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Promoting Arab Collective Claims in the Judicial Arena

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**Electronic version**

URL: <http://journals.openedition.org/bcrfj/259>

ISSN: 2075-5287

**Publisher**

Centre de recherche français de Jérusalem

**Printed version**

Date of publication: 30 November 2005

Number of pages: 287-300

**Electronic reference**

Hélène Sallon, « The Judicialization of Politics in Israel », *Bulletin du Centre de recherche français à Jérusalem* [Online], 16 | 2005, Online since 09 October 2007, connection on 03 May 2019. URL : <http://journals.openedition.org/bcrfj/259>

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## **The Judicialization of Politics in Israel: Promoting Arab Collective Claims in the Judicial Arena**

Hélène Sallon

One of the central debates on the Israeli political scene in 2005 was the public controversy between the President of the Supreme Court, Aharon Barak, and the Minister of Justice, Tzipi Livni, on the nomination of three new justices to the Supreme Court. This controversy focused on Law professor Ruth Gavison, whose nomination Barak opposed because of her vehement criticism of the political orientation and judicial activism of the Supreme Court, which many observers attribute to Barak himself. The extent of this controversy indicated the political significance of the composition of the Supreme Court and political importance of the direction of its judicial policy after the retirement of its present President in September 2005.

The Supreme Court has become a central actor on the Israeli political and public scene. It is considered pivotal actor in the judicialization of Israeli politics and society and has, despite numerous criticisms, gained a public reputation as ultimate defender of the country's democracy. It systematically involves itself in areas that were traditional domains of other public authorities, and has thus restrained or substituted their influence on crucial social and political issues. Its reputation as last defense of democracy reposes on its active role in the enforcement of the respect for fundamental rights and freedoms in public policies. It has been encouraged in this by law professionals and civil society actors, who entered the judicial arena to promote sectarian interests of individuals and marginalized groups.

The systematization of the political use of Law and Justice is indicative of an increased perception of Law as a means for collective action and of Justice as a privileged arena for political expression and participation. The law is strategically mobilized by social actors and law professionals to force the acknowledgement of specific social and political claims in public policies. The

study of these practices in the Israeli context contributes to the theory on the use of legal means in collective action, and more generally, on the role of Justice in democratic societies that are undergoing profound societal changes. The judicial activism by Israel's Arab minority is in this context a particularly privileged fieldwork. With its singular history and status, the minority demands social and political rights that relate to fundamental questions of State, and requests that the judicial power arbitrate between the minority and the State. This analysis will focus on claims arising from the allocation of public resources such as land, which constitutes a large part of legal challenges.

The judicial activism by the Arab minority reflects strategies that were developed in and should therefore be understood in the wider context of the judicialization of Israeli politics and society and its particular political meaning with regard to the marginalization of the Arab minority in the public and political spheres. Despite the inherent limitations to the strategy of such judicial activism, it is used by numerous actors who aim to significantly influence public policy.

### **I. The Judicialization of Politics and Society in Israel**

The judicialization of Israeli politics and society in the nineties was concomitant with the expansion of judicial power based on the North American model onto the international level.<sup>1</sup> The conditions and modalities of the entry of this form of judicial power into the Israeli context display similarities with those observed in other countries. Socio-political transformations, such as the shift in the balance of powers and the consequent increase in the political power of the Supreme Court, as well as the active involvement of political, judicial and social actors, were determinant factors in the judicialization of Israeli politics and society.

#### *Judicialization of politics*

The concept of the judicialization of politics has become an influential instrument in the analysis of the mechanisms behind the "expansion of the province of the courts or the judges at the expense of the politicians and/or the administrators, that is, the transfer of decision-making rights from the

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<sup>1</sup> C. Neal Tate & T. Vallinder, *The Global Expansion of Judicial Power: The Judicialization of Politics*, New York, New York University Press, 1995.

legislature, the cabinet, or the civil service to the courts.”<sup>2</sup> This expansion relies on the increase in the number of these mechanisms which result in a larger influence of Justice on public policies. One such example is the increase in the number of recourses to judicial arbitration, increasing numbers of appeals made to the courts on social key-issues, and the shifting of political affairs’ settlement from the political to the judicial arena.<sup>3</sup> Among other, this phenomenon has resulted in a greater role for judges in norm-setting, to the detriment of the legislative power.<sup>4</sup> As such, it is frequently denounced as a blow to majority democracy or praised as the expression of the rule of law.

