The Dilemma of Serving Two Masters:  
*The Impact of Lawyers' Professional Morality on Outcomes in Litigation*

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Note for the Readers: The paper is based on a chapter from a book on government lawyers in Israel I'm currently working on. Accordingly, I present a short background (p. 2-5) to provide the context for the readers.

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Background

A. The Israeli High Court of Justice (HCJ)

The High Court of Justice (HCJ) is one of the functions of the Supreme Court of Israel. When a civil or criminal dispute arises in Israel, it normally makes its way into a County Court and then - on appeal - to a District Court. Only a handful of such cases reach the Supreme Court as a third instance of cassation. The Supreme Court also functions as an appellate court for cases involving serious criminal offenses or civil disputes in which the value of the claim is particularly high. Such cases will make their way directly to a District Court and then, on appeal, to the Supreme Court. If, however, the dispute - no matter how minor and ordinary - concerns a public agency exercising its legal powers, it is brought directly before the Supreme Court, and is resolved by this Court with no possibility of appeal. Therefore, the Supreme Court in Israel serves, in fact, in three different capacities: as a court of cassation, as a court of appeal and as a court of first (and last) instance for judicial review cases (HCJ).

The fact that the Court serves a triple function has wide implications on its caseload. The Israeli Supreme Court is an extremely busy judicial institution. The 14 judges, sitting normally in panels of three, have to cope with thousands of cases brought before them each year. For example, in 1993, the Court dealt with over 1,400 appellate cases, a similar number of cassation cases and over a 1,000 other lawsuits, apart from the 1,171 HCJ petitions which were disposed by it during that year. The number of cases increases constantly each year. On 1996 the number of petitions disposed by the HCJ rose to 1821 and after 2000 the number of petitions per year exceeded 2000.

The procedures in the HCJ are characterized by simplicity, brevity and expediency. Ease of access to the Court is assured by minimal court fees and by the lack of cumbersome formal requirements. A petition to the HCJ can be written by a layman, and at no stage of the proceedings is representation by a lawyer required. Any person

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1 In 2000 a reform has been conducted in the structure of public law litigation and various categories of litigation have been placed under the jurisdiction of the district courts (The Administrative Court Act, 2000). Still, the HCJ serves as the principal court for judicial review in Israel.
who has reason to believe that a particular public agency denies her legal rights may petition the Court and apply for a conditional order (order nisi). A single judge reviews the petition. The judge may order a preliminary hearing before 3 justices to take place, requiring the respondent to supply the Court with a concise statement as to the reasons and background for the relevant governmental action. Alternatively, the judge may issue a conditional order (order nisi), requiring the respondent to appear in Court and show why a particular action should or should not be performed. A full hearing before three judges would then be held before the Court reaches its final decision. Hearings are based on the parties’ affidavits on behalf of and on their oral arguments. Oral testimonies as well as cross examination are usually not allowed. The Court is able to grant petitioners immediate relief and to issue orders and injunctions, either interim or absolute, at any stage.

B. The High Court of Justice Department in the Ministry of Justice (HCJD)

The Government of Israel is represented in all judicial proceedings by the Attorney General of the State. In the HCJ, the Government is represented by lawyers belonging to a department specializing in litigation before the HCJ: The High Court of Justice Department (HCJD). This department is part of the office of the Attorney General (OAG). It is a small department, currently composed 25 lawyers in charge of the representation of public agencies belonging to the Central Government of Israel, including ministries, governmental departments, the army (and any other security agency); the police; and many other public corporations (other than local authorities, which are represented in Court by their own lawyers). The Department, however, does not represent local municipalities (and other administrative agencies outside the central government of Israel). Those agencies are represented in the HCJ by their own house lawyers (or by private lawyers hired for that purpose).

The Department enjoys a high degree of independence from overt political pressures. The staff is nominated by the General Prosecutor (herself not a political nominee) solely on the basis of professional skills, and serves under her supervision.

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2 The vast majority of cases dealt with by the HCJ are disposed at the stage of the preliminary hearing without any conditional order being issued. According to the data of the Central Bureau of Statistics of Israel, out of 4,266 cases disposed by the HCJ between 1985-1993, in only 886 cases was an order nisi issued.
and under the instructions of the Attorney General\(^3\). All the lawyers in the department, much like their colleagues in all other departments of the Attorney General's office, are career civil servants. They join the public service sector at an early stage of their professional career, normally after completing their legal training. They normally serve in the Department for a long period of time and, in most cases, leave the Department for a senior job within the Ministry of Justice or for the bench.

The lawyers in the Department enjoy a considerable amount of prestige both within and outside of the bureaucracy. For their colleagues within the Ministry of Justice, these lawyers are the sole who appear before the Supreme Court, and are those who "control" the important arena of public law litigation. Bureaucrats within the various departments of the administration respect them as their representatives in Court. From the point of view of the public at large, the HCJD staff enjoys some of the glory of the HCJ itself.

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**Methodology**

The initial idea for this book came to me when I served for 6 months in 1994 as a lawyer at the HCJD. My stay at the Department gave me ample of opportunity to study from inside the working practices of the HCJD (and to some extent other departments in the OAG office). The materials gathered during the period of this participant observation were complemented throughout the years by several in-depth interviews with HCJD members (past and present), other lawyers within the OAG, judges, bureaucrats and lawyers in governmental agencies whom the HCJD represents in Court and lawyers in NGOs who often face the HCJD in court. The Department also gave me access to various documents including reports, internal files, memos and statistics it used during its regular course of operation. The 'price' for this easy access was my commitment to keep the names of all my interviewees coded and to receive

\(^3\) The Attorney General in Israel is nominated by the Government and serves as its legal advisor. Unlike in England, she is not a member of Cabinet, and, unlike in the federal system of the United States, the position is not considered a political one, and the nomination is not understood to be influenced by partisan affiliations or ideological inclinations. Rather, the Attorney General is assumed to be the unbiased guardian of the rule of law, and is answerable to the principles of the constitution alone. Recently, the Government made an attempt to appoint to this position a lawyer who was a party member and involved in political activity. The appointment was met with an almost unprecedented wave of public criticism and was challenged immediately in the HCJ. As a result the nominee was forced to resign (See, e.g. Alon and Verter 1997; Markus 1997).
the Departments permission to the publication of any contents of its internal materials (occasions of refusal for permission to use such materials were rare and in my opinion insignificant to the overall results of the research).

The quantitative parts of the research are based primarily on a large sample of HCJ files. The sample includes over 1000 HCJ files from the Nineties and around 600 files from the Seventies which compose around 10% of all court files during these periods. The HCJD represent the respondents in over 70% of all cases in our sample while in the rest the respondents (mostly local municipalities) are represented by other lawyers. The sampling process was conducted on actual court files located in the Supreme Court archives. This method of sampling is extremely cumbersome and onerous but it gave us the possibility of achieving maximum information on the files sampled. Each file is coded according to a large number of factors including the identity of the judges, the parties to the litigation, their lawyers, their ethnic and institutional affiliation and so forth. The database also includes ample information about the whereabouts of the litigation: its duration, its subject matter, its outcome, the content of the pleadings, remedies etc. This method of sampling also enabled us to study not only cases that were disposed by court decisions but also cases disposed by out-of-court settlements and to accurately codify the content and conditions of settlements. In addition we also created a sample of internal adjudicative files which are disposed by the HCJD itself (pre-petitions) (which will be discussed in Chapter 6).

