973-1988* (Durham, NC: Duke University Press, 2006).

> I was before the Supreme Court and I asked if some relatives could come along so the judges could see for themselves that something was going on which was very unusual in our system. In the end it was 35 people came to the court, elderly people, some young people came, little children, poor people, peasants, people who you would never even see in the city centre in those days – all seeking their relatives. It made my arguments more emotional. It was clear what I was saying about these disappearances was true. They waited around for hours. Finally, the President of the bench called me aside, greeted me affectionately as always, and he said 'why are you doing all this, all of these people they may all be dead. And I said to him President then you should open a criminal process and investigate what's going on. And from that day on, as far as that judge was concerned, I was dead to him. They [the judiciary] were moved by what they saw and heard but they had this blindness, this clear commitment to the dictatorship regardless the evidence before them.[150]

To recapitulate, cause lawyers across the sites in which we conducted our research found ways to rupture, subvert and otherwise resist through different performative strategies in or around court proceedings. Even in the civil law systems which tend to have less of a public-facing tradition, cause lawyers found ways of working within the rules to reach diverse audiences and transform such settings into sites of political resistance. For some lawyers, such activities are designed to address both the immediate and the longer term. This view to posterity is the focus of our third style of resistance.

Courts as sites of memory work

In this final section we wish to explore the ways in which courts and law more generally were used by cause lawyers as sites of 'memory work'.[151] Originally associated with the holocaust historian, James Young, 'memory work' emphasises memory making as a process rather than a static result, something that is negotiated in an 'animated dialogue' between ourselves and the past.'[152] For Young, the ways in which museums organise and visitors engage with holocaust artefacts such as a rusty spoon, a political pamphlet or a yellow star are part of the work around which memory is constructed.[153] The term has also been used by feminist scholars and activists in analysing the memories and experiences of women in light of patriarchal power relations.[154] Memory work therefore connotes an engagement between actors and audience, as well as a way of situating particular experiences within their broader political and sociological context.

Our analysis leans heavily on the notion of 'collective memory' initially developed by the Durkheimian scholar, Maurice Halbwachs, to inform the process by which recollection is shaped by the 'thoughts that come to us from

150 Interview with retired lawyer and politician, Santiago, Chile, 1 May 2014.
151 N. Fischer, *Memory Work: The Second Generation* (London: Palgrave Macmillan, 2015).
152 J.L. Geddes, 'An Interview with James E. Young' (2007) 9 *The Hedgehog Review* 68.
153 J.E. Young, *The Texture of Memory: Holocaust Memorials and Meaning* (New Haven, CT: Yale University Press, 1994).
154 V. Haug et al, *Female Sexualization* (London: Verson, 1987).

the social milieu'.[155] He argues that collective memory comes into existence at a particular time and place through different forms of 'memory activity'.[156] Given that collective memories are inevitably contested, law and legal settings have a particularly important role to play in determining who and what gets remembered.[157] Law involves high prestige rituals, it is enforced by the coercive apparatus of the state, and the process by which evidence is admitted (or not) directly affects the version of collective memory that is 'publicly authorised'.[158] Law can be both the tool by which memory is compelled (for example in the case of criminalising holocaust denial) or indeed a means to effectively 'command forgetting' where discussion on past abuses is either legally silenced or drowned out by the 'over-remembering' of other more palatable historical events.[159] Given its centrality in defining relationships of domination and subordination, for the powerless in particular, the fact that law confines them to their position 'is imprinted in the social space of their lives and thus produces deep and rich layers of collective memories.'[160] At the same time, law can provide a space for resistance, either at the time (if there is a 'real rule of law') or at some future date wherein it might deliver on its promise.[161] In times of conflict or authoritarianism, lawyers can become what Todorov described as 'activists of memory',[162] nudging the collective memory of particular events 'towards the future' and 'towards justice'.[163]

There is a well-established literature on the relationship between law and memory making *after* a period of conflict or authoritarianism. Much of this scholarship focuses on the pedagogical power of law and legal settings to 'make public memory, publicly.'[164] Such discussions remain highly relevant in contemporary Chile, South Africa, Tunisia and Cambodia regarding the role that law has played in helping these countries come to terms with their respective past.[165] However, our focus here is on the memory work of cause lawyers *during*