According to Jacques Commaille,<sup>5</sup> the explanation for this development can be found in the following socio-political evolutions: the increasing influence of the media and the market, in the advent of democratic individualism, in the shifting role of the State, in the contractualization of social relationships, in the crisis of politics and politics’ inability to find solutions to sensitive social issues, and in the end of great ideologies. Neal Tate<sup>6</sup> identifies the conditions that encourage the expansion of judicial power as the separation of powers, the “politics of rights” – understood as “an acceptance of the principle that individuals or minorities have rights that can be enforced against the will of putative majorities” –, the use of legal courts by special interest groups and the opposition, ineffective majority institutions and negative perceptions of policy-making institutions, refusal by majority institutions to deal with particular issues, and judges with the appropriate personal attitudes and policy preferences or values.

#### *Loss of Power of Majority Institutions*

The loss of power of the legislative and executive authorities and their delegitimization in the eyes of the public, are considered to be central factors in the judicialization of Israeli society and politics. Martin Edelman<sup>7</sup> explains that « rampant partisanship, arbitrary and self-interested policies, and, worst of all, an

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<sup>2</sup> T. Vallinder “When the Courts Go Marching In” in C. Neal Tate and T. Vallinder, *op. cit.*

<sup>3</sup> Jacques Commaille, « La judiciarisation. Une nouvelle économie de la légalité face au social et au politique », work paper, CERAT, February 2002 (French).

<sup>4</sup> Violaine Roussel, « La judiciarisation du politique : réalités et faux semblants », *Mouvements*, 29, september-october 2003 (French).

<sup>5</sup> Jacques Commaille, *op. cit.*

<sup>6</sup> C. Neal Tate, “Why the expansion of judicial power?,” in C. Neal Tate and T. Vallinder, *op. cit.*

<sup>7</sup> Martin Edelman, “Israel”, in C. Neal Tate and T. Vallinder, *op. cit.*

inability to deal with crucial problems besetting Israeli society, corroded that authority and, ultimately, the power of the elected leadership ». According to Gad Barzilai,<sup>8</sup> the traditional balance of powers between a strong legislative power and a centralized executive was first weakened by the legislative elections of 1977. Marking on one hand the end of the political monopoly by the Mapai party and Laborites, these elections highlighted the division in political leadership in the Knesset and on the other hand, the beginning of the growth of the influence of small political parties that, due to the fragmented nature of coalition politics in Israel, could negotiate their support against funding for their particular constituents. This trend intensified after 1992 with the introduction of a new electoral system with direct election for Prime Minister. These changes offered the Supreme Court the opportunity to increase its political role by stepping into the void left by representative institutions in the settlement of main social and political questions.

The transition from “party hegemony to the judicial hegemony”<sup>9</sup> paralleled the americanization of Israeli society during the seventies. In the opinion of Itzhak Galnoor<sup>10</sup> the artificial introduction of American institutional organs and of its interpretation of balance of power, which favors the power of the judiciary, signified a dangerous erosion of the Israeli tradition of strong parliamentarianism. This americanization was accompanied by the development of “the ethos of a litigious society”<sup>11</sup> and by the identification of a growing section of Israeli society with democratic, secular and liberal values, values which the Supreme Court represents. According to Ran Hirschl,<sup>12</sup> the threat to these values posed by the increasing influence of small political parties, in particular religious ones, led to the introduction of the Basic Laws of 1992. The political, economic and judicial elites that identified themselves with these values had effectively transferred part of their decision-making power and the defense of these values to the Supreme Court.

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<sup>8</sup> Gad Barzilai, “Partisan leadership and electoral laws: the Israeli domain in context,” *Palestine, Jordan, Israel-PASSIA*, first edition, December 1997.

<sup>9</sup> *Ibid.*

<sup>10</sup> Itzhak Galnoor, “The judicialization of the public sphere in Israel,” *Israel Law Review*, 37, Summer-Fall 2003.