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4 I currently conduct a similar sampling process on cases from 2000 to 2010.
Chapter 4: The Dilemma of Serving Two Masters

The work of government lawyers is intertwined with an inherent tension between the lawyers' commitment to the client-agency they represent in court and their commitment towards broader values, such as the rule of law and the public interest. On the one hand, when representing government agencies in court, lawyers should presumably act – like any other lawyer within the adversary setting – to promote the best interest of their client. On the other hand, as the representatives of the government before courts of law (and indeed, as government agents at large) there is an expectation that government lawyers bring into consideration interests wider than the immediate concerns of the government agency at stake. There are various views regarding the way in which this dilemma should be resolved. Few, however, would deny its very existence.

This chapter discusses the dilemmas involved in government lawyering in the context of the HCJD. I begin by presenting some hypothetical test-cases that illuminate these dilemmas. Then I examine these test-cases from the point of view of various theories on government lawyers' professional, ethical, and constitutional commitments. The theoretical overview is followed by a detailed empirical description of the views and practices espoused by the HCJD. I argue that, since the early 1980s, the HCJD has developed a model of lawyering that gives prominence to the commitment of government lawyers towards the broad ideal of the "rule of law" at the expense of their immediate commitment towards their client-agencies (the Rule of Law Model). Then I examine possible justifications for the existing model of lawyering in the HCJD from a critical point of view. I further examine the links between this model of lawyering and the rise of judicial activism in Israel during the 1980s, and discuss the causes and alternative options for that model. In the last section I investigate the extent to which the professional ideology of individual lawyers influences actual practices and outcomes in litigation, and do so by using a quantitative analysis of outcomes in litigation in HCJ files.

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5 See generally the discussion in the Introduction to this book text after note 6*.
6 See Chapter II Section *. 
I. Theoretical Overview

1. Three "Hard Cases"
Let us consider the following three hypothetical cases:  

Case A (information disclosure): A government lawyer represents the Ministry of Transport in a petition against a decision to refuse an operation license to a public carrier. During her preparations for trial, the lawyer learns that there were significant flaws in the decision-making process. She also knows, however, that, due to the procedural limitations of the judicial review process the chances that the other party would obtain knowledge of these flaws are negligible. Should the lawyer come forward and disclose information about those flaws in her brief to the court?

Case B (procedural defenses): Let us assume now that those serious flaws in the decision-making process are evident, and might well have brought about judicial intervention to strike down the administrative decision. The petition, however, was submitted beyond the time-limits set by the procedural regulations of the reviewing court. Should the government lawyer raise the preliminary procedural defense in order to fail the petition or should she waive her right to do so?

Case C (frivolous positions): A government lawyer represents the Ministry of Education in a case questioning the legality of governmental appropriation to a private school that espouses discrimination on the basis of gender. A few months before the petition was issued, the Supreme Court ruled anonymously that the appropriation of public funds to a private school – under similar circumstances – was unconstitutional. Should the lawyer take the case to the court and defend it?

Had we discussed these three cases from the point of view of lawyering in the private sector, none of them would have raised any serious ethical, moral, or practical

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dilemma. As a private attorney representing (say) a private corporation in litigation, no ethical obligation whatsoever devolves on the lawyer in Case A to expose in court (damaging) information revealed to her by her client (in fact, she would have probably violated her duty of confidentiality towards her client had she done so). Likewise, it would be her professional duty to raise any procedural defense at her disposal in order to bring about the dismissal of the petition. There is also hardly a question that (as, for example, the representative of the private school in Case C) it was her right (if not her duty) to forcefully argue the case (at her client's request) even though she believes that her chances to succeed the court are nominal.

The discussion's point of origin is, however, that government lawyers are presumed to differ from private lawyers. Therefore, questions that receive straightforward answers in the case of private lawyers might receive very different ones in the case of government lawyers or, at the very least, even if we end up with the same answers, they cannot be given straightforwardly and without a careful examination of the complicated considerations involved.

2. Identifying the Client
One common methodology for dealing with dilemmas regarding government lawyers is to identify the lawyer's client. The point is, of course, that in the case of the


9 See Lon L. Fuller, 'The Adversary System' 3 Forum Lectures 1, 2 (19***) ("...it is perfectly proper for a lawyer to undertake in a criminal case the defense of a man whom he knows to be guilty."). For the situation under the ethical codes in the U.S. see e.g. Lancot, supra note 7, 962-64; 'Note: Rethinking the Professional Responsibilities of Federal Agency Lawyers', 115 HARV. L. REV. 1170, 1174 (2002) (hereinafter: Note-Harvard 2002). For the duty of zealous advocacy in the U.K. see Boon & Levin, supra note at 29 et seq. For the law in Israel see Sec. 54 of The Lawyers Bar Law 1961 ("...A lawyer shall act for the benefit of the client with loyalty and devotion, and shall help the court to do justice"). See also Limor Zer-Gutman, The Lawyer's Duty not to Mislead the Court" 24(2) Iunei Mishpat 462 (2000) (Hebrew).

government lawyer identifying the client is not always a simple task.\textsuperscript{11} One possibility is that the "client" is the government \textit{agency} who is represented by the lawyer in the \textit{specific case} (such as the Ministry of Transportation in \textit{Case A} above).\textsuperscript{12} Another view is that the client is \textit{the government a whole}, embodied in the head of the executive branch or the agency \textit{to which the lawyer belongs}.\textsuperscript{13} Yet a third approach would submit that the government lawyer represents "\textit{the public at large}" or "\textit{the public interest}".\textsuperscript{14}

The implications of choosing each of these alternatives for the duties of the lawyer in each of the three hypothetical cases are noteworthy. In \textit{Case A}, if the lawyer owes fiduciary duty to the public at large and not merely to its client agency, she may be under duty to disclose information regarding the agency's wrongdoing and to assist


\textsuperscript{12} See \textit{e.g.} Lanctot, \textit{supra} note 7; Geoffrey P. Miller, \textit{Government Lawyers' Ethics in a System of Justice}, 54 U. CHI. L. REV. 1293 (1987); \textit{*Paulsen 1998}, 85-86

\textsuperscript{13} \textit{*See e.g.} Robert P. Lawry, Who is the Client of the Federal Government Lawyer? An Analysis of the Wrong Question, 37 Fed. B.J. 61 (Fall 1978), at 66 ("The client of the federal government lawyer is the federal government."); see also James R. Harvey III, Note, Loyalty in Government Litigation: Department of Justice Representation of Agency Clients, 37 Wm. & Mary L. Rev. 1569, 1575-76, 1594 (1996) (noting that "the Solicitor General[s] ... client is most often the government as a whole, or the executive branch in particular, rather than an individual agency"). In the United States this approach is often identified with the concept of 'unitary executive', see Neal Devins, 'Unitariness and Independence: Solicitor General Control over Independent Agency Litigation', 82 CAL. L. REV. 255 (1994). In Israel, much like in the federal system in the United States, government agencies are not represented in courts by their own 'house' lawyers but by a special agency that specializes in litigation (i.e. the Department of Justice in the U.S. and the Office of the Attorney General (OAG) in Israel), see Chapter II Section B [\textsuperscript{14}Text after note 17]. This means that the 'client' may be the Attorney General or the head of the executive, i.e. the Prime Minister. It should also be noted that the Attorney General in Israel is not appointed by political preferences of the government and thus enjoys a relatively higher degree of independence vis-à-vis the government than in the U.S. (see Chapter II Section B [\textsuperscript{14}Text after note 26]).

