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# COMBINING PROFESSIONALISM, NATION BUILDING AND PUBLIC SERVICE: THE PROFESSIONAL PROJECT OF THE ISRAELI BAR 1928-2002

Neta Ziv\*

## INTRODUCTION\*\*

Professions distinguish themselves from trades and businesses by claiming to serve a public function that reaches beyond the interests of their members. Lawyers profess to promote legality and justice, a public good, through the basic constituent of lawyering—legal representation. Under this understanding, lawyers negotiate a trade-off with society: they obtain the exclusive right to practice law and to regulate their affairs free from state intervention, and in return they fulfill an important public goal and societal need—law and justice. These interests are served when lawyers place the interests of the common good and of their clients beyond their self-interest.<sup>1</sup>

Thus, lawyers articulate their duties to clients and to the common good as interdependent, by claiming that ultimate client loyalty is in and of itself a means to promote desirable and important societal values such as liberty, equality and legal certainty.<sup>2</sup> But serving the interests of individual clients does not always coincide with the

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\*\* The Fordham Law Review relies on the author's translations for the Knesset Protocols, the meetings of the Jewish Lawyer's Association, and the Bar Association materials.

1. Dietrich Rueschemeyer, *Lawyers and Their Society: A Comparative Study of the Legal Profession in Germany and in the United States* 13 (1973). For a summary of the main sources to this functional approach to legal professionalism, see Russell Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. Rev. 1229, 1237-40 (1995).

2. For a critical view on this approach see William H. Simon, *Babbitt v. Brandeis: The Decline of the Professional Ideal*, 37 Stan. L. Rev. 565 (1985).

advancement of the public interest. In contrast, critics assert that lawyers' professionalism rests upon their duty to third parties or to the broader community, and that the centrality of the lawyer-client relationship creates an impediment on such public duties.<sup>3</sup> The central tenet of lawyering—namely, client loyalty—thus bears an inherent tension: it is claimed to be the basic and essential component of lawyers' public duties, but it has also become the symbol of lawyers' abandonment of their public role.<sup>4</sup>

Still, in order to maintain the status and privileges of a recognized profession, lawyers need to articulate and define their public role—which entails settling the tension between individual representation and public-communal interests—for themselves and their particular communities of reference. To gain societal legitimacy and recognition, the process of constructing and defining the legal profession's "public role" must remain consistent with the specific conditions amidst which it is formed, embedded and operates. In other words, lawyers' ethos of public service needs to conform to the value system existent within their society.

In this article, I illustrate this process by examining the formation and development of the Israeli legal profession from the 1920s to today. My central argument is that the professional ideology of the Israeli bar was contrived by defining concepts of public and private spheres in a manner that harmonized with the political, social and cultural values prevalent in Mandatory Palestine and later in the State of Israel. The public obligations of the legal profession were construed to correspond with the central ideals of Zionism, namely Jewish national institution and state building. At the same time, the bar maintained a formalistic and private, client-centered approach to legal professionalism derived from the British Mandatory legal system, which constituted a dominant source of Israeli law and legal culture. The combination of such a public-institutional objective together with a private form of representation, allowed the Israeli bar to exhaust its public obligations and forgo its social commitments

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3. Simon calls the first approach "The Dominant View," under which "the lawyer must—or at least may—pursue any goal of the client through any arguable legal course of action and assert any non frivolous claim." William H. Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* 6 (1998). The second type of lawyering Simon labels "The Public Interest View" (formerly labeled in Simon's works as the "normative" view), and its basic maxim is "that law should be applied in accordance with its purposes, and litigation should be conducted as to promote informed resolution on the substantive merits." *Id.* at 8.

4. On the tension between client representation and serving the good, see Deborah L. Rhode, *In the Interests of Justice, Reforming the Legal Profession* 49-80 (2000); William H. Simon, *The Practice of Justice, A Theory of Lawyers' Ethics* (1998); Russell G. Pearce, *Lawyers as America's Governing Class: The Formation and Dissolution of the Original Understanding of American Lawyers' Role*, 8 U. Chi. L. Sch. Roundtable 407-10 (2001) [hereinafter Pearce, *Lawyers as America's Governing Class*].

without altering the ethical tenets of individual client loyalty as its main formative principle. Issues such as access to justice, legal representation of poor people, and protection of human rights, for example, were absent from the discourse, rhetoric, and practices of the bar. The Israeli bar managed to keep its dominance as the representative of professional ideology until the 1990s. Since then, both the traditional concept of lawyering as well as the bar's hegemony in this area has been eroding. The process is a result of numerous factors including the entry of new social groups into the profession due to changes in legal education, the sharp rise in competition between lawyers, a new leadership of the organized bar, the emergence of public interest and community lawyering, and a stronger inclination of the Supreme Court to scrutinize the bar's practices under Israel's new constitutional framework.<sup>5</sup>

The bar has responded to demands from within its ranks and from external sources, challenging the preceding and existing professional order. For example, the bar launched its first pro bono program in 2002 (following a two year struggle within its internal institutions); a private law firm established in 2001 a pro bono law firm; numerous lawyers are providing assistance to poor people through poverty NGO's and almost all law schools are offering some kind of clinical or community program as part of their legal education. At the same time, market forces have led to changes in restrictive rules on lawyers' practices. The total ban on advertising has been lifted and replaced by a regulatory mechanism, and prohibition on lawyers' engagement in certain occupations has been eased.<sup>6</sup> Though it is still early to assess the extent to which these trends will significantly alter the collective role of the profession, they signal an important shift in the professional ideology which, in turn, ought to be understood against broader changes occurring within Israeli society. In the next sections, I expose these connections, in an attempt to explain the evolving role of the legal profession within Israeli polity and society.

### I. THE BRITISH MANDATORY PERIOD

Lawyering entered its modern age in Palestine in the beginning of the 1920s, shortly after the British Mandate took over the control of the region in 1917. Throughout the British Mandate, Jews driven by Zionist convictions moved to Palestine and began the process of nation and state building, leading to the creation of the state of Israel in 1948. The legal profession during that period developed under the influence of three main forces and interests: first, the British legal heritage from which lawyers derived both their formal status as well as their ideals; second, the need to take an active part in the Zionist

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5. See *infra* Part V.

6. See *infra* Part V.

movement of nation and state building; and third, lawyers' move to promote their professional status, social recognition and financial interests as members of a new social class. These interests, which simultaneously affected the growth of the legal profession, frequently stood in direct tension with one other.

*A. The British Influence on Lawyering During the Mandatory Period*

During the Mandatory period, British courts served as the central legal institutions for adjudication.<sup>7</sup> Most of the criminal, administrative, and civil matters were handled according to British law, which prevailed as the law of the land.<sup>8</sup> British judges served in all District Courts and the Supreme Court of Palestine, and English was the main language of adjudication. By creating a web of Ordinances that regulated most aspects of modern life, British lawmakers influenced the legal culture of the emerging nation.<sup>9</sup>

Jewish lawyers who immigrated to Palestine perceived themselves as part of a modern and Western legal culture. British law constituted one of those elements and lawyers adopted many of its attributes during the formative stage of the legal profession in Palestine.<sup>10</sup> Not only the structural aspects of the administrative and legal infrastructure of British Mandatory law were incorporated into the emerging Jewish institutions and apparatus, but also its spirit and belief systems.<sup>11</sup> Lawyers identified with British legal doctrine, form and style. Relations between local lawyers and British lawyers were

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7. It has been common to describe the Mandatory law as the source upon which Israeli law was built. Mandatory law is considered the first stage of the development of modern Israeli law. See Daniel Friedmann, *The Effect of Foreign Law on the Law of Israel: Remnants of the Ottoman Period*, 10 *Isr. L. Rev.* 192 (1975); Yoram Shachar, *History and Sources of Israeli Law*, in *Introduction to the Law of Israel 1-10* (Amos Shapira & Keren C. DeWitt eds., 1995).