<sup>11</sup> Menachem Mautner, “Law and Culture in Israel: The 1950s and the 1980s,” in R. Harris, A. Kedar, P. Lahav, A. Likhovski (eds), *The History of Law in a Multi-Cultural Society: Israel 1917-1967*, Aldershot, 2002.

<sup>12</sup> Ran Hirschl, “Towards Juristocracy: The Origins and Consequences of the New Constitutionalism,” Harvard University Press, Harvard, 2004.

*The Supreme Court<sup>13</sup> and “the Politics of Rights”*

The introduction of two Basic Laws in 1992,<sup>14</sup> last “chapters” in Israel’s progressive and uncompleted written constitution, led to the constitutionalization of the Israeli legal system, introducing a « constitutional revolution » according to Aharon Barak.<sup>15</sup> They were the first to define the formal legal status of several fundamental rights<sup>16</sup> and to hold a normative value superior to ordinary laws. They were amended in 1994 to include a reference to the principles contained in Israel’s Declaration of Independence<sup>17</sup> and to “the values of Israel as a Jewish and democratic state” which placed the Supreme Court in front of values often deemed irreconcilable.<sup>18</sup> The Supreme Court asserted the constitutional nature of the Basic Laws in a landmark case in 1995,<sup>19</sup> thus opening all existing laws to judicial review in the light of their constitutionality with regard to the fundamental rights contained in the Basic Laws.

Although this “constitutional revolution” encouraged the Supreme Court’s activism, it was, in fact, only the formalization of fundamental rights and of the doctrine of judicial intervention that had already been established through jurisprudence.<sup>20</sup> In the framework of its judicial review of administrative acts, the Court extended the scope of review to all statutory provisions, and even to some legislative acts, in the name of the doctrine of justiciability of political acts. The democratic character of the state served as justification for the liberal and extensive interpretation of the principles which orientate public action. The legal principles contained in the Supreme Court’s “theory of rights and

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<sup>13</sup> On the functions and the role of the Israeli Supreme Court, see Claude Klein, « *Le Droit israélien* », PUF, collection Que sais-je ?, 1986 and « *La Cour Suprême : un îlot dans la tourmente* », *Les Cahiers de l’Orient*, 70, 2<sup>ème</sup> trimestre 2003 (French).

<sup>14</sup> The Basic Law on Freedom of Occupation and the Basic Law on Human Dignity and Freedom.

<sup>15</sup> Aharon Barak, « *La révolution constitutionnelle : la protection des droits fondamentaux* », *Pouvoirs*, 72, 1995 (French).

<sup>16</sup> These fundamental rights encompass the freedom of occupation; protection of the life, body and dignity of human being; protection from arrest, detention or extradition; protection of the residence and of the secret of correspondence.

<sup>17</sup> The Declaration of Independence entrenches the principles of freedom, peace and justice; a complete equality in social and political rights to all citizens, without distinction based on belief, race or gender; as well as freedom of belief, religion, education and culture.

<sup>18</sup> Dan Avnon, “The Israeli Basic Laws (Potentially) Fatal Flaw,” *Israel Law Review*, 32 (4), 1998.

<sup>19</sup> *United Mizrahi Bank v. Migdal Cooperative Village* (1995), 49 (iv) P.D. 221.

<sup>20</sup> Aharon Barak, *Judicial discretion*, Yale University Press, Yale, 1989.

freedoms”<sup>21</sup> are the freedom of expression and of equality, the right to individual freedom and security, the freedom of movement, religion and conscience, the right to strike, association and gathering, the right to follow one’s vocation and the right to private property. If the development of this jurisprudential law greatly relies on the personality and activism of judges like Meir Shamgar or Aharon Barak, it is also dependent on the activism of social actors and cause lawyers that took the opportunity to develop and extend their judicial activities following the implementation of public standing<sup>22</sup> in 1986.