155 M. Halbwachs, *On Collective Memory* (Chicago, IL: University of Chicago Press, L.A. Coser, trans, 1992) 53.

156 *ibid*, 172. See also N. Wood, *Vectors of Memory: Legacies of Trauma in Postwar Europe* (New York, NY: Berg, 1999). For analysis of the dangers of collective memory studies neglecting the contradictions and complexities of an individual's life – the 'spaces within or between dominant discourses', see A. Green, 'Individual Remembering and "Collective Memory": Theoretical Presuppositions and Contemporary Debates' (2004) 32 *Oral History* 35.

157 L. Douglas, *The Memory of Judgement: Making Law and History in the Trials of the Holocaust* (New Haven, CT: Yale University Press, 2005).

158 Osiel, n 127 above, 262.

159 P. Ricoeur, *Memory, History, Forgetting* (Chicago, IL: University of Chicago Press, 2004); G. Beiner, *Forgetful Remembrance: Social Forgetting and Vernacular Historiography of a Rebellion in Ulster* (Oxford: OUP, 2018); H. Rousso, *The Vichy Syndrome: History and Memory in France Since 1944* (Cambridge, MA: Harvard University Press, 1994).

160 S. Karstedt, 'Introduction; The Legacy of Maurice Halbwachs' in S. Karstedt (ed), *Legal Institutions and Collective Memories* (London: Hart, 2009) 3.

161 See G. Palombella, 'The Rule of Law as an Institutional Ideal' in L. Morlino and G. Palombella (eds), *Rule of Law and Democracy* (Leiden: Brill, 2010).

162 T. Todorov, 'The Abuses of Memory' (1996) 5 *Common Knowledge* 6, 22.

163 P. Ricouer, 'Memory and Forgetting' in R. Kearney and M. Dooley (eds), *Questioning Ethics: Contemporary Debates in Philosophy* (London: Routledge, 1999).

164 Osiel, n 127 above, 240; See also R. Wilson, *Writing History in International Criminal Trials* (Cambridge: CUP, 2011).

165 C. Collins, *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (University Park, PA: Penn State University Press, 2010); R. Killean, *Victims, Atrocity and International Criminal*

periods of conflict or authoritarianism. Certainly, one could interpret some of the actions of cause lawyers or their clients in high profile political trials (discussed as 'symbolic resistance' above) as forms of memory work. For example, Mandela and his co-defendants at the Rivonia trial were self-consciously 'transforming themselves into the subjects of history rather than impersonal objects of official historical records.'[166] In a similar vein, another veteran ANC activist we interviewed told us that he and his colleagues engaged in both backward-looking and forward-looking memory work while also appealing to a range of audiences. This memory work took place in response to an apartheid-era parliamentary commission established to prevent international funding going to anti-apartheid civil society organisations (the Schlebusch Commission):

> It was supposed to be a parliamentary commission but it was more like an inquisition or a trial. We decided that we wouldn't testify and we would make political statements – this is anti-democratic, political persecution and so on. Beyers Naudé was the most prominent of us, an anti-apartheid activist from impeccable Broederbond stock, and the equivalent of a Bishop in the Dutch Reformed Church. We spent ages working on his statement. We worked in how Afrikaners had been an oppressed people and how they had now become the oppressors. His lawyers were all Afrikaners, he spoke in Afrikaans and he said, 'my people we are on the wrong path'. It was a trial where we knew from the start that history books would be written about it.[167]

As illustrated by our fieldwork in Chile, resistant memory work can also be much less obviously performative.[168] 'Memory work' associated with the Pinochet era was common parlance in Chile but interviewees told us of particularly interesting ways in which lawyers engaged in such activities during the dictatorship. For example, one interviewee explained how she and her colleagues deliberately took advantage of the 'paper heavy' nature of Chilean legal culture – both to highlight the realities of the state's disappearance strategy but also with an eye to some future accountability:

Justice: Lessons from Cambodia (London: Routledge, 2018); D. Preysing, *Transitional Justice in Post-Revolutionary Tunisia (2011-2013): How the Past Shapes the Future* (Berlin: Springer, 2015); M. le Roux and D. Davis, *Lawfare: Judging Politics in South Africa* (Johannesburg: Jonathan Ball Publishers, 2019).