8. For a period of about 10 years starting from around 1918, a system of Hebrew community courts (Hebrew Peace Courts) operated in Palestine side by side with the courts of the Crown and the religious courts. This system ceased to operate in the late 1920s. See Ronen Shamir, *On the Death of an Israeli Legal System*, in Mautner, Sagi & Shamir, *Multiculturalism in a Democratic and Jewish State* 589-632 (1998) [hereinafter Mautner, *Multiculturalism in a Democratic and Jewish State*]. In addition, local religious courts maintained jurisdiction over personal status matters.

9. Assaf Likhovski, *In Our Image: Colonial Discourse and the Anglicization of the Law of Mandatory Palestine*, 29 *Isr. L. Rev.* 291 (1995).

10. Ronen Shamir, *The Colonies of Law: Colonialism, Zionism and Law in Early Mandate Palestine* 25 (2000) [hereinafter Shamir, *The Colonies of Law*] states:

In law, the identification with the West was directly expressed in the dominant attitude towards the newly established colonial system of justice. . . English imported law and the legal ways of the British in general were perceived by most Jewish jurists in Palestine as the incarnation of a highly developed enlightened law.

11. See, e.g., Edwin Samuel, *British Traditions in the Administration of Israel* 33 (1957).

established already in the early 1920s, as some of the more prominent lawyers in Palestine came from London.<sup>12</sup>

In 1920 Norman Bentwitch, the Attorney General for Mandatory Palestine, established "Law Classes," the first institution for legal education in Palestine.<sup>13</sup> Legal education in this institution included in its first part skills training (taught by local Jewish and Arab jurists) and at the second stage theoretical classes in law and jurisprudence, taught by British jurists. The program of Law Classes was heavily Anglicized, and many subjects of study were imported from the British legal education system, regardless of whether they directly applied in Mandatory Palestine.<sup>14</sup> In general, law was taught as an autonomous discipline, through a formalistic, positive approach.<sup>15</sup>

The Mandatory courts in which lawyers conducted most of their adjudication operated as colonial courts and applied English law and doctrine. These courts served as the model for future state institutions. A legal doctrine under the British legal system was formalistic, the precedents used in the colonial legal system were British, the language spoken and used in the higher court system was English and law enforcement officers were British. It was this understanding of the justice system that the "pioneers" of the Jewish legal profession experienced first-hand.

The basic professional concepts governing lawyers' practice in Britain were reenacted in Palestine. First, membership in the English bar conferred permission to practice law in the British colonies.<sup>16</sup> Second, The Advocates Ordinance of 1922, which regulated the practice of law in Palestine, carried many of the characteristics familiar within the British system on professional legal practice. It conditioned legal practice on obtaining a formal license and required a minimal apprentice period and the passing of professional entrance exams.<sup>17</sup> The Ordinance imposed numerous formalistic requirements upon lawyers (e.g., annual payment of fees, registration in a professional registrar). Regarding fiduciary obligations, it defined the core duties of the lawyer to act in the best interest of the client and to assist the court in the administration of justice.<sup>18</sup> The Ordinance also restricted lawyers' vocational activities to legal work only, prohibited

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12. See Gavriel Shtrassman, *Wearing the Robe, A History of the Legal Profession Until 1962*, at 20 (1985) (describing the influence of two British lawyers, Harry Sacher and Horas Samuels, on Jewish lawyers in Palestine).

13. Assaf Likhovski, *Legal Education in Mandatory Palestine*, 25 *Iyunei Mishpat* [Tel Aviv U. L. Rev.], 291, 300 (2001) [hereinafter Likhovski, *Legal Education*].

14. *Id.* at 304.

15. *Id.* at 301.

16. *Id.* at 296.

17. The Advocates Ordinance of 1921, §§ 2, 3 & 5.

18. See *id.* § 14.

self-advertisement, provided instructions for attorney's fees and established internal disciplinary tribunals.<sup>19</sup>

Hence Jewish lawyers in the Mandatory period developed their professional identity with a strong correlation to the practices, rules and ideals of the British Legal Professionalism.<sup>20</sup> This source of professional ideology emphasized the private role of lawyers (i.e., their primary obligations to their clients<sup>21</sup>), it strongly differentiated between professionals and laypersons, and it was based on a formalistic approach to law.<sup>22</sup>

### B. Nation and State Building

The emerging Jewish Israeli legal profession also needed to define its relation to the ideals of Zionism. Alongside the establishment of administrative and legal institutions by the British administration, the Jewish immigrants to Palestine began to build their own quasi-state apparatus. The central goal of Zionism was to gather sufficient numbers of Jewish people in the land and to "settle" the country, particularly the rural areas and geographical frontiers. The new immigrants were urged to build as many future state institutions as possible in order to establish the political, economical, legal, and cultural infrastructure of the reviving Jewish State. This scheme was considered a principal vehicle to fulfill the goals of nation building, and it also applied to legal institution building.

Since a primary objective of the Jewish national organizations was to "staff" public and private institutions with Jews, the leaders of the legal professional community in Mandatory Palestine viewed the integration of Jewish professional judges and lawyers into the Mandatory judicial system as the central method in accomplishing the Zionist goals of Jewish nationalism. Bernard Joseph, who later became the Minister of Justice in Israel, wrote in 1926 that real nationalism depended on strengthening the ties to the Mandatory state's institutions, increasing the numbers of "Jewish lawyers who would penetrate the governmental establishment, [and] Jewish judges

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19. *Id.* (describing the restrictions on engagement in commerce and prohibition of advertising); *id.* § 15 (discussing the establishment of disciplinary tribunals).

20. See, e.g., Mautner, *Multiculturalism in a Democratic and Jewish State*, *supra* note 8, at 619.

21. Compare this to the United States, where lawyers articulated their public role to promote "the common good" to become part of the state's governance—i.e., as Pearce states to constitute "a governing class," in contrast to the European traditional concept of a guild. Pearce, *Lawyers as America's Governing Class*, *supra* note 4, at 388-89.

