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The Limitations on the Right to Education before the Supreme Court

By Gadeer Nicola[1]

The right to education is not among the recognized constitutional rights enumerated in Israel's Basic Law: Human Dignity and Freedom – 1992. The Supreme Court has also refused to recognize the right to education as such; in one of its most important decisions on education, the Court rejected the petitioners' arguments that the right is a constitutional right.[2] The non-recognition of the right to education as a constitutional right, and the manner in which the Supreme Court has dealt with the issue, have served to limit petitioners' scope for appealing to the Supreme Court in such matters to two legal claims: discrimination between groups, and the non-implementation of a specific law relating to education. In spite of the significance of these two claims, and the real possibility of forging achievements through them, they are limited. Hence, they cannot, in themselves, provide an answer to all aspects of the right to education in its broadest sense, including the right to choose an education, and the right to influence educational content and teaching programs decided upon by the Ministry of Education. These rights are essential for any society, and especially for a national minority, in order to preserve its culture and history, and safeguard its development.

Discrimination between Groups

In most cases brought before it on the subject of discrimination against the Arab minority in the field of education, the role of the Supreme Court has resembled that of an 'arbitrator.' In this role, the Supreme Court has demonstrated understanding of the extent of the injustice and discrimination which the Arab minority suffers from, and yet at the same time has also accepted the State's arguments. These arguments have essentially revolved around budgetary deficits, the fact that narrowing the gaps between Arab and Jewish students requires time, and that achieving equality through budgetary apportionments is only possible on a gradual basis. The role of 'arbitrator' has made the Supreme Court an intermediary between the two sides – an actor which attempts to find a suitable balance between them.

A glaring example of this approach is provided by the Court's decision on a petition submitted by Adalah in May 1997, on behalf of the Follow-Up Committee for Arab Education and Parents' Committees of Arab Students in the Negev (Naqab) against the Ministry of Education.[3] The petitioners demanded that the Ministry of Education be compelled to implement the Shahar Department's academic enrichment programs equally in Arab and Jewish schools. The Shahar programs, established in the early 1970s, was intended to assist weak students from underprivileged socio-economic backgrounds, by raising the level of their academic achievements and bringing them up to par with the rest of the students in the country. Until the filing of the petition, the Ministry of Education had not implemented any of the Shahar programs in Arab schools, although they were in most need of such programs. In its response to the

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[2] H.C. 1554/95, *Shohari Gilat Organization v. Minister of Education*, P.D. 40 (3) 2.
[3] H.C. 2814/97, *Follow-Up Committee for Arab Education, et. al. v. Ministry of Education, et. al.,* P.D. 54 (3) 233.

petition, the State acknowledged the existence of a policy of discrimination against Arab students in the implementation of the Shahar programs. However, the State argued that the application of the principle of equality, meaning the allocation of at least 20% (the percentage of the Arab population in Israel) of the Shahar budget to Arab schools, should be gradual, and spread over a period of five years. In July 2000, three years after the submission of the petition, the Supreme Court issued its decision. It accepted the State's suggestion of gradual implementation, despite the petitioners' opposition, while at the same time confirming the existence of discrimination against Arab students in the field of education.

In the majority of its decisions dealing with education, the Supreme Court has not relied on the right to education alone. Rather, its decisions have focused on the right to equality, and its central argument has been that discrimination between groups in the field of education is illegal. As a result of the Court's position, the Arab minority's right to education, for example, has become dependent upon the right to education as it is available to the Jewish majority. That is, in order for an Arab student to obtain his right to education, and to the Ministry of Education's various academic enrichment programs, he must provide comparative data showing how Jewish students are benefiting from these programs. Consequently, it is very difficult for an Arab student to petition the Supreme Court relying on the right to education alone.

While there should be reasonable chances for success in petitions concerning 'discrimination between groups' – because of the depth of discrimination entrenched in the Ministry of Education's policy towards Arab students – the Supreme Court's approach in these cases creates many difficulties and obstacles, which in practice make such petitions less likely to succeed. The most significant obstacle is the 'burden of proof' imposed on the petitioners. As a result of the non-recognition of the right to equality as a constitutional right, it is not enough for the petitioners merely to establish the existence of discrimination, in order to shift the burden to the State. In many cases, in addition to demonstrating the existence of discrimination, petitioners must also convince the Court that there is no justification for it.