166 See D. Nikulin, 'The Names in History: Rancière's New Historical Poetics' in J.P. Deranty and A. Ross (eds), *Jacques Rancière and the Contemporary Scene: The Philosophy of Radical Equality* (London and New York, NY: Continuum, 2012) 67. See also A. Allo, 'Black Man in the White Man's Court: Performative Genealogies in the Courtroom' in Allo, n 133 above, 190.

167 Interview with former ANC activist, Cape Town, South Africa, 12 August 2014. The Schlebusch Commission was established in 1972 to investigate anti-apartheid civil society organisations. A number of staff who refused to give evidence to it were charged with obstruction of justice including Bayers Naudé. The Broederbond was a secret Afrikaner men's society which became synonymous with the Afrikaner dominated National Party and Naudé's father was involved in setting it up. See further C. Merrett, *A Culture of Censorship: Secrecy and Intellectual Repression in South Africa* (Macon, GA: Mercier University Press, 1995); International Commission of Jurists, *The Trial of Beyers Naudé: Christian Witness and the Rule of Law* (London: Search Press, 1975).

168 We will discuss a broader range of memory work and the role of cause lawyers in dealing with the past across the sites in a forthcoming book – K. McEvoy, L. Mallinder and A. Bryson, *Lawyers in Conflict and Transition* (Cambridge, CUP, 2022).

> Once the mass arrests and disappearances started, we started to generate lists of the missing. We then started to lodge habeus corpus writs and of course these were rejected out of hand by the court. We didn't expect them to be accepted the courts were very obedient to the regime. However, we knew that even though the writs weren't accepted, they generated paper. Chile is a very legalistic, very bureaucratic country so our cases were generating paper just like the Nazis … We also knew it would be important if these people were ever to be held accountable in the future.[169]

Another Chilean cause lawyer told us:

> Why did we insist on these hopeless legal battles you ask? To document, document, document these violations of human rights, to keep a very professional record of it all. We gathered the writs, the responses of the military courts, the appellate courts, all the legal proceedings, the statements of the victims the witnesses of the family members. It was all we could do, that's basically what we had. But we thought this dictatorship cannot last forever.

Another lawyer and former Chilean truth commissioner told us that this approach was 'part of the legal culture' in Chile and that it not only made the subsequent investigative work of the commission much easier; it also made it more difficult for apologists for the regime to challenge their findings.[170] Documentation of human rights abuses – what Dudai has termed 'advocacy with footnotes' – was a common feature of the work of cause lawyers and civil society organisations across all of the jurisdictions we studied.[171] As discussed above, it was usually framed as a means of bringing such abuses to the attention of diverse local or international audiences who could bring pressure to bear on the respective governments.[172] While of course Chilean human rights organisations did exactly the same thing during the Pinochet era, memory work was explicitly framed as an additional value-added to such traditional human rights advocacy. As another interviewee, who now works in the torture museum Londres 38 told us:

> I consider myself to be a militant for both human rights and for memory … I think there is a very close tie between justice and the memory work that we do here … When one individual is held accountable, that is an act of memory. What we do here is also an act of memory, using this very same space where these things occurred, collecting the testimonies of people who experiences the repression,

169 Interview with communist politician and cause lawyer, Santiago, Chile, 28 April 2014.

170 Interview with cause lawyer in private practice, Santiago, Chile, 29 April 2014. See further A. Ferrara, *Assessing the Long-Term Impact of Truth Commissions: The Chilean Truth and Reconciliation Commission in Historical Perspective* (Abingdon: Routledge, 2015).

171 R. Dudai, 'Advocacy with Footnotes: The Human Rights Report as a Literary Genre' (2006) 28 *Human Rights Quarterly* 783.

