The Evasive Facets of Law: Litigation as Collective Action

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Introduction - Litigation as a Sociopolitical Venue

Litigation and social change may be perceived as mutually exclusive. Litigation is a court-centered tactic which deals essentially with the resolution of limited, defined conflicts in their narrow legalistic sense, while social change is often the result of large scale political reforms in legislation and public policy. Litigation is delivered by lawyers, while social reforms are generated by social and political organizations. Praxis and theory are more compound than *prima facie* binary dichotomies, however, since the interactions between litigation and social change are multidimensional.

On the one hand, the legal field as it stands periodically inclines towards legitimatizing the *status quo* and reproducing its imagined necessity. All social revolutions since the Lutheran Reformist revolution which swept through Europe in the 16th century have had to deal with the law's proclivity towards the preservation of the *status quo*. On the other hand, law by itself, even state law, is so multidimensional, fragmented, heterogeneous, and non-linear that its certain unpredictability may be conducive to social reform. Hence, the apparent incompatibility between litigation and social change is theoretically and practically a significant dilemma with some paradoxical and unexpected results. That crucial transnational dilemma of whether and how to foster social changes through litigation should be debated in the context of the politics of rights. The politics of rights is a set of practices that are based on faith, either false or correct, in the junction of social needs and legalities.

Law and society scholarship has acquired a vast knowledge on the modest ability of litigation to bring about limited socio-legal change, namely a few changes that exceed the immediate legal remedy in a specific case (Dotan 1999, Epp 2001, Esmeir 1999, Feeley 1992, Hajjar 1997, Jabareen 2000, Kagan 2000, McCann 1994, Sarat and Scheingold 1998, 2001, Scheingold 2004, Silverstein 1996, Shamir and Ziv 2001, Barzilai 2003). Seven types of collectivities have often been debated within the professional literature: cultural groups, social-class groups, ethnic groups, national minorities, gender and sexual orientation groups, corporations, and sociopolitical movements. The literature renders us a good understanding of the possible limited effects of cause-lawyering and repeated players, namely individuals and usually groups who file the same case time and again in order to find remedies in court.

In this article, I address two more difficult issues in that context: the sociopolitical thresholds that may prevent litigation from being helpful for minorities, and the legal sociopolitical calculus that should guide minorities on whether or not to use litigation. Accordingly, the following section deals with the question of why the tensions between litigation and social change may be severe. I then move to analyze the dangers and possibilities within litigation for national minorities, such as the Israeli Palestinians.

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Sociopolitical Predicaments and the Limits of Litigation

1. Thresholds of Activating Litigation

A myth still prevails, among critics and advocates of litigation alike, that litigation is a significant part of popular practical culture. The critics would like to suggest that litigation is unreservedly overused in democracies, while its adherents underscore its practical and, even more so, potential usefulness. However, even when NGOs which employ litigation increase in number, and their influence in society increases accordingly, the accessibility to litigation remains limited socially. Thus, most Arab-Palestinian NGOs in Israel are not litigious, and most social grievances cannot reach lawyers at all (Barzilai 2003). In most countries around the globe, litigation is carried out primarily by the "haves," the bourgeoisie, like the financial corporations, and not by the "haves-nots," the needy, the proletariat.

Since litigation is costly and luxurious in comparison with some other modes of political participation, most individuals cannot afford it. Litigation is an elite means of sociopolitical struggle and not independent from social class interests. Communal litigation, for example, requires strong organizational mechanisms and financial resources. Visibly, it does not mean that litigation may not be constructive to the politics of rights, through assisting the expansion of rights' discourse and rights' mobilization. Yet, to argue that litigation may be a foremost tool in resolving social conflicts is also to presume, often wrongly, that litigation is affordable for those who desperately need it. Such criticism as it stands does not confute all the virtues of litigation, but it does require us to critically limit the prevailing sense of celebration, constructed by the mass media, politicians, and interested lawyers (Haltom and McCann 2004).

Even when and where litigation is utilized by communities, groups, social movements, and organizations, however, there is a threshold of professional language, which constitutes a significant pillar of the judicial architecture. Myriad social and political problems cannot be converted into legalistic language, and, if they are translated, their articulation is meaningfully different from the sociopolitical language used to denote the same sociopolitical problem in praxis. Frequently, subdued national feelings and poverty are not litigious, as such. A lawyer knows that s/he needs to name these foundational issues through various rhetorical and legalistic constructions, relying upon segments of rights and duties, obligations and rules of evidence, which constitute a different type of a problem, one which may be resolvable in the courtroom, but which often does not do justice to the victim of any given sociopolitical predicament. The threshold of language and professionalism inflicts a high cost of conversion from the sociopolitical praxis to the imagined reality in the courtroom. Once a sociopolitical problem has been signified in legal phraseology, its denotation confines the scope of the perceived sociopolitical problem.

Litigation may assist Israeli Arab-Palestinians in attaining more equality in allocations of national budgets for education, which in itself is no minuscule achievement. However, it cannot make the education rendered by the Jewish state for Arab-Palestinians much better. Litigation may enforce upon the state a greater obligation of responsiveness, but not greater ethical inclusiveness (Jabareen 2004). The epistemological, ideological, economic, and sociopolitical costs of naming sociopolitical problems in legal terms are not marginal, and they have certainly to be taken into somber account during the legal, sociopolitical calculus of minority members.

Furthermore, even if a legal remedy is granted, either through court or out-of-court settlements, it does not necessarily serve the purposes of the litigation itself. We have sufficient data in law and society research to know that the legal remedies granted after protracted and costly processes of litigation are often too general or too unenforceable on an averse or even hostile administration (Rosenberg 1991). Last but not least among some of the thresholds that I explicate in this article is that litigation should be understood in its deliberative democratic context. The efforts of minority members who struggle to litigate cases may meanwhile divert all

public attention from profound discussions of critical issues to disputes around the litigation itself. Hence, litigation as a policy may inflict damage on our abilities to develop a deliberative democracy. I move on in the next section to analyze another difficulty with litigation, before exploring some of its advantages.