\textsuperscript{14} \textit{See e.g.} Steven K. Berenson, 'Public Lawyers, Private Values: Can, Should, and Will Government Lawyers Serve the Public Interest?' 41 \textit{B.C.L. Rev.} 1329 (2000); Steven K. Berenson, The Duty Defined: Specific Obligations that Follow from Civil Government Lawyers' General Duty To Serve the Public Interest, 42 Brandeis L.J. 13 (2003); Bruce A. Green, Must Government Lawyers "Seek Justice" In Civil Litigation?, 9 Widener J. Pub. L. 235, 235-37 (2000); Ugarte, \textit{supra} note 10 at 274. For several manifestations of this approach in judicial decisions in the U.S., see Clark, \textit{supra} note 8 at 1050 and note 69 \textit{id}.
the court to reach decision on the basis of the maximum information.\textsuperscript{15} Likewise, in \textit{Case B}, the general public interest may require that illegal administrative decisions should not persist, and therefore, forgoing the procedural defense could be considered the proper avenue for promoting the public good.\textsuperscript{16} While in \textit{Case C}, adopting the view that the lawyer represents the interest of the executive at large or the "public interest" may lead to the conclusion that the lawyer should refrain from going to court to argue a frivolous case, since this would be regarded as an improper waste of government resources.\textsuperscript{17} Moreover, providing zealous advocacy for frivolous cases may end up by eroding the government representatives' credibility in the eyes of the judges, and thus compromise the government's overall stature in litigation. Thus, if the client is "the government as a whole," the lawyer should refrain from adopting such a course of action.\textsuperscript{18}

3. Identifying Commitment

The above discussion seems to point to the deficiencies of the methodology that strives to answer questions regarding the commitment of government lawyers through the process of identifying their single ultimate "client." One problem with this approach is that it is often difficult to identify the exact "client," since government lawyers are often presumed to owe duties to multiple entities within the government (and, sometimes outside it). Therefore, at the practical level, such an approach does not provide a simple and effective solution to dilemmas of the sort presented above.\textsuperscript{19} In addition, it seems that the methodology of identifying "a client" is based on the assumption that the dilemmas of government lawyers should be dealt with in the

\begin{itemize}
\item \textsuperscript{15} See generally 'Note: Government Counsel and Their Obligations' 121 Harv. L. Rev. 1409 (2008) hereinafter: Note-Harvard 2008 (suggesting government lawyers should serve as gatekeepers); Clark, \textit{supra} note 8 (suggesting that government lawyers owe special duties of disclosure of information despite ethical duties of confidentiality).
\item \textsuperscript{16} See e.g. Schnapper, \textit{Legal Ethics and the Government Lawyer}, 32 RECORD 649, 658 (1977) (suggesting that every government lawyer has responsibility to scrutinize "the validity of the conduct or contention he or she is asked to defend." And see Note: 'Development in the Law: Conflict of Interest in the Legal Profession', 94 Harv. L. Rev. 1217, 1413, 1421 (1980-1981).
\item \textsuperscript{17} See Donald L. Horowitz, \textit{The Jurocracy} (Washington D.C., Lexington Books, 1977) at 47-48
\item \textsuperscript{18} See Horowitz \textit{id.} at 45-46 and 64-65; Michael Hertz and Neal Devins, 'The Consequences of DOJ Control of Litigation on Agencies' Programs', 52 Admin. L. Rev. 1345 (2000).
\item \textsuperscript{19} See Lawry, \textit{supra} note 13; Clark, \textit{supra} note 8 at 1056; Note: 'Government Counsel and their Obligations' 121 Harv. L. Rev. 1409, 1413 (2008) (hereinafter: Note – Harvard 2008).
\end{itemize}
narrow context of the ethics of the legal profession. Arguably, however, the dilemmas of government lawyers have broader implications for the way governments create and enforce policies, for relationships between the executive and the judiciary, and for the commitment of government agencies towards the public at large. Therefore, when discussing that commitment, one should also bring to the table various considerations of constitutional law and public policy.

Accordingly, I believe it is useful for the purpose of the current analysis to discuss the commitment of government lawyers by contrasting two principal models of lawyering: The first is the "regular" (adversarial) lawyering model under which the lawyer is primarily (and perhaps ultimately) committed to the interests of her immediate client in the litigation (also known as "the single-client model"). The second is the "public interest" lawyering model under which the lawyer is committed to a wider set of concerns. Admittedly, the use of these two models does not exhaust all the various ramifications of the above-presented dilemmas, nor do I purport to resolve all complicated questions regarding government lawyers in general by using them. For the purposes of the current analysis, that deals with the dilemmas of lawyers representing the government of Israel before the Supreme Court, I believe that the suggested framework is suitable for presenting and discussing the most crucial aspects of these dilemmas. At the bottom line there is one persisting question that these lawyers must answer: "Do I have to act like any other (private) layer – or does the fact that I represent the government require me to go beyond the "lawyering" perspective and consider wider ("public") interests?" In the following section I describe the ways in which lawyers in the HCJD answer this question.

II. Empirical Overview: The Dilemma within the HCJD

Interviews with veterans who served in the HCJD during the 1960s and 1970s suggest that the members of the department never considered themselves as mere "hired guns" who strove to win the case for the government in court, at all costs and regardless of any consideration. The notion that as the representatives of the State of Israel before the High Court of Justice they are "officers of the court" committed to promoting the "public interest," has always been part of the heritage of the OAG office, and the

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20 See Miller, supra note 12.
Department was no exception. The practical implications of this notion seem, however, to be rather limited during that period. The Department always espoused a practice of full disclosure of all information at their disposal in court, and regardless of the question whether such evidence would have been disposed had they chosen to do otherwise. Procedural defenses, on the other hand, were presented by the HCJD's members in court on a regular basis (and regardless of the merits of the petition at stake). Cases in which lawyers clashed with client agencies over the question whether to defend the agency's (frivolous) position in court were rare. And, even in those cases, the HCJD's objections were directed more to the concern that the litigation would end up with a precedent damaging the government's overall position, or that the Department's professional credibility in court would be compromised, than with any broader sense of ideological commitment to "the public interest." On occasion, lawyers felt that their personal morality prevented them from defending a certain agency decision. The consequence was either a process of "negotiation" with the client, with mutual attempts to persuade the other party to accommodate its position or, in rare cases, an appeal to the higher echelons of the OAG to sort out the problem (sometimes by assigning another lawyer to argue the case). If one has to encapsulate the various pieces of information and different personal views presented in these interviews into one picture relevant to the conceptual framework discussed here, the bottom line seems to point to a very "restrained" model of "public interest" advocacy at that time.