172 For example, interview with Chilean international human rights lawyer, Santiago, 2 May 2014; interview with former ANC activist, Cape Town, South Africa, 12 August 2014; interview with Israeli legal academic, Tel Aviv, Israel, 20 May 2014.

> witnesses, people who were held here …The two things go hand in hand, they are interlocked.[173]

The Vicaría de la Solidaridad is probably the best-known civil society group that emerged to offer support to victims of the dictatorship. Working under the auspices of the Catholic Church, its membership included rightist lawyers from Christian Democrat backgrounds, communists, socialists as well as 'non-aligned' legal advocates, priests, researchers, psychologists, social workers, students and others. Originally focused on filing habeus corpus writs, its remit expanded to providing medical, social and economic support as well as meticulously documented details on arrests, detentions, disappearances and the locations of clandestine torture centres. In addition to producing reports aimed at local and international media, the organisation made microfiche copies of their data and hid the most sensitive information in the vaults of the Archbishop's Palace.[174] When the Vicaría closed in December 1992, its archives held some 47,000 individual case files and more than 80,000 legal documents, becoming the main archive for human rights abuses of the period and a crucial source for dictatorship-related prosecution cases.[175] A number of interviewees suggested that it was precisely because the organisation's approach entailed legal human rights advocacy, practical support *and* memory work that such a broad political cross-section of people were able to work together over such a long period. A former communist cause lawyer affiliated to the Vicaría stated: 'We were also very politically diverse, with lots of disagreements on politics and strategies … We could all agree however that we needed to work together on documenting the abuses for future generations.'[176]

In sum, in contexts where few had illusions about the capacity of law to deliver justice, cause lawyers and their civil society colleagues nonetheless engaged in different forms of memory work linked to the legal system. This involved not only the backward-facing use of law as a pedagogical tool to explore past human rights abuses but also future-facing strategies and tactics *during* the period of violence. Such memory work was designed to leave 'traces' which either directly or indirectly challenged the apparent omnipotence of the authoritarian state (for example through performative resistance at political trials). It also involved gathering and securing evidence which could be used at some unspecified date in the future for justice, truth recovery, reparations and other forms of

173 Interview with human rights activist and museum curator Santiago, Chile, 2 May 2014. This interviewee had herself been detained and her husband was disappeared and murdered by the Pinochet regime. Number 38 Londres Street originally housed an office of the Socialist Party but it was seized by Pinochet regime and used in 1973-74 as a site of clandestine detention and torture by the infamous Chilean DINA (Dirección de Inteligencia Nacional), the Secret Police.

174 Interview with left-wing politician and cause lawyer, Santiago, Chile, 28 April 2014. See also V. Bell, 'Documenting Dictatorship: Writing and Resistance in Chile's Vicaría de la Solidaridad' (2020) *Theory, Culture and Society* 1, 7.

175 See also D. Accatino and C. Collins, 'Truth, Evidence, Truth: The Deployment of Testimony, Archives and Technical Data in Domestic Human Rights Trials (2016) 8 *Journal of Human Rights Practice* 81; B. Hau, F. Lessa and H. Rojas, 'Registration and Documentation of State Violence as Judicial Evidence in Human Rights Trials' in O. Bernasconi (ed), *Resistance to Political Violence in Latin America: Documenting Atrocity* (London: Palgrave Macmillan, 2019).

176 Interview with communist cause lawyer, Santiago, Chile, 28 April 2014.

transitional justice.[177] Such memory work constituted a form of 'moral resistance'.[178] It also speaks to what Derrida and Ferraris refer to as 'justice as it promises to be, beyond what it actually is.'[179] It is to this idea – the vision of an imagined rule of law in such contexts – that we now return.