22. In fact, the formalistic nature of the bar was so pronounced that Simon Agranat, who served on the Israeli Supreme Court beginning in 1948, declared as one of the first tasks of the newly appointed Minister of Justice to come out against "the excessive formalism of the bar." See Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* 81 (1997).

who would be appointed to the Mandatory courts, Jewish jurists who would shape the spirit of Mandatory law.”<sup>23</sup>

Accordingly, The Jewish Lawyers' Association (“JLA”) dealt over and over again with the absence of a Jewish Judge in the Haifa District Court. This issue was raised during the JLA’s meetings in 1931, 1932, 1935 and 1937, and was considered a central topic in the Association’s struggle to strengthen the Zionist goals of nation building.<sup>24</sup> So was the need to hire Jewish clerks in the court administration.<sup>25</sup> Along this “structural” line, the establishment of magistrate courts in the periphery (Tiberias, Tsfat), which the JLA demanded, was considered a “national” goal even though it stood in tension with lawyers’ “professional interest,” i.e., the inconvenience entailed traveling to distant towns for irregular court appearances.<sup>26</sup>

The role of Hebrew within the system of justice illustrates this approach as well. During the first meeting of the JLA in 1928, attorney Moshe Eliash (one of the leading lawyers in this period) gave a lecture about the legal situation within the British mandate. Eliash raised the question of what lawyers can do as Jews to strengthen law and the justice system. He discarded the idea that the jurists’ input as Jews ought to be through influencing the substance of legal rules (for example through the Jewish Halachic law), but rather via their form. National Jewish interests can be fulfilled by giving the existing law, in Eliash’s words, “a Hebrew form, and the translation of the [Ottoman] *Megele* to Hebrew by Gad Frumkin, can prove in what way we need to dress the laws of the land in a Hebrew form.”<sup>27</sup>

23. Shamir, *The Colonies of Law*, *supra* note 10, at 112 (citing Ha’Aretz, 5.9.26).

24. See The Fourth Meeting of the Jewish Lawyers Association Committee, May 3, 1931 (Central Zionist Archives, J108/2); The Fifth Meeting of The Jewish Lawyers Association Committee, June 1, 1936 (Central Zionist Archives, J108/2); The Seventh National Council of The Jewish Lawyers Association, July 1935 (Central Zionist Archives, J108/5); The Sixth Meeting of the Jewish Lawyers’ Association Committee, April 1937 (Central Zionist Archives, J108/12).

25. The Seventh National Council of The Jewish Lawyers Association, July 1935 (Central Zionist Archives, J108/5).

26. *Id.*

We are a Zionist-Settlement (“*Zioni-Yishuvi*”) organization, and not a purpose for ourselves and this should constitute a criteria in all our professional public work. In this area the boundaries between “professionalism” and politics is fragile and unclear . . . . To explain this I will bring a few examples. The appointment of a Jewish Judge in Haifa which we fought for years is not only a professional matter, and also the transfer of state institutions to Tel Aviv, or the question of transferring Tsfat, Tiberias and the Jordan Valley [regions] to the jurisdiction of the District Court in Nablus. Against this, perhaps our professional interest says that we have to object to the opening of a magistrate court which convenes once or twice a week in the settlements near the big cities and if we demand their establishment, it is for national and not professional reasons.

*Id.*

27. The First Meeting of The Jewish Lawyers Association Committee, April 1928 (Central Zionist Archives, J108/2).

The use of the Hebrew language in the courts by Jewish lawyers constituted a constant struggle of the JLA, because many lawyers did not abide by its official decision to prefer Hebrew to English. In order to enforce this practice, the JLA's Central Committee decided, during its second meeting in 1929, to make the use of Hebrew by lawyers in the courts (and other governmental institutions) mandatory.<sup>28</sup> In subsequent meetings, the JLA expressed its dismay with Jewish lawyers who refused to use Hebrew in court despite the decree of the JLA.<sup>29</sup> This criticism was tied to complaints against "segregationist" lawyers who did not become members of the JLA and maintained their membership in the English bar, an act viewed both as an insult to the JLA as well as a violation of their national duties.<sup>30</sup>

These structural-institutional aspects of Jewish national revival were dominant in lawyers' professional efforts to take part in the Zionist movement. However, they did not exhaust their professional activity and occasionally lawyers did express concern over the substantive values underlying individual legal representation, the collective stand of the JLA, and their relation to the goal of nation building. For example, in 1931, three years after its formation, the central Committee of the JLA briefly addressed a number of public interest issues in its meeting: it voiced its opinion against corporal punishment of children, instructed the local committees to provide legal aid to poor people (the Jerusalem branch appealed the instruction), and joined the Jewish public's protest against the British ban on Jewish immigration to Palestine.<sup>31</sup> As to the problem of "land speculation," the JLA posed a direct tension between lawyers' financial interests and national objectives. As aforementioned, land acquisition by Jews (either individually or by the Jewish national institutions) was a top priority within the Jewish community. The national institutions tried to prevent the sale of land to non-Jewish purchasers. Apparently some lawyers represented Jewish "land speculators" in such transactions and arranged for the sale of land to

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28. The decision of The Second Meeting of the Jewish Lawyers Association Committee in May 1929, stated:

The Committee confirms the temporary order issued by the Central Committee regarding the use of the Hebrew language in writing and orally in courts stating: It is mandatory for every Jewish lawyer, to use whether orally and in writing, in all applications and pleadings before governmental institutions generally and the courts in particular, the Hebrew language only. Exceptions to this rule are 1. If the client is not Jewish. 2. If counsel for the adversary does not know Hebrew. 3. In private appearances before judges.

29. On the difficulties of enforcing the use of Hebrew, see Shtrassman, *supra* note 12, at 52-62.

30. The lawyers who maintained their ties to the British bar provoked extensive fretting. See The Sixth Meeting of the Jewish Lawyers' Association Committee, April 1937 (Central Zionist Archives, J108/12).

31. The Fourth Meeting of the Jewish Lawyers Association Committee, May 3, 1931 (Central Zionist Archives, J108/2).

non-Jews. This behavior was discussed in the JLA's meeting in 1935, and was described as "a heavy national misdeed and also a grave violation of the professional ethical rules and lowering of our moral status."<sup>32</sup>

During the period of the Jewish revolt against the British Mandate (1945-1946),<sup>33</sup> and further during 1945-1948, when Jews fleeing from Europe attempted to enter Palestine, the tension between law, lawyers and nationalism peaked. Lawyers questioned their professional role when the British government imposed administrative restrictions and used emergency security regulations against the Jewish population in Palestine. During this period some lawyers assisted in trials of Jews accused of illegal immigration to Palestine,<sup>34</sup> others offered representation to administrative detainees and members of the Jewish resistance underground. The JLA spoke out against the use of emergency regulations by the British government.<sup>35</sup> However, even during those turbulent days, members of the JLA argued about their proper role in the national struggle. Some asserted that the JLA must remain an apolitical-professional organization while others argued that it carried an obligation to take part in the national strife.<sup>36</sup> Indeed, during this period the enlistment of the legal

32. The Seventh National Council of The Jewish Lawyers Association, July 3, 1935 (Central Zionist Archives, J108/5).

33. The goal of the national revolt against the British was to end the British Mandate in Palestine; it included all the underground paramilitary resistance movements and used all methods of passive and active resistance to the British government.

34. The most notable one was Max Zeligman, together with his partner, Max Kritzman, who represented Jewish prisoners from the underground group "Etzel." See Shtrassman, *supra* note 12, at 125-32.

35. On February 7, 1946, 400 lawyers came together in a meeting organized by the JLA to protest the violations on personal liberty imposed by the British government. During this meeting Bernard Joseph stated that it was the duty of the lawyers to alert against the danger in the emergency regulations. See Shtrassman, *supra* note 12, at 149-50.

36. Shtrassman quotes two leaders within the association who professed contrasting views about the role of the legal profession at that time:

Moshe Korot stated in a national committee [meeting] that was held before the end of World War II: we have to rise above the mundane affairs and memos that have been submitted or will be submitted. . . . The question before us is: how can we integrate ourselves and our organization in the historical struggle of the yishuv and of our people for our survival . . . the political problems of the yishuv have distinctive legal aspects and our legal and organizational problems are of great political worth, and they cannot be separated.