*Civil society and cause lawyers*

Israeli civil society saw unprecedented growth in the eighties, with the appearance of many non-governmental organizations representing different sectarian interests. Some of these organizations specialized in or oriented a part of their action to the defense of legal rights, such as the Association for Civil Rights in Israel, ACRI. They were inspired by the US civil rights movement of the sixties and seventies, whose success to a great extent relied on the use of legal skills, opportunities and tools. The introduction of legal strategies proven in the American and international context to Israel was supported by American institutions and foundations.<sup>23</sup> These encouraged the use of the American human rights model and the liberal approach abroad through, for instance, awarding stipends to foreign law professionals at American universities, Fulbright scholarships for the creation of legal aid clinics and directed funding of NGO projects.

A new category of actors linked to the social movements appeared: cause lawyers who applied their legal skills to the defense of the rights of minorities and disempowered groups. The term “cause lawyering,” defined by Austin Sarat and Stuart Scheingold,<sup>24</sup> is both an analytical category and a definition<sup>25</sup> used to

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<sup>21</sup> Françoise Dreyfus, « La Cour Suprême : l’audace du juge », *Pouvoirs*, 72, 1995 (French).

<sup>22</sup> In *Ressler v. Defense Minister* (H.C. 910/86), the Court acknowledged the right to any person, even if not personally affected by the government action, to attack that action in court if the action raises an important question of wide public implications.

<sup>23</sup> This phenomenon has been studied in the South-American context by Yves Dezalay and Bryant G. Garth, *The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States*, University of Chicago Press, Chicago, 2002.

<sup>24</sup> Austin Sarat et Stuart Scheingold (eds.), *Cause Lawyering: Political Commitments and Professional Responsibilities*, New York, Oxford University Press, 1998; idem, *Cause Lawyering and the State in a Global Era*, New York, Oxford University Press, 2001.

describe law professionals, innovating legal strategies and activities that are oriented towards the defense of a social or political cause. Since the eighties, Israeli cause lawyers developed an agenda of socio-political laws grounded on the principles of human rights and social justice.<sup>26</sup> Some cause lawyers, especially those of ACRI or those of big law firms, progressively entered what Patricia Woods calls “the judicial community.”<sup>27</sup> This diffuse and elite community of cause lawyers, law professors and justices of the Supreme Court is motivated by the belief in the rule of law and can be considered as a space that defines new norms. Through the normative debates within this community, justices of the Supreme Court indicate to cause lawyers the arguments and judicial cases that they are amenable to receive. By using this knowledge, cause lawyers enable the Court to translate some of these norms into legal principles, thus increasing the Court’s political influence.

## II. Judicial Activism for the Arab Minority in Israel

The legal defense for Israel’s Arab minority knew important developments during the nineties. The number of actors multiplied and the Supreme Court became more receptive to their claims. New innovative legal strategies were developed to translate the minority’s social and political claims into legal rights’ claims, while at the same time grounding them notably on the principle of equality developed in constitutional jurisprudence. Despite numerous legal victories, it is debated by the actors involved and within the empirical research community, to what degree these victories have resulted in a improving the political and social status of the minority. The pronounced liberalism of the Supreme Court and its hesitation to statute on issues that constitute major political challenges to the state are considered serious limitations to this process.

### *The social and political marginalization of the Arab minority in Israel*

The members of the Arab community in Israel are descendants of Palestinians who remained inside the borders of the newly created State of Israel on May 14, 1948. Citizens of Israel, this national, cultural and religious minority

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<sup>25</sup> Liora Israël, « La Justice comme espace politique. Trois études de cas : Israël, Inde, Argentine », *Droit et Société*, 55, 2004 (French).

<sup>26</sup> Neta Ziv, “Hanging by the Cloak – Advocates for Social Change in Israel: Between the Legal and the Political,” *Adalah’s newsletter*, 2, June 2004.

<sup>27</sup> Patricia Woods, « Normes juridiques et changement politique en Israël », *Droit et Société*, 55, 2004 (French).



counts more than one million today.<sup>28</sup> Their origin and history position them outside Jewish and Zionist meta-narratives on which the new state was built. State law, which gave preference to distinctions between different religious and national belongings, has not granted the Arab population the status of a minority, and consequently does not recognize rights attached to that status.<sup>29</sup> Although members of the minority have had full civil and political rights since the end of the military administration in 1966, the minority is faced with severe social and political discrimination. This is in part due to the constitutional status of Israel as a “Jewish State.”<sup>30</sup> Moreover, the confiscation in the first years of the State of its main resources, in particular that of land, and public policies which give preference to the interests of the Jewish majority<sup>31</sup> contributed to the social and economic marginalization of the Arab minority. Their identity was constructed, noted Gad Barzilai<sup>32</sup>, on a feeling of collective deprivation, of a lack of freedom of expression and of discrimination in policies related to social rights and land.