CONCLUSION

In his critique of the limitations of law as a tool of social and political struggle discussed above, Scheingold also talked of 'the myth of rights' being available as 'a kind of resource'.[180] Shifting the gaze of socio-legal analysis away from an exclusive focus on what law delivers towards its 'mythic and ideological properties',[181] Scheingold, together with Bringham, Hunt and others have advocated seeing law as constitutive of the political landscape rather than simply a reflection of what happens therein.[182] Bringham, for example, has analysed the ways in which different social movements engage with law not simply as rules from above or a series of instrumental or strategic choices to litigate from below, but rather as shaping how people 'think and act.'[183] Although, as Butler has argued, law inevitably 'posits an ideality that it can never realise …'[184] – and this was certainly the case for the cause lawyers we interviewed – the 'vision thing' discussed above is crucial to understanding how lawyers thought and acted in these very diverse legal contexts.

In analysing the arguments cause lawyers presented to explain what they decided to do regarding the boycott/engagement dilemma, we became increasingly aware of the importance of the ways in which law was *imagined* in such contexts. The ways in which law is envisioned is often referred to as 'legal consciousness.'[185] Although subject to significant definitional wrangles, legal consciousness is perhaps best understood as 'the cognitive activity through which legal understandings, expectations and choices are developed'[186] or the ways in which actors 'construct, sustain, reproduce or amend the circulating (contested

177 See M. Ferraris, *Documentality: Why it is Necessary to Leave Traces* (New York, NY: Fordham University Press, 2012).
178 E. Lira, 'The Chilean Human Rights Archives and Moral Resistance to Dictatorship' (2017) 11 *International Journal of Transitional Justice* 189.
179 J. Derrida and M. Ferraris, *A Taste for the Secret* (Cambridge: Polity, 2001) 20.
180 Scheingold, n 91 above, xix.
181 *ibid*, xxi.
182 See also L. Salyer, 'The Constitutive Nature of Law in American History' (1991) 15 *Legal Studies Forum* (1991) 61; A. Hunt, *Explorations in Law and Society* (New York, NY: Routledge, 1993); J. Brigham, *The Constitution of Interests: Beyond the Politics of Rights* (New York, NY: New York University Press, 1996).
183 Brigham, *ibid*, 27.
184 J. Butler, 'Deconstruction and the Possibility of Justice: Comments on Bernasconi, Cornell, Miller, Weber' (1989) 11 *Cardozo Law Review* 1715.
185 S.E. Merry, *Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans* (Chicago, IL: University of Chicago Press, 1990) 5.
186 M. McCann, 'On Legal Rights Consciousness: A Challenging Analytical Tradition' in B. Fleury-Steiner and L.B. Nielsen (eds), *The New Civil Rights Research: A Constitutive Approach* (Aldershot and Burlington, VT: Ashgate, 2006).

or hegemonic) structures of meaning concerning law'.[187] Our research suggests that legal consciousness is a fruitful way of exploring the role of law in conflicted or authoritarian contexts, both with regard to the institutions of the state and for cause lawyers who challenged the actions of the state.

As noted above, across all of the sites we examined (with the exception of the Khmer Rouge period in Cambodia) the relevant states retained varying degrees of attachment to the rule of law. What occurred in practice at different historical junctures across these sites was what Ginsburg and Moustafa term *rule by law* rather than any recognisable *rule of law* (wherein the human rights of citizens are protected and the power of the state is curtailed by an independent judiciary).[188] Nonetheless, in reviewing key political and legal developments in each site, as well as the ways in which these have been challenged by cause lawyers, we have been struck by the prominence of law as both a rhetorical and practical resource for the state.

By way of illustration, one of the rationales offered by the Pinochet regime to justify the military coup in 1973 was to 'restore the rule of law', the coup itself was formalised by a 'decree law' (the Acta de Constitución de la Junta de Gobiero), and in 1980 Pinochet introduced a new constitution to consolidate the power of the military and the neo-liberal economic reforms introduced by the dictatorship.[189] As discussed above, the apartheid regime in South Africa was highly legalistic in nature, replete with racist and authoritarian 'emergency' legislation and again this was often framed as 'strengthening the rule of law'.[190] Taking pride in its self-image as the 'only democracy in the region', Israel has long argued that its occupation of the West Bank (and previously Gaza) was subject to the rule of law just like the state of Israel itself.[191] As noted above,

187 S. Silbey, 'After Legal Consciousness' (2005) 1 *Annual Review of Law and Social Science* 323, 334.

188 Ginsburg and Moustafa, n 3 above. The Rule of Law is defined by the United Nations as 'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.' See UN Secretary-General: *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies* (2004) (S/2004/616). For a good discussion on the theoretical and practical complexity of the term see B. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: CUP, 2004).