*Id.* In contrast, Moshe Dunkelblum was resistant of any involvement of the emerging bar in political affairs:

[O]ur organization is not a political association. Each one of us belongs to his own political organization and there he expresses his activity. True, lawyers do not have the best public reputation, but this has always been so and in all countries. Our reputation will rise only if we raise our professional performance . . . we must take care only of those political questions which have a direct bearing on our profession or on the legal reality.

profession to the national cause and to the struggle against the British Mandate intensified. But despite the common view, forwarded by lawyers themselves, that the legal profession played an important role in the "Yishuv" struggle against the British Mandate, in fact, the lawyers who mobilized to take an active part in the Jewish rebellion against the British Mandate in the 1940s were a passing and peripheral phenomenon.<sup>37</sup>

In sum, despite occasional reference to the substantive connection between lawyering and Jewish national revival, for the most part, lawyers defined their public role by establishing, strengthening and expanding Jewish "staffing" of legal institutions. Lawyers generally did not see their contribution to Jewish national renewal through the development of a particular value system of law—Jewish or universal. Law and legal institutions were instrumental to Jewish national revival in a structural rather than a content-value manner. Little attention was paid to the substantive aspects of Jewish-law-renewal, which is the kind of law that would be applied within these legal institutions or the norms governing the lawyers that appear before them. Rather the mere infiltration and expansion of Jewish professional presence in the state-to-be apparatus served to recreate the new Jewish entity, which was to evolve into the Jewish state.<sup>38</sup>

### C. Guarding Self-Interest

The third force that shaped the development of the legal profession during the Mandatory period was the effort to promote lawyers' self-interest as a professional and social group. As Richard L. Abel illustrates, similar to other professions in modern capitalist societies, lawyers seek control over the market for their services. They do so through attempts to control the marketability of the "commodity" they provide (legal services), as well as of the providers of the service (lawyers).<sup>39</sup> They restrict entry into the profession, demand exclusivity for provision of services, pursue social closure, and limit competition between their members as well as from outside sources. In common law England, the legal profession carried the same characteristics, which can all be traced to the process through which the legal profession evolved during the Mandatory period.<sup>40</sup>

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*Id.* at 166-67.

37. Lawyers tended to glorify their involvement in political cases during that period, and "war stories" of lawyers became nostalgic memories of the "old days" in which the state-to-be was struggling. See Y. Shabo, One Year in the Life of the Jewish Lawyers' Association, 28 Hapraklit [The Advocate], 44-50 (1972).

38. Shamir, The Colonies of Law, *supra* note 10, at 92-100.

39. Richard L. Abel, American Lawyers 18-30 (1989) [hereinafter Abel, American Lawyers].

40. Richard L. Abel, England and Wales, A Comparison of the Professional Projects of Barristers and Solicitors, in Richard L. Abel & Philip S.C. Lewis, 1 Lawyers in Society: The Common Law World 23 (1988) [hereinafter Abel, England

Many, if not most, issues on the agenda of the JLA concerned the need to protect lawyers' interests as members of a distinguished profession. Encroachment on lawyers' exclusive jurisdiction constituted a major concern for the association. From the late 1920s and for three decades thereafter, the lawyers practicing in Palestine were incessantly concerned with "the problem of petition writers"—laypersons who assisted the public in filing court cases and registering land transactions. The practice of petition writers was well established in Ottoman Palestine, and the emergence of the professional bar in the late 1920s created a harsh competition between them and the new professionals, who moved to secure their exclusive jurisdiction and to displace the "old experts."<sup>41</sup> The meetings of the JLA during those years were permeated with complaints, concerns, disappointments, suggestions, and ideas on how to deal with this problem, which in 1935 found its way to the Tel Aviv District Court.<sup>42</sup> The lawyers approached the Ministry of the Colonies in England as well as the Attorney General in Palestine in order to ask for enforcement of the rules against the petition writers, but met resistance from within the bar. After the court decision barring anyone who was not a lawyer or a lawyer's clerk from conducting land transactions, some Jewish lawyers turned to hire the same petition writers as their official clerks, thus enabling them to handle transactions before the land registrar. This response drew heavy criticism from the JLA, which even considered joining forces with the Arab Lawyers' Association (a step that stood against the Jewish national interest of separating the two) to combat this seeming threat.<sup>43</sup>

The JLA was also constantly concerned with the growing number of licensed lawyers and regularly complained, "there are too many lawyers."<sup>44</sup> In 1937 there were 246 Jewish lawyers licensed to practice law in Palestine (and 112 Arab lawyers), and the JLA dealt with several proposals to restrict entry into the profession, such as closing one of the existing law schools. The lawyers also decided on minimal

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*and Wales*].

41. Cf. Andrew Abbot, *The System of Professions: An Essay on the Division of Expert Labor* (1988).

42. See The Seventh National Council of The Jewish Lawyers Association, July 1935 (Central Zionist Archives, J108/5). The JLA initiated a complaint against petition writer Michael Neeman in the Tel Aviv Magistrate Court, in which the court accepted the claim but was apparently sympathetic to the defendant. On appeal, the Tel Aviv District Court affirmed the lower court's decision, and seemed to be more supportive of the JLA's claim. As a result, the petition writers initiated a legislative amendment in order to secure their professional jurisdiction.

43. *Id.*

44. See The Sixth Meeting of the Jewish Lawyers' Association Committee, April 1937 (Central Zionist Archives, J108/12); The Fourth Meeting of the Jewish Lawyers Association Committee, May 3, 1931 (Central Zionist Archives, J108/2); The Seventh National Council of The Jewish Lawyers Association, July 3, 1935 (Central Zionist Archives, J108/5).

attorney fees in order to restrict internal competition and complained about clients “shopping” for the cheapest lawyer as a practice that degrades the profession.<sup>45</sup> In short, the newly emerging bar was deeply engaged in efforts to obtain real and symbolic privileges for its members and to secure their interests from old and new threats to their accumulated achievements.

In sum, during the pre-state period the Israeli legal bar developed under the influence of three major political forces. First, there was the British legal heritage from which many of the lawyers received their basic conception about law and lawyering. This system was formalistic, doctrinal, and emphasized the private role of lawyers, i.e., their chief duty to their clients. Within this framework, little was conveyed to members of the profession concerning their responsibility for attaining substantive justice.

Second, the legal profession was formed during a period saturated with a nation-building ethos. Jews immigrating to Palestine were directed to prepare the institutional apparatus for the Jewish State. This way the profession could, on the one hand, discharge of its public duties, necessary to claim the status of a professionalized group, and at the same time continue to preserve its private orientated practice by maintaining the principles of autonomy, independence, and client loyalty.

Third, the emerging bar strove heavily to create a structure and a culture that would provide lawyers with social status, financial advantage, and unique privileges. It is striking that from 1942-1944, in the midst of World War II, the JLA continued to deal with rather mundane matters: the “petition writers” problem, stricter exclusive jurisdictional rules, “improper competition” between members of the profession, accountants that performed legal work, and the ever worrisome problem of the excessive number of lawyers in the country.<sup>46</sup>

It is therefore not surprising that lawyers emerged into the newly established state with a rather weak professional commitment to ideas such as public service and professional social accountability. The bar focused inwards, towards its members and clients, as a means to preserve its professional identity and interests. As will be discussed in the next section, this disposition was reinforced as the new state’s legal mechanism was being contrived. Thus, when the British Mandate ended, the State of Israel was founded and the elite of the

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45. In the Seventh National Council of The Jewish Lawyers Association, July 1935 (Central Zionist Archives, J108/5), attorney Shoham from Haifa “warns the members from a disgraceful habit of a notorious type of clients who call, for example, a number of lawyers and ask on the phone about their fees, and to choose the cheapest. Against such phenomenon [they] must fight.”