For a long time, this socio-economic marginalization was translated on the political level by a quasi absence of representative institutions capable of representing and defending the interests of the Arab minority.<sup>33</sup> Increased communalization and palestinization<sup>34</sup> during the eighties however, was reflected by the creation of several Arab political parties. These parties succeeded in attracting a majority of the Arab vote, which translated into genuine negotiating power in the political game. However, internal fragmentation, lack of legitimacy in the eyes of the Israeli public and the refusal by the main Jewish political parties to integrate the Arab parties into governmental coalitions prevented these of increasing their influence on public policy-making. Failure by the Arab political leadership combined with a acuter feeling of collective deprivation, resulted in several developments that weakened these strategies: The violent demonstrations in October 2000, the massive boycott of the 2001 national elections and the growing support for the Islamic

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<sup>28</sup> The Arab minority constitutes as such 20% of the whole Israeli population.

<sup>29</sup> The Arab nationality is legally recognized, but distinguished from the Druze and Bedouin nationalities that characterize groups considered as integrant parts of the minority.

<sup>30</sup> David Kretzmer, « Les droits de l’homme en Israël », *Pouvoirs*, 72, 1995 (French).

<sup>31</sup> Gad Barzilai, “Fantasies of Liberalism and Liberal Jurisprudence: State Law, Politics and the Israeli Arab-Palestinian Community,” *Israel Law Review*, 34 (3), 2003.

<sup>32</sup> *Idem*.

<sup>33</sup> Laurence Louër, « Comment gérer la minorité arabe d’Israël ? Les élections de mai 1999 », *Politique étrangère*, 65 (2), 2000 (French).

<sup>34</sup> *Ibid*.

Movement.<sup>35</sup> It also pushed the new Arab elite into seeking alternative strategies of expression and promotion of their social and political claims, in the associative movement and in organizations of legal defense.

*Lawyers of the Arab cause*

Until the nineties, the legal defense of the Arab minority interests remained relatively limited. Cause lawyers at ACRI, which was then the only organization providing professional and organizational support to the defense of a wide range of civil rights, were the first to invest in the Arab minority. The Qa'adan affair, initiated in 1995 by ACRI, was the first landmark judicial case addressing the right to equality of the Arab citizens in the access to public resources. ACRI and the Program for Legal Education of the New Israel Fund, NIF, born in 1984,<sup>36</sup> were essential in the emergence of a new generation of Arab lawyers who developed a legal approach to articulating national discourse and collective rights. Hassan Jabareen, who was educated in the United States and was the first Arab recipient of the NIF program in 1990, created Adalah, The Association for the Defense of the Arab Minority in Israel, in 1996 on the model of ACRI where he had previously worked. Adalah is now the biggest association for the defense of the rights of the Arab minority, with eight lawyers working on prisoners' rights, land rights, social, economic and cultural rights, including religious and language rights, women rights, and rights in the Occupied Territories. The lawyers at Adalah formed a strategy from their judicial activism for the promotion of collective rights of the Arab minority on the political level. In spite of the strong political implication of its petitions, the professionalism of its lawyers and its public relations' employees resulted in Adalah's success and reputation before the Supreme Court and the Israeli public eye. Adalah is however criticized within the community for defending only cases that pursue a collective interest and for its refusal to defend individuals against Arab communal institutions, in particular against religious institutions.

The growing receptivity of the Supreme Court to Adalah's petitions encouraged the entry of other organizations to this field and influenced the strategies of those that, like ACRI, were already working in it. ACRI progressively renounced the Jewish and Zionist perspective that characterized its initial approach to cases related to the Arab minority and adopted an approach

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<sup>35</sup> Laurence Louër, « L'Intifada d'Al-Aqsa : quelle place pour les citoyens arabes de l'État juif ? », *Cultures et Conflits*, 41, 2001 (French).