The practices and ideology of the HCJD began to shift in the early 1980s with the rise of judicial activism in the HCJ. The changing of the guard in the Supreme Court (most notably with the appointment of Justice Aharon Barak) was followed by rapid developments in public law. At the procedural level, the court eliminated central access doctrines such as standing and justiciability, and significantly curtailed (or softened) other procedural barriers, such as time limitations. At the substantive level

22 See Chapter II [*Zamir quote]
23 Interview with MA (11.10.99); Interview with NM (7.3.979); Interview with IO (27.12.99) and Cf. Horowitz, supra note 17
24 Interview with MA (11.10.99); Interview with NM (7.3.979); Interview with IO (27.12.99); Interview with LN (24.5.99); Interview with MA (11.10.99). Cf. Horowitz, supra note 17, 45-46.
25 See Chapter II Section E-3.
it rapidly widened the scope of judicial review. Most importantly for our purpose, it reversed the old doctrine that practically exempted decisions by the Attorney General (and OAG) from judicial review and ruled that all prosecutorial (and other) decisions by the Attorney General would be fully subjected to review in court.27

The changing of the guard in court was accompanied by a similar process in the OAG itself. Yitzhak Zamir, a colleague of Barak at the Faculty of Law at the Hebrew University (and a close friend) took office as Attorney General.28 Dorit Beinisch, one of Barak's closest allies at the OAG, took office as the Head of the HCJD.29 The dramatic expansion of judicial review exerted significant pressures on the HCJD. From Barak's point of view, judicial review was not merely a process in which the court disposes "cases and controversies" between two opposing parties - a private individual and governmental agency.30 Judicial review was rather an opportunity for the Court to review the legality and "reasonableness" of government policies. This shift in the Court's policies called for a far wider role for the government representatives. In order to exert its full leverage over the administration, the court needed active assistance from the HCJD. Assistance meant providing the court with full and reliable factual setting that would facilitate expedient disposition of the case; helping the court to ease its rapidly growing docket pressures31 by screening out cases that could be effectively settled without trial;32 sorting out effective administrative solutions to ensure enforcement of major policy reforms ensuing litigation and so forth.33 All these missions could hardly be carried out by government lawyers who view themselves (even remotely) as "hired guns" for their client agencies.

The changes in the HCJD's practices and ideological perceptions did not occur overnight and were accompanied by some resistance and internal opposition.34 By the start of the 1990s however, the HCJD was already fully espousing a very different

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27 See Chapter II Section B [*text near note 36]
28 See Chapter II Section E-2 [*text after note 91]
29 See Chapter II. Beinisch was later appointed as a Deputy AG (a position from which she retained considerable influence on the HCJD, see Interview with NM (7.3.979). Both Zamir and Beinisch were themselves appointed to the Supreme Court after the completion of their service at the OAG.
31 See Chapter I Section B-1.
32 See Chapter III Section II-C-2.
33 See Chapter V*- SORTING THINGS OUT
34 *See Chapter II Section E-2 and see Section IV-A below text after note 78 infra.
model of lawyering, a model that I call "The Rule of Law" model of lawyering. Under this model, the government lawyer does not merely express some vague commitment to interests wider than her client agency's interest to win the case in court. Rather, the government lawyer is expected to facilitate the process of judicial review over its client's decision – as one of her principal professional duties.

How does this model work in practice? Let us now demonstrate some of its parameters by using the three "hard case" examples cited above.

A. Disclosing Information

I noted earlier that for HCJD members, withholding information from the court had never been an option (and regardless of the question whether the other party could gain access to such information). One obvious reason for the government lawyer to provide the court with the fullest factual setting of the case is that by doing otherwise she risks losing her credibility and damaging her professional reputation in the eyes of the judges. Given the court's high expectations from the lawyers under the "rule of law" model, the fact that the HCJD is a small group of elite lawyers who appear before the justices on a daily basis, and that the career structure of HCJD members means that they often ultimately join the bench – it is not difficult to understand why any option other than a full, thorough, and reliable disclosure of all the facts – is completely off the table. In the words of one lawyer I interviewed:

"It is a million times more important for me to retain the Court's trust in me than to win a certain case".

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Given the ambitious role adopted by the HCJD on the factual level, the question arises whether the client agency would be willing to expose all information to the representing lawyer. Members of the Department insist, however, that they not only provide the court with all the information they receive, but also make sure that this

35 See Section II above text near note 22.
36 * Chapter II Section E-2 text near note 103.
37 * Interview with TL (7.7.97). and see Yoav Dotan, 'Judicial Rhetoric, Government Lawyers and Human Rights: The Case of the Israeli High Court of Justice during the Intifada' 33 (2) Law and Society Review 401, * (1999). See also interview with AN (16.6.97); "It is certainly not my goal to win as many cases as I can…my goal is…I don't know…to bring the state to act properly…".
information is complete and accurate by \textit{investigating} their clients in any case of uncertainty or omission. As one lawyer observed:

We don't put up with the role of "a pipeline" [of information]. We…check the facts thoroughly…There is no case in which I think that [the agency] isn't revealing the facts, and I continue. I stop. There is no case in which I suspect that I'm not revealing the whole story to the Court…I check the file, I question the client…all [agency] members involved…I don't purport to say I know everything in every case but I think I can fairly say that generally the real factual setting, as seen from the point of view of the agency, is presented in court.\footnote{Interview with INZ (3.9.97)}

\textbf{B. Procedural Defenses}

I noted earlier that during the 1980s the HCJ severely curtailed and softened most access doctrines in judicial review. Under the new doctrine of \textit{standing}, cases could be brought to judicial review even when the individual petitioner herself had not sustained "personal injury" but was merely a "public petitioner" bringing some general governmental policy or abstract constitutional question to judicial review.\footnote{See Chapter I Section C-2 [*text after note 63]} Likewise, the Court softened the rules concerning time limitations, and discarded strict formal procedural rules of governmental immunity from judicial review.\footnote{See note 26 \textit{supra} and text.} Obviously, the shift in the Court's doctrine had a major impact on the ability of the HCJD to make use of procedural defenses in Court. The question was not whether the lawyers \textit{wanted} to use such weapons, but whether they \textit{could} do so under the new judicial policies; as one lawyer observed:

In one [major constitutional] case I could argue that the case became moot… I didn't want to raise the argument…It was crystal clear to me that the Court would have no interest to deal with it… I didn't argue it in my brief. I just avoided it. But on the day of the oral hearing for interim injunction, the Treasury [i.e. the client agency],

\footnote{Interview with INZ (3.9.97)}
\footnote{See Chapter I Section C-2 [*text after note 63]}
\footnote{See note 26 \textit{supra} and text.}
"stood on their hind legs" and insisted that I raise the argument. I said: OK. I'll raise it, just so you know that if they rule against us [on the interim injunction] I exhausted all options. And indeed, I started arguing this and immediately Justice Barak expressed his discontent [and I backed off]…

All this is not to say that after the 1980s the HCJD stopped raising in court procedural defenses or arguments based on access doctrines. But the decision to raise such arguments involved no professional or moral dilemma since the lawyers knew that, in any case, the fate of the case could hardly be decided solely on formal procedural grounds. Moreover, given the new doctrines of judicial review, the decision to raise such arguments, based on old precedents was, in many cases, equivalent to the adoption of frivolous legal position, an issue that is now discussed.

C. Defending Frivolous Positions

Issues regarding disclosure of information and raising procedural defenses seem to be quite settled under current legal doctrine and professional practice. However, the question when and to what extent the HCJD should defend in court positions that it considers frivolous appears unresolved, and is the source of many disagreements within the Department. Two important factors contribute to this state of affairs.