46. Shtrassman, *supra* note 12, at 165; Michael Keren, *Law, Security and Politics: An Israeli Case Study*, 21 Int’l J. Soc. L. 105, 113 (1993).

legal establishment was incorporated into the state bureaus;<sup>47</sup> lawyers in Israel, then a little over 500 in number, resorted to minding their own interests and those of their clients.

## II. THE EARLY YEARS

The structural-institutional manifestation of lawyers' "public role," described above, carried over into the early stages of Israeli statehood. Nation and state building continued to form the central goals of Israeli polity well into the first two decades of statehood. When the Israeli Supreme Court was inaugurated, the newly appointed Jewish judges expressed their joy and pride in Jewish national revival by use of such notions. The appointment of Jewish judges to the Israeli Supreme Court in and of itself was considered a symbol of sovereignty, a revival of old hopes and dreams. Commemorating this historical occasion, Chief Justice Moshe Zmora recalled the following traditional diction: "For almost two millennia the Jewish people were praying three times a day: 'Restore our judges as at first'; trembling we approach today the fulfillment of this vision."<sup>48</sup> Lawyers took part in constructing this ethos by joining the newly established state legal institutions. However, this was not a smooth transition for the lawyers, as the central values of Israeli society during that period stood in discord with the dogmas of the bar and the legal profession.

A dominant social ideal that permeated sovereign Israel in its earlier years was collective solidarity, coupled with the goals of nation and state building.<sup>49</sup> Yonathan Shapiro describes the combination of nationalism and collectivism as follows:

The spiritual hegemony of Mapai (the governing labor oriented party) was based on a few basic principles which were conferred upon the Israeli society at large by its leadership. The first was the national principle in its Zionist version. The national ideology

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47. On the early appointments of lawyers to the Ministry of Justice and the courts see Ruth Bondy, Feliks: Pinhas Rozen and His Time (1990). On the appointment of the first Supreme Court Justices from the top ranks of the private bar, see Eliakim Rubinstein, *Shoftei Eretz: Lereshito Velidmuto shel Beit Hamishpat Haelyon BeIsrael* [Judges of the Land: The Origins and Image of the Israeli Supreme Court] (1980). Interestingly, Jewish judges who served on the Mandatory courts were usually not appointed to the Israeli Supreme Court. Rubinstein explains that because the establishment of state institutions was conceived as an act of sovereignty, Mandatory court judges could not symbolize this transformation and most were not re-appointed. *Id.* at 73.

48. Resorting to quotations from Biblical sources, perhaps building an imaginative connection between judges in the newly established state and the biblical era of the book of Judges, was common in other inauguration speeches as well. See Lahav, *supra* note 22, at 84-85.

49. For a recent critique of the socialist ethos and its subordination to nationalism see Zeev Sternhell, *The Founding Myths of Israel: Nationalism, Socialism and the Making of the Jewish State* (David Maisel trans., 1998).

preferred the collective interests of the nation to the will of the individual. This collectivism was also the basis of the socialist view. Abolition of private property and preference of a cooperative economic community was an expression of the socialist collectivist philosophy. Mapai managed to fuse the nationalist Zionist view with the socialist collectivist.<sup>50</sup>

Collective ideals trumped individualism. Individuals were perceived as bearers of collective objectives and their interests subordinate to the national cause. Dan Horowitz and Moshe Lissak write that "[t]he perception of the individual as a bearer of collective ideals whose commitment to these ideals makes him or her subordinate to their imperatives was characteristic of both the pioneering ideology and the ideology of the national radical right."<sup>51</sup> Expressions of individualism, writes Yaron Ezrahi, were conceived as a miscarriage of the prevailing Zionist ideals and "as symptoms of the breakdown of high ideals and the disintegration of communal life, not as the inner spiritual dramas of the individual and the issues of his or her social authenticity."<sup>52</sup>

Lawyers (as well as judges) did not easily blend into this scheme of collectivism and bureaucratic rule and were estranged from this dominant culture. At the time, Israel's elite groups were associated with Zionist pioneering projects: land redemption, agricultural work and security.<sup>53</sup> Israel's historiography concentrated on transforming the image of the old Diaspora Jew implanted among books and holy studies to the New Jew. The New Jew was a pioneer-settler, connected to the land and striving to protect the emerging nation from its enemies.<sup>54</sup> These symbols of national revival, well entrenched into a hierarchical social structure of the pre-state era, continued to govern during the first decades of Israeli statehood.<sup>55</sup> Lawyers, in contrast,

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50. Yonathan Shapiro, *An Elite Without Successors, Generations of Political Leaders in Israel* 26 (1984).

51. Dan Horowitz & Moshe Lissak, *Origins of the Israeli Polity* 131 (Charles Hoffman trans., 1978) [hereinafter Horowitz & Lissak, *Origins in Israeli Polity*]; see also Dan Horowitz & Moshe Lissak, *Trouble in Utopia, The Overburdened Polity of Israel* 153-54 (Charles Hoffman trans., 1989) [hereinafter Horowitz & Lissak, *Trouble in Utopia*].

52. Yaron Ezrahi, *Rubber Bullets, Power and Conscience in Modern Israel* 97 (1997).

53. On the early Israeli elites, see, e.g., Eva Etzioni-Halevy, *The Elite Connection: Problems and Potential of Western Democracy* 111-12 (1993).

54. Ezrahi, *supra* note 52, at 175. "At the heart of Zionist revolution that culminated in the creation of the State of Israel in 1948 was the transformation of the Jew from a member of a disempowered and vulnerable religious minority into an armed citizen-soldier of a sovereign state governed by a Jewish majority." *Id.*

55. The Mapai party, which continued to control the political arena, did not have many lawyers within its institutions. Rubinstein, *supra* note 47, at 27-28. Contrary to other Western societies, the number of lawyers in key political positions in the first two decades of Israeli statehood was low. For example, in the first six parliamentary terms, less than six percent of the Knesset members were of legal training. See Ronen

were associated with the letter of the law, with official rules and formalistic precedents. They did not play a central part in the epic of Jewish nation building nor produce any heroes in Israel's pre-state revolutionary movements. Lawyers worried about their inferior status and the issue was occasionally discussed in the main professional publication of that time—Hapraklit (The Advocate). Polonsky, one of the leading lawyers in the 1960s wrote: "we cannot deny that in our country too our profession is not appreciated or popular to the extent which befits this kind of profession."<sup>56</sup>

The frustration over the subordinate status of lawyers and judges is also reflected in writings of Supreme Court judges from this period.<sup>57</sup> Justice Vitkon, who was appointed to the Supreme Court in 1954, stated that the first generation of state builders was driven by ideals of socialism and pioneering, under which agricultural settlement was the primary condition for national revival. "The New Jew" in Israel was expected to internalize and exhibit these qualities, and the ruling bureaucracy of Mapai looked down at jurists who did not endorse such characteristics.<sup>58</sup> Supreme Court Justice Itzhak Olshan recalls: "In the eyes of a few ministers, and especially in the eyes of senior officials—even if not expressed in public—the Supreme Court Justices were perceived as 'too superior creatures' . . . we often had to confront disrespect on behalf of part of the bureaucracy."<sup>59</sup> The decision to locate the Supreme Court in Jerusalem exemplifies this point, too. Lahav explains that the location of the Supreme Court in Jerusalem (in the "Russian Compound") dismayed the Justices, who would have preferred it be located in Tel Aviv, close to other state

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Shamir, *Society Judaism and Democratic Fundamentalism—on the Social Roots of Judicial Interpretations*, 19 *Iyunei Mishpat* [Tel Aviv U. L. Rev.] 699 (1995).