<sup>36</sup> The New Israel Fund Program, funded by the Ford Foundation, combines one year of legal education in an American university and one year of practice within a human rights organization.

close to Adalah's.<sup>37</sup> It also got involved further with the launching of its program "Equality for Arab Citizens" in 2000. The Legal Aid Clinic of Tel-Aviv University, created in 1983, also got involved more systematically in the defense of the rights of the Arab minority, notably under the direction of Neta Ziv, a former ACRI lawyer. Beyond the defense of socio-economic and housing rights, the Clinic distinguished itself through the defense of Arab citizens against their community-based institutions, such as the defense of women rights against religious courts. These organizations and their cause lawyers work closely with the associations of Arab civil society whose social and political claims they relay. This informal coordination constitutes a guarantee for the legitimacy of their actions in the eyes of the minority. The concern for legitimacy moreover encourages predominantly Jewish organizations to entrust Arab lawyers with cases related to the minority. The trend in the last few years is towards greater cooperation between these organizations and they have begun to work together on several petitions to the Supreme Court and in judicial actions. These exchanges also resulted in some cause lawyers to move from an organization to another.

*Which cause(s), which right(s)?*

During the initial years of judicial activism in defense of the Arab minority, two approaches characterized the methods and strategies used by Adalah and ACRI in the selection and building of judicial cases. These approaches were opposed in the Qa'adan family case.<sup>38</sup> The Qa'adan family was legally represented by ACRI. The family had been denied the right to live in Qatzir, a village built by the Jewish Agency on public land, on the basis of their ethnic origin. ACRI attacked the State for discriminating in the allocation of public resources through a third party, founding its argument on the Right to Equality. Adalah criticized ACRI for having deliberately limited the petition to the Qa'adans' case and having therefore avoided the greater issue of state policies on land confiscation and management. Adalah objects to the individual and formal interpretation of the right to equality defended by ACRI in this case, and favors a substantive interpretation that takes into account past discriminations and genuine needs of the Arab minority.<sup>39</sup> Answering these needs requires,

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<sup>37</sup> Neta Ziv, interview, August 28 2005.

<sup>38</sup> H.C. 6698/95, Qa'adan v. Administration of Israel Lands *et al.*

<sup>39</sup> For a detailed analysis of the formal and substantive conceptions of equality, see Youssef Jabareen, *Constitutional protection of minorities in comparative perspective: Palestinians in Israel and African-Americans in the United States*, Ph-D thesis, Georgetown University Law Center, 2003.

according to Adalah, an equal allocation of development budgets to the Arab local authorities and institutions, in which a majority of the Arab population live. As such, Adalah oriented part of its action against discriminations in the allocation of governmental budgets, in the areas of religion, education, health or local authorities' development.<sup>40</sup> The petition brought by Adalah in 1998 against the National Priority Areas<sup>41</sup> is indicative of this strategy. Adalah attacked a governmental decision granting substantial social and economic benefits, notably in the field of education, to residential communities categorized as National Priority Areas, from which the majority of the Arab towns and villages were excluded in spite of their severe socio-economic conditions. The Supreme Court accepted in February 2006 the argument according to which the decision lacks proper grounding and is discriminatory in its effect, thus asking the government to cancel it. The Court reasserted the obligation made to the State to ensure equality for Arab citizens in the allocation of public resources. Adalah's strategy has further aimed for the recognition of Arab collective rights and of Arab narrative in public policies. This strategy gradually found an echo in the Supreme Court,<sup>42</sup> which notably acknowledged the cultural specificity of the Arab minority and the official status of the Arabic language by calling on the state and on mixed-cities to add Arabic to public road signs.<sup>43</sup>

The growing receptivity of the Supreme Court to Adalah's petitions encouraged other legal aid organizations to present similar cases, developing similar strategies and arguments. For instance, in the rally against the use of indirect discrimination through selection criteria, such as the requirement for completed military service,<sup>44</sup> in the allocation of financial aids to families and for education and housing the three organizations collaborated<sup>45</sup>. Due to the