The first major factor is the considerable powers that the Attorney General holds vis-à-vis the government with regard to both the question of asserting the right interpretation of the law and the issue of representation in court. Under the presiding legal doctrine – shaped by the HCJ during the 1990s – the Attorney General is authorized to read the law and interpret it, and his reading is binding on all governmental agencies (unless and until the Supreme Court itself overrules him). The AG (and the OAG) also holds – under current doctrine – a full monopoly in representing all government agencies before the Court. Thus, under the Court's ruling,

41 Interview with TL (7.7.97)
42 Chapter II Section B [*text near note 11]*
the AG may refuse to defend a given government case in court, and should he do so, the government is not entitled to representation by any other lawyer.\footnote{Chapter II Section B [*text near note 18]. For cases in which the Solicitor General in the U.S. refused to represent, see Lincoln Caplan \textit{The Tenth Justice} (N.Y., Knopf 1987) at 34 \textit{et seq}; Note-Harvard 2002, \textit{supra} note 7, 1190.}

Obviously, this state of affairs leaves government agencies in a rather awkward position when facing the HCJD. On the one hand, the agency is a captive client.\footnote{\textit{Cf.} Horowitz, \textit{supra} note 17 at 5.} Yet on the other, as a client, it is subjected in principle to its lawyers' decision whether and under what conditions they are to bring its case to court. It should be noted that the power of the AG to refuse representation has been used only on rare and exceptional occasions,\footnote{Chapter II Section B [*text and note 23].} and the lawyers of the HCJD are well aware that the implications of resorting to such a solution are severe. However, the very existence of this power seems to serve as a framework for the give-and-take process that often occurs between the agency and the representative lawyer over which strategy should be applied to deal with the case, as one lawyer observed:

\begin{quote}
We are not a bunch of "prima donnas" who don't defend hard cases or take to court only cases we think are likely to succeed. We appear in a large variety of cases that involve politics, with many constraints. There are circumstances in which even if you think the chances are slim the client is entitled to representation… If, according to our legal analysis, the minister's position can be defended as a valid position, then… even if we aren't enthusiastic about it, we'll defend. If, on the other hand, we are convinced that his position won't stand review, I think it is our job to say so, and \textit{we say so loud and clear}. Whenever the disagreement is with the ministerial level, and it does not end up with some agreement between us, then we refer it to the AG to hear all parties and reach the \textit{final} decision. (emphases added. Y.D.)\footnote{Interview with INZ (3.9.97)}
\end{quote}

Besides confronting the client agencies before trial, the HCJD has other means \textit{during trial} to bring the client to accept their positions regarding the case at stake. One such
tactic is to expose its doubts regarding the client's position in court. As one lawyer said:

I never raise arguments [and openly say] that I think are wrong…there are tactics…I speak "in the name of," I speak not on my behalf but on [their] behalf…I say "the minister argues"… There are certain ways by which the lawyer distances herself from argument she doesn't really believe in…I think the Court understands this…(emphases added, Y.D.)

The second major factor that contributes to uncertainty regarding the position the HCJD should take regarding "frivolous" positions has to do with development in the legal doctrine. While judicial review before the 1980s was based mainly on formal doctrines of legality, during the 1980s the Court rapidly developed new doctrines such as reasonableness and proportionality. Unlike its American counterpart, the Israeli Supreme Court did not adopt a bright-line doctrine of deference to administrative discretion, but instead grounds its review on the elusive concept of reasonableness, which opens the way to ad-hoc analysis of each and every decision. Decisions on legality are based on legal expertise. In contrast, decisions regarding the "reasonableness" of administrative actions are largely susceptible to the subjective assessment of the beholder.

The intensive use of these doctrines by the Court had two important implications for relationships between the HCJD and its clients. First, the "legal" analysis of the case became far more dependent on the assessment of the individual lawyer who handles the case, an assessment that could not escape being influenced (at least to some extent) by the lawyer's personal opinion of the merits (and wisdom) of the policy at stake. Secondly, the use of such doctrines significantly hampered the

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47 Interview with TL (7.7.97) and cf. Note-Harvard 2008, supra note * 1190.
48 Chapter I Section C-2 [*text and note 66]
49 While in principle the Israeli Supreme Court espouses a doctrine of deference with regard to administrative actions, the scope of review depends on the circumstances of the specific case and there is no principle equivalent to the bright-line rule of the Chevron Doctrine as in the U.S. (see Chevron U.S.A. Inc. v. Natural Resources Defense Council Inc., 467 U.S. 837 (1984). On the relationship between the Chevron Doctrine and the relationship between the Solicitor General and administrative agencies in the US see e.g. Richard L. Pacelle, Between Law and Politics: The Solicitor General and the Structuring of Race, Gender and Reproductive Rights Litigation (Texas A&M Un. Press 2003) 19.
ability of all parties to foresee the outcome of the litigation. It thus enabled the lawyers, and to some extent encouraged them, to expand the "safety margins" they use in their evaluations of the chances in court. The HCJD lawyer, who came across a decision that appeared questionable, could safely inform her clients that she "expects troubles" if the litigation proceeds, thereby exerting pressure on the client to settle the case out-of-court.

In addition, the HCJD is – in any case – under severe pressure by the court to settle cases out of courts. From the Court's point of view out-of-court settlements are much preferred to disposition of the case by judicial decision. First and foremost, settlements help the court to save time and resources and to ease its rapidly growing docket. Moreover, settlements are preferred in sensitive political cases since they save the Court the need to confront the government directly, and also enable the Court to influence government policies with lower media coverage and public outcry.

Last, but not least, settlements enable the Court to informally expand its influence over governmental decision-making precisely due to the use of the "soft" doctrines of review discussed here. That is, by using the mechanism of settlements by the HCJD, under the encouragement of the Court, and by resorting to the indeterminate concept of "reasonableness," the justices could bring about change in administrative policies, even if such policies would have ultimately stood judicial review had they been litigated "all the way" by the HCJD. As a one member of the HCJD observed:

You need, on the one hand, to represent the client…who has legitimate expectations to be represented. But, on the other hand, the Court expects you to be "an officer of the court"…You have to maneuver between the client who is entitled to have his position presented legitimately, as long as it is not illegal or patently unreasonable, and the Court that sometimes has pragmatic proposals which are even correct on the merits, without necessarily meaning that the current administrative position is illegal. The Court has a proposal which they think is more appropriate and they expect you [i.e. the lawyer] to [accept it]

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50 See Chapter 1 Section B-1. The use of settlements with regard to the expansion of judicial review is further discussed in Chapter V**.
51 See Dotan, supra note 37.
Q: Does this mean that you accept the Court's offer even when you know that the Court, should it need to rule on the matter, would not intervene?

A: Yes, definitely.\(^{52}\) (emphases added. Y.D.)

As another lawyer commented:

There are many cases in which the Court offers a settlement and it is pretty clear that should we say "no," they will decide the case in our favor.\(^{53}\)

And another lawyer recalled:

I had once a big argument with someone on a professional question. I told him regarding a certain case: "This is the lowest threshold I am willing to defend such cases in the future. If you go lower than that – I won't defend". He answered: "Why do you need to set up a threshold? As long as this is going to stand the HCJ's review – it should be OK with you". I told him: in certain scenarios "standing review" is a very laconic thing. But I think it is improper to bring this to court and therefore we should save the court the need to deal with issues that they may have no choice but to affirm.\(^{54}\)

(emphasis added, Y.D.)

* If one wants to sum up the "raison d'être" of the positions and practices that the HCJD espouses with regard to the dilemmas of government lawyers, it is fair to say that after the activist "revolution" of the 1980s, the HCJD responded to the new "rules of the game" set by the HCJ. The way in which the lawyers function according to the "Rule of Law Model" is pretty much the way the HCJ expects them to function. The HCJD's

\(^{52}\) Interview with INZ (3.9.97); Interview with AN (9.1.96); Interview with TN (7.7.97).