A clear example of this approach is provided by the Court's decision on the petition of *Adalah v. the Ministry of Religious Affairs*.[4] In this case, the petitioners brought solid evidence, based on governmental and official reports, that all of the religious denominations within the Arab minority in Israel combined received less than 2% of the Ministry's budget. The petitioners demanded equality through the assignment of the appropriate budget to the all of the Arab religious communities. However, this information was not adequate for the Supreme Court. It rejected the petition on the grounds of 'generality', stating that the petitioners failed to put forward a specific and concrete claim, and to establish the existence of special needs calling for the allocation of enlarged budgets. Hence, the Supreme Court was not satisfied with proof of discrimination; rather, it requested that the petitioners bear the entire burden of proof, which included convincing the Court that the discrimination against the Arab minority in the allocation of the Ministry's budget was illegitimate.[5]

A further example of this approach appears in a recent decision in which the Court dismissed a petition filed against the Ministry of Education seeking the establishment of preschools for three- and four-year-old children in two unrecognized villages in the

[4] H.C. 240/98, *Adalah, et. al. v. Minister of Religious Affairs, et. al.*, P.D. 52 (2) 167.

[5] Moshe Cohen, *Critique*, Adalah's Review, Volume 1, *Politics, Identity and Law*, Fall 1999, p. 37.

Naqab.[6] The Court based its rejection on three fundamental arguments brought by the State. The first argument held that building preschools in these villages would lead to a violation of the planning and building laws, since there are no master plans for the unrecognized villages in the Naqab. The Court accepted this argument, despite admitting its awareness that the Ministry of Education had previously constructed buildings and established schools in these villages. The second argument reasoned that the petitioners had failed to demonstrate the basis for their argument that, "The members of the sector were suffering from discrimination in this case *vis-à-vis* the rest of the children in the country, given the limited implementation of the compulsory education law at the state level for all children of the mentioned ages." However, this argument disregards the extensive data brought by the petitioners concerning discrimination in the field of education against Arab children in the Naqab, and the lack of an adequate and suitable educational framework for children, such as preschools. This information was enough to confirm the existence of a special and urgent need on the part of the children of the two villages, and to necessitate their prioritization over the rest of the children in the country. This logic is supposed to be the basis for the gradual implementation of the Compulsory Education Law: to prioritize those who have been discriminated against. The third argument accepted by the Court contended that the petitioners did not prove that children from these two villages face difficulties in accessing existing preschools in neighboring villages. This argument was accepted in spite of the fact, as stated in the decision, that it was unclear from the State's response whether or not the Ministry of Education intends to finance their transportation to the preschools in neighboring villages. The Court further added that the petitioners did not present adequate factual grounds relating to the impact on the children's access to the preschools, should the Ministry not fund their transportation costs.

The two aforementioned decisions reveal that the Supreme Court adopts an overly-flexible approach to the issue of discrimination. Official data revealing that gaps exist between the national minority and the majority does not satisfy the Court; nor does it accept the argument that such gaps are a symptom of systemic failure. In general, the Supreme Court does not view itself as 'indicting' a State policy, so long as the State makes no clear 'confession'. The recognition of the right to equality or the right to education as a constitutional right would have required, in cases where petitioners present clear evidence indicating discrimination, that the Court transfer the burden of proof to the State, and oblige the State to prove that the claim is unfounded, or the discrimination in question justified. Such a shift would be proper, particularly when the discrimination identified by the petitioners is based on national or ethnic belonging, as this category of discrimination in particular is thought to create doubt, and the burden of proof which falls on the State in such cases is weightier.[7]

Non-Implementation of the Law

The second cause which can open the doors to the Supreme Court relates to cases where the State fails to implement the law. An example is furnished by a recent decision on a petition dealing with the rights of children with special educational needs.[8]

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[6] H.C. 5108/04, *Ismail Muhammad Abu Goda et. al. v. Minister of Education, et. al*., decision not yet published, delivered on 9/9/2004.

[7] Tribe, *American Constitutional Law* (1988), pp.1465-1474; Strauder v. West Virginia, 100 U.S. 303, (1880); Law Society of British Columbia v. Andrew (1989) 56 D.L.R. (4th) 1; Egan v. Canada (1995) 124 D.L.R (4th) 609; Miron v. Trudel (1995) D.L.R. (4th) 693; and Thibadeau v. Canada (1995) 124 D.L.R. (4th) 449.

[8] H.C. 6973/03, *Liat Natan Martziano et.al. v. Finance Minister, et. al*, decision not yet published, delivered on 24/12/2003.

This decision provoked widespread debate, especially within governmental and ministerial quarters, about the extent of the Supreme Court's authority to interfere in budgetary matters, and issue decisions making changes in budgetary allocations. The petitioners in this case demanded that the Ministry of Education be obligated to implement Amendment 7 to the Special Education Law – 1988, which requires the Ministers of Education and Finance to allocate budgets on a gradual basis, year by year, to increase the number of students with special needs who are taught in regular schools.