189 See R. Barros, *Constitutionalism and Dictatorship: Pinochet, the Junta, and the 1980 Constitution* (Cambridge: CUP, 2002). The previous democratically elected government socialist government under Allende had used legal 'loop-holes' to nationalise a number of important industrial and agricultural companies as well as some private banks. These processes were determined to be illegal by the Chilean Supreme Court but the Allende government refused to abide by the Court's judgements. Following a letter from the Supreme Court to the President accusing him of presiding over 'the breakdown of legal order in the country,' Allende replied that the court had been 'partial and insensitive to the claims of the poor while efficiently taking care of the cases of the rich.' See further E. Velasco, 'Special Lecture Series: The Allende Regime in Chile: An Historical and Legal Analysis: Part II' (1976) 9 *The Loyola of Los Angeles Law Review* 711, 726.

190 A. Sachs, *Justice in South Africa* (Berkeley, CA: University of California Press, 1973) 237-238. See also Meierhenrich, n 105 above and Ellmann, n 105 above for detailed discussions on the legal architecture of apartheid.

191 Y. Mehozay, *Between the Rule of Law and States of Emergency: The Fluid Jurisprudence of the Israeli Regime* (New York, NY: State University of New York Press, 2016). Indeed antipathy towards the

during the Ben Ali dictatorship in Tunisia, prominent support for gender equality and an ostensible commitment to increased adherence to the rule of law were posited as part of a process of 'democratic gradualism', designed at once to enhance the regime's international respectability and improve authoritarian resilience.[192] In a similar fashion, while Cambodia has become increasingly unabashed about its authoritarian nature in recent years (pivoting towards China as its preferred trading partner and principal investor rather than the West), the Hun Sen government previously accepted significant rule of law international investment including for a new Criminal Procedure Code in 2007 and a new Criminal Code in 2009.[193]

Across all of the sites one of the obvious payoffs for a rhetorical commitment to the rule of law was the quest for international respectability. This is what Cohen memorably termed 'magical legalism'. In response to criticisms, governments list the numerous domestic laws, international conventions ratified, appeal mechanisms triggered, and 'then comes the magic syllogism: torture is strictly forbidden in our country; we have ratified the Convention Against Torture; therefore what we are doing cannot be torture.'[194] At an instrumental level law is of course also how states 'get things done'. As Dyzenhaus has argued, where there is a legal system, generally acts of political power are expressed 'through the medium of law.'[195] In addition to being the vehicle by which policies are enacted, law is also often an enabler for state actors or their proxies to commit human rights violations or to provide space for sadistic innovation (through lack of legal accountability). In both scenarios, such impunity may indeed be formalised through an amnesty – itself a creature of law.[196] In thinking about strategies and tactics such as boycotting or different forms of resistance in hopeless legal settings, law also has a broader role.

One of the sociological functions of law within a state structure is that it can serve to legitimate the state itself and the actors who work within it.[197]

historically interventionist Supreme Court has become a trope in rightist Israeli politics, despite the fact that, as Kretzmer has argued with regard to the Occupied Territories 'in almost all of its judgements, especially those dealing with questions of principle, the [Supreme] Court has decided in favour of the authorities, often on the basis of dubious legal arguments.' See Kretzmer, n 61 above, 3. See further M. S. Wattad, 'Israel at 70: The Rule of Law and the Judiciary (2018) 23 *Israel Studies* 172.

192 See for example S. Erdle, *Ben Ali's 'New Tunisia' (1987 – 2009): A Case Study of Authoritarian Modernization in the Arab World* (Berlin: Klaus Schwartz Verlag, 2010); F. Cavatorta and R.H. Haugbølle, 'The End of Authoritarian Rule and the Mythology of Tunisia Under Ben Ali' (2012) 17 *Mediterranean Politics* 179.