\(^{53}\) Interview with TN (7.7.97)

\(^{54}\) Interview with ES (16.6.97)
members see themselves as committed to the "public interest," but the notion of the public interest is largely *shaped and manifested* by the Court and by the ideal of *serving the Court*.

In the words of a senior member in the Department:

> We are in fact - I don't want to say, "dancing to the Court's tune" because this may carry negative connotations - but we operate within a framework whose boundaries and rules are set by the Court.\(^55\)

### III. Analysis

In the opening section of this chapter I suggested that we discuss the dilemma of government lawyers by referring to two competing models: the "regular – adversarial" model of lawyering and the "public interest" model.\(^56\) As the previous discussion demonstrates, it is evident that the HCJD adopted a quite robust version of the "public interest" model (at least after the 1980s). It is now the time to evaluate the pros and cons of this model from the policy point of view. A number of arguments against the public interest model have been raised in academic scholarship. I shall now examine these arguments with reference to the case of the HCJD.

#### A. Democracy and Legality

One argument against the public interest model is that it is undemocratic. Under the doctrine of separation of powers, administrative policies should be shaped by the administrative agencies to which the law (and the constitution) assign powers to create and shape policies that promote the public good, and are accountable to the public. In this line of thinking, government lawyers are not authorized to adopt and promote a concept of the public good different than that of their clients and if they do so, they exceed their statutory powers and defy their constitutional mandate.\(^57\)

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\(^55\) Interview with INZ

\(^56\) See Section I-3 above.

\(^57\) See Miller, *supra* note 12, at 1295 ("Nothing systemic empowers government lawyers to substitute their individual conceptions of the good for the priorities and objectives established
Leaving aside the question to what extent administrative agencies are "democratically accountable" to the public,\textsuperscript{58} it seems that the above argument begs the main question regarding the legitimacy of the public interest model. It is true that government agencies are awarded by law the power to formulate policies in their field. It is also true, however, that government lawyers (the HCJD included) are assigned by law the power to represent the government in litigation. The main question is therefore how those powers of representation should be exercised, and how should we interpret the mandate given to the HCJD to represent its client. The answer to the question lies not within some abstract formulation of democracy but by referring to policy considerations that deal directly with the model of representation.

\textbf{B. Zealous Adversarial Advocacy}

The main argument against the public interest model is based on the adversarial conception of litigation. Government lawyers should not promote any interests in litigation besides those of their immediate client agencies, because doing otherwise would violate the fundamental principles of adversarial advocacy.\textsuperscript{59} As one critic of the "public interest" model stated:

\begin{quote}

The central principle that purportedly underlies the adversary system is that "justice" can best be achieved by the battle of two zealous advocates before a neutral decision-maker. Allowing a government lawyer to sit in judgment of the justice of a client's cause would be inconsistent with the fundamental principles underlying the adversary system\textsuperscript{60}

\end{quote}
The principal flaw of this argument, however, lies with the assumption that the process of judicial review should be regarded as following the traditional counters of adversarial litigation. There are a number of reasons to doubt the proposition that judicial review fits into the adversarial framework. First, the adversarial model assumes that the main objective of the litigation is to decide the concrete controversy between the parties. It also assumes that the interests involved with such a decision are limited to those of the immediate parties. In judicial review it is very difficult to maintain that the Court should limit its attention solely to the narrow interests of the direct parties involved. Take, for example, a litigation in which a major piece of legislation (such as the Healthcare reform statute in the U.S.) is brought before the Supreme Court for review. The legislation at stake may have a major impact on millions of persons whose interests could be directly influenced by the court's decision. Presumably, many different groups will be represented (either as petitioners, respondents, or as amici curiae), and indeed such a process is usually a multi-party one. The court must take into consideration a variety of conflicting interests and has to analyze a wide array of considerations. Not surprisingly, in such complex litigation the governmental legal apparatus is often called on to provide assistance to the court in disposing the case. The whole adversarial framework seems quite unfit to encompass this kind of process, or, at the very least, needs to be adapted to the context of judicial review. Using the mechanism of government lawyers as providers of assistance to the court is exactly the kind of adaptation of the litigation process essential to allow the court to sort out the matter.

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61 See e.g. Jay Tidmarsh & Roger H. Trangsrud, Complex Litigation and the Adversary System (Foundation Press 1988) p.v; Robert A. Kagan, Adversarial Legalism: The American Way of Law (Harvard, 2001) 9. This is certainly the case with regard to civil law litigation, but arguably less so in the case of criminal law, in which this rationale is weaker.


63 See a, supra note 61 at 1-3.

64 See e.g. Caplan, supra note 43 at 3, 7 and 19-25;

65* For a discussion of the function of Solicitor General as amicus, see Salokar, supra note 10 at 134-150. In Israel the institution of amicus curiae was acknowledge by the Supreme Court in 1996 (F.H. 7929/96 Kozali v. State of Israel (1999)) but is much less developed than in the U.S. since the flexible rules of standing enable a wide array of parties to join the proceedings in the Supreme Court, either as petitioners or respondents. Still the number of Amicus applications approved by the courts has been on the rise during the last decade (see Israel Doron, Manuel Totri-Gobran, Guy Enosh & Tal Regev, 'A decade to "Amicus Curiae": Empirical Analysis of Court Decisions' 34 Iunei Mishpat 667 (2011) (Hebrew). See generally, Charles J. Ogletree Jr. & Yoav Sapir, 'Keeping Gideon's Promise: A Comparison of
Accordingly, it may be argued that the adversarial model is unfit for judicial review if one looks to the principal objective of the process and the role of the court. Unlike the case of a regular adversarial setting (in civil litigation), the objective of the process is not merely to decide the controversy among the parties, but also to *ascertain the legality of governmental action and to prevent abuses of official powers.* This is certainly the case for judicial review in Israel after the 1980s but also true, I believe, regarding any process of judicial review in a democracy. Accordingly, in judicial review it would be both unrealistic and wrong to regard the judiciary's role as "neutral." The judicial review "game" is not only a game between the parties to the litigation, but also *between the judiciary and the administration,* within which the judiciary assumes an active role to correct administrative abuses. The framework of the adversarial model should be adopted accordingly.

An additional argument in this respect refers to the fact-finding process. The adversarial model assumes that, overall, the best way to reach the true facts in litigation is by zealous competition, in which each party seeks to present facts on its behalf and countervail the opposing party's evidence. The model thus assumes some parity between the opposing parties concerning access to information. None of these assumptions are valid in the case of judicial review. In judicial review the government usually enjoys significant advantages over the petitioner with regard to access to information, since the whole decision-making process is carried out within the government and by its staff. In addition, the government enjoys significant procedural advantages while presenting evidence in court. Not surprisingly, many scholars...
believe that it is the role of government lawyers to offset these advantages by coming forward and providing evidence on illegality in administrative actions, even when such flaws cannot be ascertained through regular adversarial proceedings.69

C. Decentralization and incoherence in the formation of public policy

Yet another critique of the "public interest" model is directed against its presumably problematic implications for the way by which public policy is formed. It is inconceivable, so goes the argument, that each individual lawyer would hold the power to identify the "public interest" in every case brought to court, for this would not only run contrary to agencies' power to form policies but also contradicts the idea of hierarchy and centralization in government.70