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<sup>40</sup> H.C. 240/98, Adalah, *et al.* v. Minister of Religious Affairs, *et al.*, P.D. 52 (2) 167 ; and H.C. 1113/99, Adalah, *et al.* v. Minister of Religious Affairs, *et al.*, P.D. 54 (2) 164 ; H.C. 6671/03, Munjid Abu Ghanem, *et al.* v. Ministry of Education, *et al.* ; H.C. 786/04, Ahlam el-Sana, *et al.* v. Ministry of Health, *et al.*; C. 6223/01, National Committee of Arab Mayors, *et al.* v. Ministry of the Interior, *et al.*

<sup>41</sup> H.C. 2773/98 and H.C. 11163/03, The High Follow-Up Committee for the Arab Citizens of Israel, *et al.* v. The Prime Minister of Israel.

<sup>42</sup> Neta Ziv, "Law, Constitutionnalism and Mobilizing for Social Change: the case of the Palestinians in Israel," paper introduced to the Conference on Constitutionalism, MADA al-Carmel, Nazareth, June 2004.

<sup>43</sup> H.C. 4438/97, Adalah, *et al.* v. The Ministry of Transportation, *et al.*, Takdim Elyon, 1998 (1) 11 et H.C. 4112/99, Adalah, *et al.* v. The Municipalities of Tel Aviv-Jaffa, *et al.*

<sup>44</sup> A majority of the Arab population does not participate in the military, since conscription is not compulsory for her.

<sup>45</sup> H.C. 4822/02, The National Committee of Arab Mayors and Adalah v. Avraham Burg, *et al.*; H.C. 2814/97, Follow-Up Committee on Arab Education *et al.* v. Minister of

Arab population's acute need for improvement in education, these organizations attempt to encourage the Supreme Court to recognize the right to education as a basic right and to instruct the state to implement affirmative action. With regard to access to land and housing, in which the divergence between the Arab and state narratives is greatest, many petitions have been presented. In a case similar to the Qa'adan affair, the three organizations challenged not only the particular governmental decision but also attacked a foundation stone of the state's land policies, which is the delegation of the management of state lands<sup>46</sup> to Jewish para-public institutions.<sup>47</sup> ACRI distinguished itself in this field by introducing a petition for fair representation of the Arab population in these institutions.<sup>48</sup> The status of Bedouin villages that have remained unrecognized by the state since 1966, the time of the National Master Plan, gave rise to innovative legal strategies developed by cause lawyers. In order to force the State to recognize these villages, they obligate it to develop public infrastructures<sup>49</sup> there in the name of the basic right of their inhabitants to live in a dignified way.

*The limitations to judicial activism*

The example of unrecognized Bedouin villages illustrates the limitations of judicial activism and the strategies of skirting elaborated by cause lawyers. Indeed, in spite of its greater receptivity to the claims by the Arab minority in the last few years, the Supreme Court still refuses to rule on cases that would have significant political implications and open itself up to requests for important legal and material remedies. Furthermore, the Court rejects all petitions that contest past and general policies. One such example is the national planning policy that aims to gather the Bedouin population into townships by re-classifying the lands where they live as agricultural lands that cannot be developed. Cause lawyers have therefore aimed to circumvent these limitations by limiting their petitions to specific demands, such as requesting the allocation of public resources and infrastructures that are considered by the Court as part of the basic rights that the state must guarantee to every citizen. These requests

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Education *et al.*, P.D. 54 (3) 233 ; H.C. 9289/03, Adalah, *et al.* v. Israel Lands Administration, *et al.*

<sup>46</sup> 93% of the Israeli lands are State land.

<sup>47</sup> H.C. 9205/04, Adalah v. The Israel Lands Administration, *et al.*

<sup>48</sup> The Association for Civil Rights in Israel v. Israel Land Authority (2001) 55 P.D. V 15.

