Viewpoint

# The Ambivalence of Litigation: A Criticism of Power

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## Litigation as a Sociopolitical Venue

Israel is one of the most litigious societies on earth, having the most lawyers per capita of any democracy.[1] Yet, litigation and social change may be perceived as oxymoron. Litigation is a court-centered process that deals essentially with resolution of limited disputes in a narrow legalistic sense, whereas social change is most often the result of large-scale political reform. While litigation is delivered by lawyers, social reforms are generated by social and political organizations.

Research has demonstrated that the ability of litigation to bring about socio-legal change is modest, at most, and any such change is usually very limited. Relatively few cases have resulted in changes that extend beyond the immediate specific legal remedy granted therein.[2] Below I address both the sociopolitical thresholds that may prevent litigation from being helpful to minorities trying to effect change and the legal sociopolitical calculus that should guide their decision whether to use litigation.

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[1] Barzilai, G. (2007) The Ambivalent Language of Lawyers in Israel: Liberal Politics, Economic Liberalism, Silence and Dissent. In Halliday, T. C., Karpik L., and Feeley, M. M. (eds.) *Fighting for Political Freedom: Comparative Studies of the Legal Complex and Political Liberalism*. Hart Publications. 247-279.
Also published in Hebrew in *Ha'Mishpat* (September 2010) 9 (1): 195-225

[2] Ibid.
Barzilai, G. (2003). *Communities and Law: Politics and Cultures of Legal Identities.* Ann Arbor: University of Michigan Press.
McCann, W. M. (1994). *Rights at Work: Pay Equity reform and the Politics of Legal Mobilization*. Chicago: The University of Chicago Press.
Sarat, A., and Scheingold, S. (2001). *Cause Lawyering and the State in Global Area*. New York: Oxford University Press.
Shamir, R. and Ziv, N. (2001). "State-Oriented and Community Oriented Lawyering for a Cause: A Tale of Two Strategies." in Sarat, A. and Scheingold, S. *Cause Lawyering and the State in Global Area*. New York: Oxford University Press. 287-304.

## Criticism of Myths of Litigation

Even as NGOs that use litigation increase in numbers, and their influence in society increases accordingly, the accessibility to litigation remains socially limited. Thus, most Arab-Palestinian NGOs in Israel are not litigious, and most social grievances cannot reach a lawyer to begin with.[3] In most countries, litigation is carried out primarily by the "Haves"—the bourgeoisie and corporate powers—and not by the "Have-nots"—the needy and the proletariat.

Compared to some other modes of political action, litigation carries an exorbitant price tag; most people cannot afford it. Litigation is an elite means of sociopolitical struggle, rarely independent from the economic interests of the social class. Communal litigation, for example, requires strong organizational mechanisms and long-lasting financial resources. Hence, often litigation is not affordable for those who most desperately need it. I don't mean to confute all virtues in litigation, but its use requires us to critically examine the prevailing sense of celebration constructed by the mass media, politicians, and interested lawyers.[4]

Moreover, a myriad of social and political problems are difficult to translate into legalistic language, and any such articulation is meaningfully different from the sociopolitical language denoting the same problems in praxis. As such, subdued national feelings and poverty are frequently not litigious. A lawyer knows that s/he needs to name these foundational issues through various rhetorical and legalistic constructions relying upon principles of rights, civic duties and obligations, and the rule of evidence. This challenge constitutes a different type of problem, one that may be resolvable in the courtroom but whose solution yields a result that does not do justice for the victim of the given sociopolitical predicament. Litigation may assist Israeli Arab-Palestinians in attaining more equality in allocations of national budgets for education. However, this does little to improve the quality of the education rendered by the Jewish state for Arab-Palestinians. The sociopolitical costs of naming social problems in legal terms are not marginal, and they certainly have to be taken into account in any legal sociopolitical calculus utilized by minority members.

Furthermore, not infrequently do long and costly processes of litigation result in legal remedies that are too general or unenforceable to affect the averse and even hostile administration.[5] Litigation should be understood in its deliberative democratic context. The efforts of minority members who are struggling in legal

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

[4] Haltom, W. and McCann, W. M. (2004). *Distorting the Law: Politics, media, and the Litigation Crisis*. Chicago: The University of Chicago Press.

[5] Rosenberg, N. G. (1991). *The Hollow Hope: Can Courts Bring about Social Change*. Chicago: The University of Chicago Press.

cases may meanwhile divert public attention from profound discussions of severe issues of urgency to conflicts around the litigation itself. Hence, litigation as a political tool may inflict damage on our abilities to develop a deliberative democracy.

## The Trap of Political Power

Minorities cannot consider the questions of whether and how to litigate without acknowledging state legitimacy. It is prominently a dilemma of national minorities, as Arab-Palestinians in Israel: how do we gain justice through the state's legal system without granting legitimacy to the ideology that underlies that nation-state? Lawyers may choose not to highlight a victorious legal case in order to prevent the nation-state from making claims that would negatively affect the future of the minority. Thus, if the Arab-Palestinians were to win a case in the High Court of Justice (HCJ) through arguments of national security, it is probable that their argument would be co-opted by the arguments for security made by the state. Hence, minorities may argue problems of secondary importance, second-order problems, in Court inasmuch as doing so evades the issue of legitimacy.

Accordingly, the minority may argue against the symptoms of discrimination but not against the system perpetuating the injustice of discrimination itself. If a minority decides that litigation steers its sociopolitical strategy, it may neglect other options for social resistance, such as civil disobedience. It is possible, if unlikely, for a minority to use disobedience and litigation at the same time, even when they concern diverging issues. Litigation may develop a discourse highlighting confined rights and advocating a more egalitarian allocation of goods. Still, the likelihood of significant sociopolitical reform in the power structure of the nation-state remains low.

Litigation is not a completely superfluous mechanism of collective political action. Nevertheless, it is important that power be the main discursive context in which litigation is explicated. Litigation is an incremental process that relies heavily on developing public consciousness through the media. It may be successful only if it fosters a certain co-optation by the state. Different contexts may affect a variance in minorities' considerations when and to what degree resistance against state ideological and physical violence is preferred to litigation, as well as when and where questions of rights apply. What is proper for the Catholic minority in Northern Ireland and the Basques in Spain is not necessarily appropriate to the Israeli-Palestinians, and vice versa. The position of Israeli Arab-Palestinians is particularly problematic. On the junction of a dwindling parliament, which is tightly controlled by the government, and exclusively Jewish ruling coalitions, litigation might be easily seen as an appealing type of collective action, despite of its meaningful deficiencies.

## Conclusion

Litigation is a compound and tricky political mode of collective action that should be understood as a part of interactions with the nation-state. Nation-states have legitimatized litigation and co-opted lawyers, not because they have acquired stronger sense of egalitarianism. Justices and other politicians are ardent to learn that litigation is a double-edged sword and not merely a shield. Litigation may ease minorities' problems and at the same time also be their worst social enemy. The only solution is to activate litigation to a confined degree in a broader context of sociopolitical legal calculus in which the field of options for collective action is always under critical evaluation by minority members.

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