In response to the petition, the State argued that, under Amendment 7, the authority for determining budgetary amounts lies with the Minister of Finance, and that these sums are to be allocated so as to realize the gradual implementation of the law as specified by the amendment. The State suggested that, because of economic difficulties and reductions in the budgets of government ministries in general, and of the Ministry of Education in particular, the implementation of the amendment would require the designation of a sum of NIS 250 million, to be distributed gradually over a seven-year period. The state also announced during the first academic year a sum of NIS 35 million would be assigned to the program.

The Court rejected the State's arguments, deciding that, although the amendment takes budgetary restrictions into account, and is therefore to be implemented gradually, the State's powers are limited in this instance. The Court relied on a letter sent prior to the filing of the petition by the Minister of Education to the Minister of Finance, in which she indicated the budgetary amount necessary for the implementation the amendment. Based on this letter, the Court ruled that the amount the government intended to apportion was, "… a meager sum compared with the estimates of the Ministry of Education's specialists, and a budget which would preclude even a minimal realization of the right to education." Accordingly, the Court ruled that the State must immediately allocate a sum to guarantee the implementation of the law, albeit on a minimal level, as reflected in the Minister of Education's letter. In the same letter, the Minister of Education stated that there exists a need for a minimal plan to achieve the gradual implementation of the law. According to the Minister, the initial cost would be NIS 600 million, spread over five years, starting from the next academic year, at a cost of NIS 120 million.

In response to this decision, the Attorney General requested a second hearing. The central argument raised by the State was that the decision represented a legal precedent, entailing, "… changing all basic rules concerning the manner in which the Court, through its decisions, interferes with the State's budget, by determining a concrete and minimal designation, to the extent of identifying specific sums for the executive branch to allocate." The State continued that the rule contradicts, "… a long-standing rule of the Court, whereby the Court does not instruct the government how to allocate or distribute its resources", and that it involves, "… a significant shift in the relationship between the judicial and executive branches."[9] The Supreme Court, however, rejected the State's request, deciding that no legal precedent had been set, and that the Court had not decided a specific sum to be allocated in order to secure the implementation of the law.

The Supreme Court, as mentioned above, decided that the State should allocate, "… a sum which will be sufficient for the minimal implementation of the law, in the spirit of the annex to the Minister of Education's letter to the Minister of Finance." These words should be understood these words as referring to a 'numerical approximation,' and not

[9] H.C. 247/04, *Finance Minister, et. al. v. Liat Natan Martziano*, not yet published, decision delivered 10/5/2004.

the specific sum mentioned in the letter. That is, the decision afforded the Ministry of Finance adequate freedom to determine the exact sums necessary, albeit that this freedom is not absolute, and is to be governed by the sums mentioned in the Minister of Education's letter.

The significance of this decision relates to the issue of the Supreme Court's interference in financial considerations and the establishment of budgetary amounts, and how these are to be allocated in particular cases. Indeed, this decision is one of few in which the Court has boldly dealt with claims of budgetary shortages and restrictions. Nevertheless, the 'innovation' of the Supreme Court's decision should not be overstated, for a number of chief reasons. The first reason is that the Supreme Court dealt with this case as a matter of the 'rule of law', implementing and enforcing the exact wording of the law. The second reason relates to the identity of the petitioning group: children with special needs. This group is perceived by the Court as a 'neutral group', which does not arouse or invite 'political problems'. The third reason concerns the fact that the Supreme Court relied on the Ministry of Education's own previous recommendations, in the form of the Minister's letter, in setting the amount required to safeguard the right to education on a minimal level. That is, the Court found support from within the Ministry itself, something which always makes the Supreme Court's task easier.

Clearly, this third reason does not apply in most petitions brought before the Supreme Court in the field of education. Generally, the petitioners are unable to indicate a specific sum which the Ministry of Education should appropriate in order to fulfill the right to education, or for the implementation of any particular educational program. This 'weakness' in the petitions is the source of the Ministry of Education's strength. The Ministry is considered by the Supreme Court as the body with the greatest expertise on the subject of education, and on existing budgetary resources. Furthermore, the Supreme Court views the Ministry as more capable than the petitioners, and even the Court itself, of determining the budgetary allocations necessary for the implementation of the law and the fulfillment of the right to education, as well as the timeframe needed for their allocation. This perception, and the great weight that the Court ascribes to the Ministry of Education's expertise, and the reliability of its arguments, is dubious. It raises questions, for the simple reason that it is the Ministry itself against which petitions alleging discrimination or denial of rights are filed. These questions become even more pressing given the Ministry's dismal current and past record regarding its commitment to the rights of education and equality, and lead to the conclusion that the Supreme Court must be less reluctant exercise its powers of judicial intervention.