2. Legitimacy Games

The sociopolitical and legal calculus of minorities of how to circumvent legitimacy traps is indispensable when deciding about litigation. Minorities must consider the difficulties in deciding how and whether to litigate without acknowledging the state's legitimacy. It is prominently a dilemma of national minorities, including Arab-Palestinians in Israel. The dilemma is how to gain justice through the state's legal ideology without granting legitimacy to the nation-state which constitutes that ideology. It is not only an intangible issue, but also a practical matter.

The legitimacy issue impinges upon minority litigation rather significantly. Firstly, lawyers may choose not to frame a successful legal case in court as victorious in order to deny the nation-state arguments that may negatively affect the future of the minority. Thus, if the Arab-Palestinians were to win a legal case in the Israeli Supreme Court by resorting to arguments of national security, it is certain that they have been co-opted by the security arguments of the state. Secondly, the legitimacy trap necessitates that minorities argue second-order problems in court to avoid the legitimacy issue. The minority may argue against the symptoms of discrimination, but not against the system which sustains the injustice of discrimination itself. This obviously increases the costs of litigation, as I explained above. Thirdly, once a minority decides that litigation will steer its sociopolitical strategy, the minority should abandon other methods of social resistance, such as civil disobedience. It is possible but very unlikely that a minority would use civil disobedience and litigation at the same time, even concerning diverse and different issues.

The legitimacy trap frames at least two levels of political interactions between the minority and the nation-state. The first interaction occurs at the level of the politics of rights, in which minorities may gain more rights as a result of mobilization through litigation. Often the aggregation of rights - mainly individual rights - will not constitute a revolution, but may improve the minority's conditions to a certain extent. The second interaction is on the infrastructural level, at which the minority is marginalized from the state's power *foci*, and yet is co-opted by the nation-state through implicit and explicit negotiations and allocation of rights and goods. Hence, litigation with all its various forms and processes may develop a limited discourse of rights and generate a somewhat more egalitarian allocation of goods (Jabareen 2004, McCann 1994). The likelihood of significant sociopolitical reform in the power structure of the nation-state, however, is low.

Power as the Context of Litigation

Obviously, litigation cannot be considered as a completely superfluous mechanism for collective political action. The matrix for consideration among members of minorities is complex. Power is the main context in which litigation should be understood. Litigation is an incremental process which relies heavily on framing public consciousness through the media. Often the process results in unpredicted coalitions, such as cooperation between Jewish Zionist feminists and Palestinian nationalist feminists. From a litigation perspective, such a process of coalition building through mobilization may be successful only if a certain co-optation by the state is framed. Litigation is a state-sponsored process, since it has no meaning without the politics of rights within state law.

National minorities should consider seriously that litigation is an in-power, rather than an out-power process. The minority should also recall that any out-power processes may escalate into violence which may spiral into severe violent repression of the minority by the state. Different

contexts may affect a variety of minorities' considerations over when and to what degree resistance against ideological and physical violence by states is preferable to litigation, and where and when to employ strategies of rights talk. What is proper for the Catholic minority in Northern Ireland and the Basques in Spain is not necessarily appropriate for Palestinian citizens of Israel, and *vice versa*.

If the minority is inclined to use in-power tactics, then litigation is not necessarily the only option of collective action available. The minority has the ability to select from among in-law and between-law options of collective political action. Civil disobedience is a type of between-law collective action which minorities may use and rather effectively. Contrary to conventional wisdom, in-law political options of collective action are also diverse. Legislation is an often neglected means of action, since litigation, among other in-law alternatives, diminishes the power of deliberative democracy, as explained above. The position of Israeli Arab-Palestinians is particularly problematic, however. At the junction of a dwindling parliament, which is tightly controlled by the government, and exclusively Jewish ruling coalitions, litigation might easily appear an appealing type of collective action, in spite of its significant deficiencies.

Litigation, once it is seriously regarded as an in-law option, has three aspects. There is a difference between rights-oriented litigation, goods-oriented litigation, and end-result-oriented litigation. Litigation which is designed to gain recognition of rights and a greater allocation of goods may have a higher chance of success and effectiveness within the power structures of the state and its legal ideology. In the broader context of education, consciousness-raising, and media coverage among the minority, such litigation may even further mobilize minority members. Conversely, end-result-oriented litigation occurs once the minority conceives the imagined court-constructed reality as its main sociopolitical reality, and as its main space for future collective action. End-result litigation may end in the complete victory of the nation-state over the minority's aspirations.

A Scholastic Opinion

Minorities have customarily articulated an ambivalent approach to litigation, and the Arab-Palestinian minority, too, has entertained internal debates and reflections about the future directions of collective action. That ambivalence is comprehensible, since, especially in a polarized, fragmented, and violent society like Israel, few tangible resources of empowerment and equality have been available for the minority. However, once the matrix that this article offers is better studied, minority activists and lawyers, such as those working in Adalah, can more easily decide upon their future collective moves.

Litigation is a tricky political mode of collective action, which should be understood as part of minorities' interactions with the nation-state. Nation-states have not responded to litigation and co-opted lawyers because they have acquired a stronger sense of egalitarianism. Justices and other politicians are keen to learn that litigation is a double-edged sword, and not merely a shield. Litigation may ease the predicaments of minorities, and also may be their worst social enemy. The only solution is the limited activation of litigation in the broader context of a sociopolitical legal calculus, in which the matrix of options for collective action is always under critical evaluation.

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