193 Notwithstanding these investments, as noted above, Cambodia remains one of the most corrupt and least judicially independent countries in the world. See further L. Morgenbesser, 'Cambodia's Transition to Hegemonic Authoritarianism' (2019) 30 *Journal of Democracy* 158.

194 S. Cohen, *States of Denial: Knowing About Atrocities and Suffering* (Cambridge: Polity Press, 2002) 108.

195 D. Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar* (Oxford: OUP, 1999) 154.

196 For further discussion on amnesties as creatures of law see K. McEvoy and L. Mallinder, 'Amnesties in Transition: Punishment, Restoration and the Governance of Mercy' (2012) JLS 39, 410.

197 See for example M. Weber, *Economy and Society Part II, Vol 2* (Berkeley, CA: University of California Press, 1968); D. Beetham, *The Legitimation of Power* (London: Macmillan, 1991).

As Douglas has suggested, for an institution to be legitimate it needs 'a parallel cognitive convention to sustain it' as well as something confirming it 'in its rightness in reason and in nature.'[198] Law is part of 'the background, the conceptual apparatus … that constitutes, among other things, the idea of the state itself.'[199] The function of law in the process of 'seeing like a state', as the anthropologist James C. Scott has argued, is that it not only produces 'an authoritative tune to which most of the population must dance' but that it also obscures and naturalises the application of power – including to those who work within the state itself.[200] Versions of legality – for example this policy has been duly passed into law by parliament, congress or emergency procedures – are a key part of the self-legitimating strategies deployed by rulers and those who work for them that what they are doing is justified and justifiable.[201]

Not surprisingly, the state-lawyers we interviewed identified a range of visions as to what they understood by the rule of law. Some expressed it in traditional legalistic terms. For example, one former apartheid-era State Attorney described his role as: 'to uphold and apply the law objectively and to work against lawlessness.'[202] Another Israeli Attorney General admitted, 'you're always in the situation where you push to the limits and you have to remember your job – to be professional, to keep the rule of law and to assist the government in fulfilling its job because it is elected.'[203] A senior South African apartheid-era attorney who had defended numerous police officers, soldiers and military intelligence officers accused of human rights abuses told us, 'if I have made mistakes it's because I don't understand the law well enough, and I must still learn more about the law. I have made mistakes, but never with a political agenda or motive.'[204] Others were more open about their conflicts and the lack of space to resist political direction by appeals to the rule of law. As one Cambodian prosecutor told us: '… if you see something white, this is white but you do not want to say this is white since you're ordered not to say it is white, you are told to say it is black so you have to follow it … you are now cheating yourself.'[205] In a similar vein, a former Israeli Attorney General told us that she thought it was unrealistic to expect too much from government lawyers or career civil servants

198 M. Douglas, *Purity and Danger: An Analysis of Concepts of Pollution and Taboo* (London and New York, NY: Routledge and Kegan Paul, 1966) 45-46.

199 P.J. Steinberger, *The Idea of the State* (Cambridge: CUP, 2004) 228.

200 Scott, n 117 above, 83.

201 Barker, n 86 above.

202 Interview with former state lawyer under apartheid, Johannesburg, South Africa, 16 August 2014.

203 Interview with former military and state lawyer, Jerusalem, 12 May 2014.

204 Interview with former state lawyer under apartheid, Cape Town, South Africa, 10 August 2014. Later in the same interview this interviewee was less guarded about presenting himself as a lawyer in the service of the state. He recounted a positive encounter at an international conference after apartheid with a former MK combatant recalling – 'Now, *we* [our emphasis] had wanted to kill that guy dearly; he was the big terrorist. He was the commanding officer of Special Operations of MK. In fact, we killed a number of incorrect people thinking it was him in neighbouring countries. We really wanted to kill him. He was the archenemy from where I come from. Yet here I was sitting in a hotel room drinking wine, he with his wife, me with mine, discussing how we wanted to kill each other.'