<sup>49</sup> H.C. 5221/00, Dahlala Abu Ghardud, *et al.* v. Ramat HaNegev Regional Council, *et al.*; H.C. 7115/97, Adalah, *et al.* v. Ministry of Health, *et al.*; H.C. 3586/01, The Regional Council for Unrecognized Villages in the Naqab, *et al.* v. The Minister of National Infrastructure, *et al.*

however do not request radical remedies to the wider problem and are often solved through out-of-court settlements between the State and the petitioners. This is also the case for petitions related to the allocation of governmental budgets and specific aids, to which the Court has asked the petitioners to limit their requests to precise budget lines. When Adalah contested the repartition of the Ministry of Religious Affairs' budgets in 1998,<sup>50</sup> its petition was deemed too general by the Court. Attacking discriminatory actions by the state is also made difficult due to the fact that the burden of proof lies with the petitioners who can seldom gain access to the necessary information. Another important limit to legal defense is the constant refusal by the Supreme Court to intervene in conflicts in which the State invokes national security. Samera Esmeir<sup>51</sup> explains that Adalah once refused to represent Arab inhabitants of Umm el-Fahm whose lands were to be expropriated by the state in order to build a field for military training. Aware of the low potential of victory of this case in the judicial arena, Adalah advised the inhabitants to use other means of political protest.

Cause lawyers are generally pessimistic on the effectiveness of the victories they have obtained before the Supreme Court. Some of the legal and material remedies granted by the Court are not enforced, due in part to the absence of appropriate mechanisms to ensure the implementation of the Court's decisions. Despite their victory before the Court, the Qa'adans were systematically denied the right to live in Qatzir so that ACRI had to present a new petition before the Supreme Court in order to implement its first decision. Eight years passed before the Qa'adans had their rights enforced. Feet-dragging by the Supreme Court in cases related to the Arab minority has been thoroughly criticized. Generally cautious on these cases with strong political dimension, the Court does its utmost to bring the parties to a compromise so as to avoid a decision that could act as precedent. The Court also takes care not to fundamentally question the state. It is criticized for having developed an extensive rhetoric on equality without having granted the remedies that could guarantee the enforcement of equality.<sup>52</sup> The Court remains in a formal and individual interpretation of equality and of other basic rights, a conception that fits the liberal orientation of its jurisprudence that many cause lawyers of the Arab minority consider to be inadequate to defend the minority in its interactions with the state.<sup>53</sup>

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<sup>50</sup> H.C. 240/98, Adalah, *et al.* v. Minister of Religious Affairs, *et al.*, P.D. 52 (2) 167.

<sup>51</sup> Samera Esmeir, "Resisting litigation in Umm el-Fahem", *Human Rights Dialogue*, 2 (2), 2000.

<sup>52</sup> Gad Barzilai, *op. cit.*; and Youssef Jabareen, *op. cit.*

<sup>53</sup> Gad Barzilai, *Communities and Law. Politics and Cultures of Legal Identities*, University of Michigan Press, 2005.

### **Conclusion. On Judicial Activism and Social Change**

The question whether courts can bring about social and political change has resulted in a large body of literature internationally as well as in Israel. The limitations of judicial activism in instigating deeper social and political changes have been noted by Gerald Rosenberg<sup>54</sup> in the US and further developed by Gad Barzilai<sup>55</sup> in the Israeli context. Social activism, they hold, is a costly method of socio-political struggle. It relies on an elite and utilizes legalistic language and professional norms which make it difficult to translate some social and political problems into litigation. Moreover, in case of victory, the means of enforcement of rulings against the State authorities is weak, and finally, the use of litigation can lead to the de-politization of social movements, as its actors renounce to other means of action. Several social actors and cause lawyers who represent the interests of the Arab minority engage in academic research on these issues and are aware of these limitations. However, they are convinced that their small victories, accumulated over time, will result in significant changes and they will therefore continue to put a lot of effort in these practices. This conviction is corroborated by the study of McCann<sup>56</sup> which showed that judicial activism can lead to significant changes by forcing changes in individual practices and in political norms, rules and agendas. Judicial action, and notably its media coverage, can bring about awareness among the targeted group and the society as a whole, and as such become a boosting factor for collective action.

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<sup>54</sup> Gerald Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?*, University of Chicago Press, Chicago, 2001.

<sup>55</sup> Gad Barzilai, "The Evasive Facets of Law: Litigation as Collective Action," *Adalah's Newsletter*, 10, February 2005.

<sup>56</sup> Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization*, University of Chicago Press, Chicago, 1994.