56. A. Polonsky, *The Status of the Lawyer in the State and in Law*, *Hapraklit* [The Advocate] 168, 169 (1961) [hereinafter Polonsky, *The Status of the Lawyer*].

57. The desire of the judges to become part of Israel's renewed and developing culture can also be illustrated through judicial folklore-like stories from that era. Shneur Z. Cheshin, who served as a magistrate and district judge in Mandatory Palestine and later became a member of the first Israeli Supreme Court, provides an account of the court-folklore of that period in his book documenting his years as the peoples' judge in Palestine. The judge describes the court and the law as being very close and accessible to the local community and to its customs and traditions. He highlights the gaps between formal law and community norms that created, in his words, "laughter and tears" in this forum. This narrative attempts to situate the Jewish judge close to and among "his" people in a crucial historical time and place. It is interesting to note that these court tales contain no mention of lawyers at all. The people and the judges interacted in these stories unmediated by any professionals. Shneur Z. Cheshin, *Tears and Laughter in an Israel Courtroom* (1959).

58. Alfred Vitkon, *The Law in a Developing State*, in *Jubilee to Pinhas Rosen* 72 (1962). Vitkon also states that the values of pioneering led people "first and foremost to agricultural settlement and redeeming of the land, in which they saw the primary condition to the revival of the nation, while the legal profession, along with other occupations the Jews excelled in, in the Diaspora, were considered loathsome." *Id.* at 72-73.

59. Itzhak Olshan, *Din Udvarim* 240 (1978).

offices, but could not because of acute land shortage. The Justices complained that "such mundane matters as judicial facilities were rather low on [the government's] priority list," and Lahav concludes, "the Supreme Court of Israel was established in Jerusalem more out of necessity than out of choice."<sup>60</sup>

Neither did lawyers carry the personal attributes of the elite social groups. To blend into the upper social and cultural milieu, one needed to display socially appreciated attributes such as informality, a capacity to improvise, flexibility, and initiative. Horowitz and Lissak explain that, in their private and public lives, people were expected to display behavioral codes that manifested ideals of egalitarianism, modesty, and collective solidarity.<sup>61</sup> Lawyers' concerns with formalism, honorable behavior, civility, and proper attire did not correspond with those norms, and were considered inferior to qualities such as improvisation, flexibility, and genuine creativity.

In particular, lawyers' preoccupation with honor in their formal and informal directives highlighted their cultural estrangement from the dominant social ambience, which—at least on the rhetorical level—praised opposite traits of modesty and informality. If legal rules reflect at least partially professional ideology, a primary objective of the rules that directed and regulated lawyers' professional conduct was to maintain the "honorable" image of the profession. The Israel Bar Association Act and the ethical rules promulgated under this statute are pervaded with the duty to preserve the honor of the profession.<sup>62</sup> Under these rules, lawyers' duties of loyalty and devotion to clients must correspond with their obligation to preserve the honor of the profession and of the court.<sup>63</sup> Other instructions that require respectable and honorable behavior are abundant: Ethical Rule 32(a) obligates the lawyer to retain the honor of the court and of the profession during representation, and subsection (b) restates the duty to appear before the court honorably (including wearing appropriate attire). Ethical Rule 33 requires the lawyer to be polite and to respect the honor of persons involved in the legal process and Rule 23 instructs the lawyer to act cordially towards her adversary. This "bourgeois" private-oriented character of the bar was poignantly reflected in the centrality of notions such as honor, decor and civility, dominant in the profession's codes and culture. These attributes stood in discord with a society that was hostile to formalism and

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60. Lahav, *supra* note 22, at 83-84.

61. Horowitz and Lissak, *Origins in the Israeli Polity*, *supra* note 51, at 108. A member of the labor movement elite, for example, was expected "to behave in a conspicuously egalitarian manner in his relations with the rank and file." *Id.*

62. On the enactment of the Israel Bar Association Act and its ethical rules, see *infra* section IV in this chapter.

63. Rules of the Bar Association (Professional Ethics), 1986 Kovets Hatakanot 4965, (Sept. 4, 1986) Rule 2.

celebrated—at least symbolically—comradeship, informality, and collective responsibility.

On a deeper, conceptual level, the central dogmas underlying legal representation conflicted with the notions of collectivism and national solidarity. In this respect, law carried a dual function. On the one hand, it was the formal language of the new sovereign state by which the legislature (Knesset) was establishing a new political and social order. Similar to other State apparatus during that era, law was conceived through instrumental terms: whether it was constructive or obstructive to the collective national cause.<sup>64</sup> At the same time, law constituted the doctrinal basis of the legal profession, carried out through the act of representation. The underlying basis of legal representation, however, was individualism: lawyers were expected to be devoted to their clients and to advance their interests even beyond those of the state or the nation. Thus, the lawyers' defining professional norm was in tension with the prevailing themes of national reconstruction.

Against this indeterminate background, the legal profession strove to position itself within the emerging state institutions. The bar needed to align with the state, on the one hand, and maintain the private-individualistic nature of legal professionalism, on the other.

As mentioned above, in the pre-state era, when Jewish institution building was the primary national objective, lawyers defined their public role through the formation of Jewish legal institutions in the emerging system of justice. Following the establishment of the basic state mechanisms, lawyers continued to organize their professional basis tightly around the courts as state institutions. At this stage, their public role was articulated, and professed, by joining the courts in constructing the basic elements of a liberal democracy and by strengthening respect for the rule of law.

Individual representation served this objective by ensuring access of litigants to the judicial system. As stated by attorney Polonsky in 1961, "we have to promote the feeling that involvement of the lawyer when the rights of the individual are infringed is for the benefit of the state and the democratic rule."<sup>65</sup> Thus the private role of lawyers (pursuing the interests of their clients) was portrayed as a means to carry out a collective goal: enhancing respect for the rule of law within the emerging democratic state. Lawyers did not forward a vision of their profession as a constituent of Israel's civil society, counterbalancing state power, but as a state interest. Here again, lawyers' duties to the public were satisfied without a need to venture into any particular value system and its relation to law, and without

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64. See, e.g., Sternhell, *supra* note 49, at 322.

65. Polonsky, *supra* note 56, at 169.

offering any substantive orientation to law, legal representation, or professional ethics.

The professional disposition described above should also be understood in relation to the attempts of the Israeli Supreme Court during those years to establish its own status and role during the early era of Israeli statehood, and in the context of a clear division of tasks that gradually emerged between the bar and the bench in this period.