205 Interview with former ECCC prosecutor and local judge, Phnom Penh, Cambodia, 13 March 2014.

in terms of standing up to political bosses. Nonetheless, when asked her view on the impact of the occupation on the rule of law in Israel, she added:

> I believe that this occupation needs democracy from inside … you can't call this a democracy when two peoples are located in the same area, one has all the rights that people have, a State has, a citizen has and the other have nothing, have no political rights and whose human rights are violated every day … So you can't call it democracy and if Israel loses its definition of democracy it loses its legitimation as the homeland of the Jewish people.[206]

Part of the resistant work of cause lawyers in either boycotting unfair legal proceedings or using the law as a form of resistance was to rupture the authorising, naturalising and normalising function of law.[207] As discussed above, such strategies were expository in nature, designed to bring national or international attention to human rights abuses, to embarrass states amongst the community of nations, and to pressurise them into amending their policies. They were also designed to unsettle the legalistic narratives which obscure or deny responsibility either within the state or in constituencies of influence who were complicit by silence or inaction.

Cohen's magisterial work on denial includes a discussion on 'self-deception', nurtured on what he describes as the 'sad tales' culpable actors tell themselves to rationalise and justify what they know to be wrong.[208] Cause lawyers we interviewed explicitly set out to undermine such self-deception. One veteran Israeli cause lawyer described her approach in defending Palestinians before the Israeli military court system as follows: 'this time it will work, this time you will understand, this time I will convince the military judge, the prosecutors, the interrogators … I don't despair easily!'[209] A Palestinian cause lawyer similarly described his efforts as appealing to the 'conscience' of the Israeli legal system.[210] Other audiences identified by cause lawyers as in need of some discomfiture included in Tunisia, 'fellow lawyers who were silent,'[211] in South Africa, 'legal associations, Bar Councils'[212] and in Chile, 'the sectors in denial, the military, civilians in government, in business and so on – [we wanted] to provoke some soul searching in these sectors.'[213]

Across all six sites, the work of cause lawyers required more than simply critiquing what Dyzenhaus has called 'wicked legal systems.'[214] It also required imagining and propagating through their actions an alternative rule of law in which, as the former political prisoner, cause lawyer and South Africa supreme

206 Interview with state lawyer and former advisor to Israeli government, Jerusalem, 16 May 2014.
207 Cohen, n 194 above.
208 *ibid*, 42. Drawing from Sartre, Cohen discusses the ways in which 'with your own collusion' one can be drawn into a project of 'bad faith'. Amongst the 'sad tales' he includes are justifications such as 'no choice', 'just obeying orders', 'didn't know what was happening'.
209 Interview with Israeli cause lawyer, Jerusalem, 20 May 2014.
210 Interview with cause lawyer in private practice lawyer, Jerusalem, 19 May 2014.
211 Interview with Tunisian cause lawyer, Tunis, Tunisia, 17 June 2014.
212 Interview with South African cause lawyer, Johannesburg, South Africa, 14 August 2014.
213 Interview with Chilean human rights activist and victims advocate, Santiago, Chile, 2 May 2014.
214 Dyzenhaus, n 79 above.

court judge Albi Sachs has described it, law could be 'realigned with justice'.[215] Cheesman and San have argued that precisely because of the limited opportunities for law to deliver substantive social or political change within conflicted or authoritarian regimes, lawyers have a particularly important role to play as 'guardians' of such a version of law.[216] The role of lawyers is to highlight the 'mutation' of the rule of law, '… constantly defining and articulating the evil to be uprooted and the good that should come in its stead.'[217] Perhaps this is the key take-away from our analysis of the perspectives of cause lawyers who either boycott unfair legal proceedings or engage them as sites of resistance and subversion. Regardless the weight of counter evidence, they are preserving what one Israeli cause lawyer described as a 'stubborn optimism' in the rule of law.[218]

215 Sachs, n 190 above 1. Justice Sachs was interviewed for this research.
216 N. Cheesman and K.M. San, 'Not Just Defending: Advocating for Law in Myanmar (2013) 31 *Wisconsin International Law Journal* 702, 703.
217 Sfard, n 62 above, 454.
218 Interview with Israeli cause lawyer, Jerusalem, 20 May 2014.