The force of this critique should not be downplayed in the context of the HCJD, particularly due to the above-discussed implications of the reasonableness doctrine that the HCJ espouses.71 Yet, it seems that the danger of decentralization and chaos in policymaking should not be overstated either, and for a number of reasons. First, even for the HCJD under the "Rule of Law" model, confronting the client over issues of policy is still the exception, not the rule. As explained above, in the vast majority of "regular" cases, the lawyers would take the administrative policy choice "as is" and represent it in court.72 Secondly, it is exactly because cases of disagreement are exceptional that they are never resolved at the level of the individual lawyer. Instead, whenever there is a doubt regarding the legality (or reasonableness) of the administrative position at stake, the matter is instantly brought to the attention of the higher ranks of the HCJD.73 A process of deliberation between the department and the agency then takes place and, if necessary, the matter is brought to the decision of the Attorney General.74 Lastly, one should consider the position of governmental lawyers in such cases. They need to carefully maneuver between different, and often conflicting, interests and to accommodate pressures from all directions, i.e., the

69 See e.g. Clark, supra note 8; Note-Harvard 2008, supra note 15; Wald, supra note 66, 117
70 See Miller, supra note 12, 1295; Jonathan R. Macey & Geoffrey P. Miller, 'Reflections on Professional Responsibility in a Regulatory State', 63 Geo. Wash. L. Rev. 1105 (1995) at 1116-19 (arguing that in practice the supervision over government lawyers is less effective even in comparison to lawyers in private corporations).
71 Section II-C above [text near note 48 supra]
72 See Section II-C above [text near note 45 supra] and see the discussion in Section IV-C below.
73 See Section II-C above [text near note 45 supra] and see Interview with KT (12.9.11).
74 See Section II-C above [text near note 45 supra].
agency, the court, and their superiors within the OAG.\textsuperscript{75} Under these circumstances it would seem a gross exaggeration to assert that individual lawyers are "free" to shape governmental policies according to their personal preferences. It appears more realistic to assume that personal ideology or preferences may sometimes influence administrative policies on the margins, rather than shape their very substance.\textsuperscript{76}

\textit{D. Separation of Powers: Shifting the Balance between the Judiciary and the Executive}

An additional argument against the "public interest" model of lawyering is that it runs against the idea of separation of powers. The model, so it argues, turns government lawyers into gatekeepers on behalf of the judiciary. Accordingly, it is very convenient from the judiciary's point of view because it gives the court various advantages: it saves judicial time and eases the caseload whenever government lawyers forgo their positions and settle; it provides the courts with ample access to information with relatively little efforts, and so forth.\textsuperscript{77} Government lawyers, however, should resist the temptation to answer the judicial calls for cooperation, since otherwise they would violate their duty towards their client agencies.

On the descriptive level it seems that the case of the HCJD perfectly demonstrates the validity of the claim that there is an intimate connection between the model of lawyering and judicial activism. On the normative level, however, it seems that the pros and cons of this phenomenon largely depend on other considerations that have already been discussed above.

More importantly, however, this argument calls attention to the following question: do government lawyers really have a choice when required "to cooperate" with courts that espouse activist practices of review? In other words, to what extent

\textsuperscript{75} See e.g. Horowitz, \textit{supra} note 17 at 10; Salokar, \textit{supra} note 10 at 151.

\textsuperscript{76} This point would be further developed below see Section IV-D below.

\textsuperscript{77} * See Harvey, \textit{supra} note 13 at 1600 ("The courts prefer the public interest model because it empowers government attorneys to act as gatekeepers who manage the courts' burden. This is a cynical but true statement") and see Judge Patricia Wald, \textit{supra} note 66, \textit{praising} the public interest model for the exact same reasons; cf Margaret H. Lemos, 'The Solicitor General as Mediator between Court and Agency, (2009) \textit{Mich. St. L. Rev.} 185 (discussing the relationship between judicial activism and deference and the model of centralized representation in litigation).
IV. The Relationship Between Professional Ideology and Outcomes in Litigation

A. "High-Stature" and Pragmatists in the HCJD

Earlier I described the rise of "The Rule of Law" model of lawyering in the HCJD during the 1980s. The change in the practices and ideology of the HCJD was not absolute, however, and did not occur without resistance. In fact, there were lawyers in the department that openly objected to those changes as challenging their ideological settings, while trying to stick to the older, more conservative, vision of their role as government lawyers. In the early 1980s there were two principal figures in the department who represented the opposing concepts of lawyering. Renato Yarek, the head of the department, represented the conservative view. While his predecessor, Dorit Beinisch (who was promoted at the time to senior positions within the OAG and still had a good deal of influence on the Department during that period) represented the "public" model of lawyering.\(^78\) The divergence did not end with Yarek's retirement, however, but continued influencing the department throughout the 1990s and even later on.

When I began my service in the HCJD in 1994 I learned that in the HCJD's corridors, some lawyers were referred to (by their peers and by themselves) as "high statures," that is, as the "militants" who were not willing to succumb to the temptations of the "Lawyering for the Rule of Law" practice. Others were tagged as "low stature," that is, as pragmatists that espoused the model more willingly. The fact that this unique terminology (whose meaning was not transparent to anyone outside the Department) developed within the HCJD indicates that HCJD lawyers were well aware of the dilemma inherent to their role and that it occupied their mind at a sufficiently intensive level to create this unique kind of discourse.

The differences between the "High" and "Low" stature revolved around the basic questions discussed above: how vigorously should they defend in court

\(^{78}\) See Chapter II, Section E-3 text after note 107 and ref. ibid. See also Interview with MR 13.1.00 (identifying Yarek as "more militant" than Beinish.
frivolous agency positions, how often should they raise procedural defenses and so forth.\textsuperscript{79} As one lawyer observes:

There is no doubt that in some situations there are those who would defend and those who wouldn't. There are topics that are very [politically] controversial… but there is no statutory provision that dictates a certain reading. In this kind of situation Renato [Yarek] (and his followers) would defend, and others would say: we don't defend… I call it a kind of "high stature." In these cases I think we have no mandate to say "we don't defend"…No one appointed me to the bench, I am a lawyer, not a judge. I can say to the client I estimate the chances (of defeat) 90%…[but it's their call, not mine]\textsuperscript{80}

Another lawyer remarked:

It is also a matter of personal style and character. There are those who think that when they go to court and receive [from the court] a hint that they don't like it, then they should "pack their things" [i.e. withdraw] and there are those – and I'm one of them – that [say that] if we believe in a certain view…the fact that the judge said something should not [change our course] and we should insist on our position being [fully] tested in court.\textsuperscript{81}

The exact meaning of "high stature" was never defined by the members of the department - even unofficially - and almost everyone seemed to agree that the differences between "High" and "Low-statures" were a matter of degree. Nevertheless, awareness that these differences existed was conspicuous enough for the staff for them to identify some of their peers as typical "high-statures" (HSS) and others as typical low-statures (LSS) (there was no consensus among the lawyers with regard to many other members of the department).

\textsuperscript{79} Issues concerning disclosure of information were much less controversial; see text above, before note 78.
\textsuperscript{80} Interview IN 7.7.97.
\textsuperscript{81} Interview MN 24.2.97.
B. Methodology

The question that I seek to answer is whether professional ideology exercises influence on lawyers' decisions and outcomes in litigation. Interviews with the members of the department indeed suggested that professional ideology influenced their strategies and behavior in litigation, so presumably outcomes in litigation were also affected by lawyers' ideology. The question is, however, whether the connection between lawyers' ideology and outcomes goes beyond anecdotal evidence as reflected in interviews, and may be traced in a systematic quantitative analysis. For that purpose I used the internal (unofficial) classification of lawyers in the HCJD (into HSS and LSS) as a proxy to represent professional ideology, while outcomes in litigation were studied on the basis of the quantitative analysis of HCJ files.  