It is now widely acknowledged within Israeli jurisprudence that in the first two decades the Israeli Supreme Court resorted to legal formalism as a means to constitute law's relative autonomy and to loosen the heavy grips of state politics. Since forces of statehood and collectivism were strong, the court's distinctive contribution to democracy was protecting the individual against the state and laying the foundation for at least a formal adherence to the rule of law. This task was especially demanding due to the lack of a formal constitution in Israel that guaranteed basic individual rights. In order to achieve this goal, the court resorted to a doctrinal and formalistic application of law. Martin Edelman describes this process:

In the early years of the State, the Supreme Court was necessarily concerned with establishing its authority by generating respect for its decisions. The Justices were aware that in the turbulent domestic and international situation of their new state, appeals to practical necessity could be used to evade or ignore court orders. Therefore, the early Supreme Court opinions were characterized by a highly formalistic legal style, narrow interpretations of statutes and precedents, adherence to *stare decisis*, and deference to the decisions of the political branches . . . . Throughout, the civil courts emphasized the importance of the rule of law and their own objective to adhere to those rules.<sup>66</sup>

Menachem Mautner provides another explanation for the court's formalistic disposition during this period. He claims that its basis lies in the gap between the ideals and values of the judges on the one hand, and the prevailing values among other state institutions and the public on the other. Mautner claims that some of the justices (who came from England, the United States and Europe) believed in values of individualism and liberalism, and recognized the importance of a court that would safeguard both formal and substantive aspects of the rule of law. Confronted by an ethos of nationalism and collectivism, the court was bound to become an estranged cultural entity within its own society. Formalism, argues Mautner, enabled the court to conceal the value-dimension of its decisions and to present the judicial process as a technical mechanism. Under this reasoning, the outcome of judicial decisions was 'inevitable' to the process and was not reached based on any value choice of the court. Legal formalism

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66. Martin Edelman, *Courts, Politics and Culture in Israel* 42 (1994).

therefore allowed the court "to cloak the cultural gap that existed at the time between the court and the society within which it acted."<sup>67</sup>

Whether the formalism of the court was a cloak to conceal a value-based cultural gap or the judges at the time simply had a more restrictive attitude towards their institutional role,<sup>68</sup> throughout the 1950s and the 1960s the court gradually transformed its professional authority into a moral one. Although the court based its rulings on formalistic rather than substantive grounds, the Israeli Supreme Court laid the substantive constitutional infrastructure for the protection of individual rights in Israel, which was further developed and expanded in later decades.<sup>69</sup>

Already at this early stage, the bar and the court began to articulate their division of roles within the evolving legal framework. The court moved, prudently and incrementally, to incorporate into Israel's constitutional infrastructure a judicial bill of rights. Basic rights and liberties such as freedom of assembly and speech, equality, and freedom of religious worship became part of Israel's unwritten constitutional properties.<sup>70</sup>

Unlike the court, the bar did not further any substantive or normative platform, such as protection of individual rights, equality under the law or even equitable access to the justice system, by use of its professional advantage. During the early decades of Israeli statehood, it continued to protect the structural foundations of the emerging liberal democratic institutions in Israel, under the rationale that soundness of legal institutions also guaranteed the stable status of the legal profession.<sup>71</sup>

67. Menachem Mautner, *The Decline of Formalism and the Rise of Values in Israeli Law* 125 (1993).

68. Mautner, *Multiculturalism in a Democratic and Jewish State*, *supra* note 8, at 609.

69. See generally Baruch Bracha, *The Protection of Human Rights in Israel*, 12 *Isr. Yearbook of Human Rights* 110 (1982); Stephen Goldstein, *Protection of Human Rights by Judges: The Israeli Experience*, 38 *St. Louis U. L.J.* 605 (1994); Asher Maoz, *Defending Civil Liberties Without a Constitution—The Israeli Experience*, 16 *Melb. U. L. Rev.* 815 (1988); Amos Shapira, *The Status of Fundamental Individual Rights in the Absence of a Written Constitution*, 9 *Isr. L. Rev.* 497 (1974).

70. Freedom of expression was recognized in the precedent case of H.C. 73/53, *Kol Ha'am v. The Minister of Interior*, 7(2) P.D. 871, *translated in* *Selected Judgments of the State of Israel* 90 (1953). See also H.C. 14/86, *Laor v. Theatre Review Board*, 41(1) P.D. 421; H.C. 680/88, *Schnitzer v. Chief Military Censor* 42(4) P.D. 617. Freedom of religion and worship was recognized as early as 1962 in H.C. 262/62, *Peretz v. Local Council of Kfar Shmaryahu*, 16(3) P.D. 2101.

71. In comparison, on the situation in the United States, see Jerold S. Auerbach, *Unequal Justice: Lawyers and Social Change in Modern America* 263 (1976) ("As long as the public retained faith in the integrity of the legal process, the bar preserved its precarious compromise between the politics of professionalism and the rule of law.").

### III. THE ISRAEL BAR ASSOCIATION ACT—PRINCIPLES AND LEGISLATIVE HISTORY

Interestingly enough, conceptualizing the profession's public role in accordance with state interests as described above was pursued in a way that placed the bar outside the scope of the public-state sphere. To do so, lawyers needed to create and preserve an enclave of professionalism. As a strategic move, they wished to assume control over many aspects of lawyers' professional conduct. First and foremost, it was necessary to detach the profession from the state controlled Legal Council, a remnant of the British era, that was responsible for licensing and examinations of lawyers.<sup>72</sup> Second, the bar moved to make membership in the organization mandatory.

These goals were not new, and lawyers had discussed them since the 1930s as "The Bar Question"—how to go about establishing an independent professional organization.<sup>73</sup> After the founding of the state, obtaining this goal was more likely, so members of the bar introduced to the Knesset a bill that would establish their new independent organization. The debates that accompanied the enactment of the Israel Bar Association Act between 1959 and 1960 revealed that the primary motive of the bar was to preserve lawyers' autonomy. Lawyers claimed that giving them an independent status was rightful and timely. Throughout those deliberations there is hardly any evidence of considerations relating to the public interest or common good. During an era saturated with notions of statism, nationalism, and collectivism, lawyers were the first group to break away from state control, demanding and obtaining an autonomous professional status.

#### A. General

The Israeli Bar Association is a statutory body with broad authority over matters related to lawyering in Israel.<sup>74</sup> One main statute governs lawyers' activities and status—The Israel Bar Association Act of 1961 ("IBA Act").<sup>75</sup> The IBA Act founded the bar and its organs and set

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72. The Legal Council Ordinance of 1938 was one of the legal sources for regulating the profession. The second formal basis for lawyers' regulation was the Advocates Ordinance of 1938 (originally enacted in 1922), which regulated lawyers' conduct. In addition, there was a voluntary lawyers association in which many, but not all lawyers were members. The association conducted disciplinary hearings on ethical misconduct of lawyers.

73. See, e.g., Pinhas Avissar, *Bterem Lishka* [Before the Bar], *Hapraklit* [The Advocate] 28, 38, 41 (1961) (describing "The Bar Controversy").

74. For a comparative and critical overview of the Israeli bar's privileges compared to lawyers' associations in other countries, see Eli M. Salzberger, *The Israeli Jurists Conspiracy—On the Israeli Bar and its Allies*, 32(1) *Mishpatim* 43 (2002).