The main hypotheses of the research were the following:

a. Rates of Success – are expected to be higher for "high statures". This is because HSS use more freely all kind of procedural advantages at their disposal (such as access to information and procedural defenses). Likewise, HSS would settle fewer cases than their peers. That is, they'll also take their chances with "hard cases" that their peers would give up at earlier stages of litigation. Since our analysis includes all cases disposed by the Court, including those settled at earlier stages, the overall success rate of HSS is expected to be higher.

b. Settlement Rates – are expected to be lower for HSS – for the reasons explained above.

c. Conditional Orders Rate should be expected to be higher for HSS. This is because conditional orders serve in the HCJ as a signal by the Court to the respondent that it regards the chances of petitioners as substantial. Thus, to the extent that HSS would tend to settle, they are expected to settle after the issuance of conditional orders, while LSS would tend to settle more often before a conditional order is issued.

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82 See Chapter III.
83 See Chapter III Section II-B (text near note 5).
84 See Chapter III Section II-B-4.
85 Id.
For the purpose of identifying HSS, I used information gathered during interviews with the HCJD members and by participant observation. As noted, not all HCJD members could be classified as either HSS or LSS. For the purpose of the analysis I chose four lawyers for each group. The lawyers in each group were identified by their peers (and by themselves) in interviews as "typical" HSS or LSS and all of them served significant periods in the HCJD during the 1990s and took part in a large number of court cases. Correspondingly, we created a database that contains 431 cases in which those eight lawyers represented governmental agencies before the HCJ, and we studied the outcomes of these cases in litigation. A description of the sample is found in Table 1:

Table 1 - Descriptive statistics of variables

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<th>Percentage</th>
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<th>Variable</th>
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</thead>
<tbody>
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<td>19.7</td>
<td>83</td>
<td>Institution/corporation/public organization</td>
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<tr>
<td>31</td>
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</tr>
<tr>
<td>12.8</td>
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<td>Self-representation</td>
</tr>
</tbody>
</table>


87 Our database of HCJ files contained 1064 cases disposed by the Court during the 1990s (see Chapter III Section II-B). The eight lawyers that we refer to here, represented the State of Israel in around 40% of all cases in our database.

88 Due to the small number of petitions that were submitted by public organizations, these petitions were merged with petitions submitted by institutions and corporations.
C. Outcomes

1. Rates of Success
The first question we posed is whether lawyers' ideology influences outcomes in litigation. The relative success rates of the HSS and LSS in our sample is presented in Figure 1 below:

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89 Due to the small amount of cases that were prisoner- or detainee-related, these petitions were omitted from the sample.
As Figure 1 demonstrates, the differences in success rates of the two groups were small and were not statistically significant. Thus, our findings seem to refute hypothesis A above.

2. Rate of settlement

We assumed that HSS should have a lower settlement rate than LSS (hypothesis B) because their professional ideology would inspire them to avoid settlements in "hard" cases and increase their tendency to litigate such cases "all the way." The outcomes of our quantitative analysis in this respect are presented in Figure 2 below.
As we can see from Figure 2, the differences between the tendencies of the two groups of lawyers to settle were found to be very small and not statistically significant. This finding is in sharp contrast to the impression one could draw from the interviews with HCJD members (HSS and LSS alike), and it refutes hypothesis B above.

3. Conditional Orders
In Chapter III we found that the HCJ issued conditional orders against local municipalities far more frequently than against state agencies. We ascribed the difference to the different structure of representation of municipalities. Correspondingly we could reasonably expect that the more militant style of representation by government lawyers identified as HSS would be correlated with higher rate of conditional orders (hypothesis c). The outcomes of our analysis appear in Figure 3:

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90 Chapter III Section III.
As Figure 3 demonstrates our third hypothesis was not corroborated by the data either. In fact, we found that the relative number of cases in which the HCJ issued conditional orders against HSS was even lower than in the case of their peers whom we identified as LSS (though the difference was not found statistically significant after we conducted logistic regression of all the variables in our sample).\(^9^1\)

D. ANALYSIS

Our findings suggest that the professional ideology of individual lawyers – at least as presented in their rhetoric – seems to have limited impact on actual day-to-day practices in litigation, and even less so on outcomes in litigation. How can we explain the fact that differences that seem to be so robust in the professional ideology between these two groups of lawyers had hardly any (quantitative) impact in the daily reality of litigation?

One possible explanation is that we should be cautious in using rhetoric (as reflected in interviews etc.) as a baseline for evaluating professional ideology. A more plausible explanation is that the evidence that we gathered with regard to professional ideology is credible, but such ideological differences should be expected to have only a marginal impact on practices in litigation. This is because moral and ethical dilemmas are expected to arise only in "hard cases" that are relatively rare. Thus, while the existence of such dilemmas is traceable through the interviews, the overall

\(^{91}\) **SEE APPENDIX** FOR THE REGRESSION
impact of such cases on the daily routine of the HCJD, as reflected in our quantitative analysis, is marginal. In fact, the relative rarity of cases of that kind is reflected in interviews with HCJD members. Almost all lawyers interviewed (HSS and LSS alike) emphasized the fact that their primary task is to represent governmental agencies in court, and that normally, such representation does not give rise to the dilemmas discussed here.\textsuperscript{92} While this explanation sounds reasonable, it still leaves some questions unresolved. For example, given the marked differences (between HSS and LSS) in the attitudes towards settlements, one might expect to see some differences in the relative rate of settlements.

More generally, however, our findings seem to point to the relative marginality of professional ideology and personal preferences on lawyers that function within a given institutional setting. Throughout this book I argued that, in essence, the whole apparatus of the HCJD (and the OAG) was responding to the changes in the legal and political framework as dictated by the Supreme Court during the activist revolution of the 1980s. Our findings suggest that personal preferences may have some influence on lawyers' attitudes towards this process. Some enthusiastically joined that judicially initiated revolution, while others dragged their feet. However, the bottom line was that those differences in personal attitude had little impact on the reality of litigation. To quote (again) the senior member of the HCJD who has already been cited above: "The Court was calling the tune – and HCJD members had to dance."\textsuperscript{93}

V CONCLUSION
In the center of the current chapter I examined the dilemma of government lawyers by referring to two competing models: the "regular – adversarial" model of lawyering and the "public interest" model. In the academic literature there is an ongoing debate on the question which of the two models is preferable. The empirical analysis conducted here on lawyers representing the state of Israel before the Supreme Court suggests that this debate is to a large extent moot, at least to the extent that it refers to choices that individual lawyers are expected to make in the course of their work.

\textsuperscript{92} See e.g. interview with INZ, supra note 46.
\textsuperscript{93} See note 55 supra and text.
During the 1980s the HCJD adopted quite a robust version of the "public interest" model, a model that I also referred to as the "Lawyering for the Rule of Law Model." The causes for this model's development are primarily institutional. They are related to the drastic changes in the legal setting and the growing affinity between the Court and the legal apparatus of the government. Within this setting, personal preferences of individual lawyers and their vision regarding their role as government lawyers seem to have had marginal impact. The dilemma between public interest and "adversarial" lawyering was decisively resolved on the institutional level.