75. The Israel Bar Association Act of 1961, 347 *Sefer Hachukim*, 178 (1961) [hereinafter IBA Act].

the general principles for lawyers' conduct. The bar is authorized to promulgate rules under the IBA Act.<sup>76</sup> The bar approves admittance into the profession, administers entrance exams, and provides licensing. Membership in the bar is mandatory and lawyers must also pay yearly dues to the organization.<sup>77</sup> The bar administers internal disciplinary forums (regional and national), issues rules of ethics, sets dress codes, and oversees the required apprenticeship period before taking the entrance exams. Eli Salzberger claims that the scope of the bar's reach over lawyers' conduct, its autonomy from external intervention, and the extent of exclusive restrictive conduct regarding unauthorized practice of law is unprecedented compared to other common law and civil law countries.<sup>78</sup>

The collective interests of the profession dominate the law.<sup>79</sup> The chapter that oversees ethical conduct sets forth a general behavioral requirement that the lawyer "will preserve the honor of the profession and will abstain from any matter which might harm the honor of the profession."<sup>80</sup> Other rules devise strict boundaries that distinguish between members of the bar and outsiders,<sup>81</sup> and broadly defines activities only lawyers are permitted to perform.<sup>82</sup> The law also restricts internal competition between lawyers through rules limiting self-advertisement<sup>83</sup> and client solicitation,<sup>84</sup> and continues to

76. Rules of the Bar Association (Professional Ethics), 1986 Kovets Hatakanot 4965, 1373 [hereinafter Ethical Rules].

77. IBA Act, § 42 (discussing mandatory membership); § 93 (discussing membership fees).

78. Salzberger, *supra* note 74, at 56-64.

79. Compare Abel, American Lawyers, *supra* note 39, at 18-30 (arguing that American lawyers constructed their regulations to gain control over their services, pursued social closure to promote professional mobility, and demanded control over the production of lawyers).

80. IBA Act § 53.

81. For example, until 2002 section 60 of the IBA Act prohibited lawyers from practicing as accountants or engaging in commercial business that has not been approved in rules promulgated by the bar, or practicing any other vocation that does not befit a lawyer. This restriction was eased. *See infra* note 179.

82. IBA Act § 20. A non-lawyer is prohibited from representing another person in any judicial or quasi-judicial forum, in arbitration, and in a list of numerous other administrative proceedings. Such administrative bodies include the land registrar, companies' registrar, patent registrar, and various tax authorities. Law students, for example, cannot provide formal representation in hearings. In addition, sections 96-98 criminalize any such activity carried out by a non-lawyer and restrict the court from accepting a civil fee suit by a non-lawyer who engaged in activities that are exclusive to lawyers only.

83. *Id.* § 55. In 2000, the Professional Advertising Regulation Act (Legislative Amendments), 2000 (S.H. 182), allowed lawyers to advertise their services according to rules to be promulgated by the bar. In 2001, the total prohibition against advertising was replaced with a set of ethical rules that prescribe the scope of authorized advertising. Bar Ethical Rules (Advertising) 2001.

84. IBA Act § 56. In the past, advertising was a basis for disciplinary action. In 1994, for example, the bar attempted to restrict courier offices from providing land transaction registration services. Israeli lawyers handle almost all land transactions,

differentiate between lawyers and non-lawyers through meticulous regulation of the use of titles and degrees on letterheads and door-signs.<sup>85</sup>

Loyalty to the client is a central theme permeating the law and ethical rules. The primary rule that addresses duties to clients (and to courts) states: "In the fulfillment of his duties the lawyer will act for the benefit of his client, faithfully and with devotion, and will help the court to generate law." Similarly, another ethical rule requires that the lawyer will represent his client "faithfully, with devotion and without fear, while acting in fairness, in honor of the profession and in perseverance of an honorable disposition towards the court."<sup>86</sup> The courts, too, have interpreted devotion to clients as the main medium through which professional conduct ought to be assessed.

The IBA Act and ethical rules include instructions regarding client confidentiality,<sup>87</sup> prevention of conflict of interests<sup>88</sup> and collegial duties towards other members of the profession.<sup>89</sup> But beyond those basic requirements, the law and ethical rules lack even minimal guidance about the profession's ethical principles. As a general statement, the law and ethical rules direct lawyers to assist the court to "generate law,"<sup>90</sup> and instruct them not to assert a factual or legal claim that they know to be false. Lawyers are guided to represent their clients fairly,<sup>91</sup> and are allowed to terminate the lawyer-client relationship if there is disagreement about the manner in which representation should be provided.<sup>92</sup> A lawyer may refuse, of course,

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and receive a percentage of the value of the transaction as their fee. Many aspects of this job are technical in nature, especially the formal registration stage, which entails bringing filled out documents to the land registry for approval and final registration. When lawyers began to use courier and messenger services to carry out this task, the bar objected and filed suit against the courier office. The case reached the Israeli Supreme Court and was settled in a way that allowed courier offices to provide this service only if they are affiliated with law firms, and in a manner that left lawyers the control over its provision. H.C. 4951/93, "Mismach" Legal Services Inc. v. The Land Registrar, The Ministry of Justice and The Israeli Bar Association. The settlement received court approval on April 5, 1994. For the settlement terms, see Takdin Elion 94(2) 2369 (1994).

85. IBA Act § 57.

86. Ethical Rule 2, *supra* note 76.

87. Section 90 is broadly versed: "Words and documents exchanged between a lawyer and his client which carry a relevant correlation to the professional service a lawyer renders the client the lawyer shall not reveal in any legal procedure, except if the client waived his confidentiality." IBA Act § 19; *see also* Ethical Rule 19, *supra* note 76 ("A lawyer will keep confidential anything that was brought to his knowledge by his client or on his behalf, when fulfilling his duties, except if the client agreed explicitly otherwise. . . .").

88. Ethical Rules 14-18, *supra* note 76.

89. *Id.* at 26.

90. IBA Act § 54.

91. Ethical Rules 2 & 34, *supra* note 76.

92. Ethical Rule 13, *supra* note 76. The wording of this section suggests nonetheless that it is aimed more at preserving the lawyer's autonomy than at achieving a just outcome from the representation.

to represent anybody on any grounds, and must notify the client promptly of a decision not to assume representation.<sup>93</sup> However, beyond a general guidance to act in fairness (including a prohibition to misguide the court)<sup>94</sup> the rules are generally silent about lawyers' substantive ethical obligations to the public good, including third parties and society at large.<sup>95</sup>

The IBA Act and ethical code largely emphasize behavioral style and etiquette, and are less ambitious about substance. Most of the rules are structural and delve in minute detail into the makeup of disciplinary boards and their jurisdiction, the structure of bar institutions, election procedures to the bar's internal institutions and internship requirements.<sup>96</sup> The law and the code do not direct lawyers to assist in the generation of substantive justice, nor are they accompanied by any comments that guide lawyers in any definite way to act morally as part of their professional role.

In this context it is interesting to follow the changes in terms chosen by the Israeli legislature compared to those used in the British ordinance that preceded the IBA Act, to describe the duty of lawyers towards the legal system. Section 54 of the IBA Act states that a lawyer must act for the benefit of his client and assist the court to "generate law," using the term "*mishpat*" to describe "law." The term *mishpat* in Hebrew could mean either law or justice. The equivalent English section in the British Advocates Ordinance of 1922 (the origin of the IBA Act) stated that the advocate must "assist the court to administer justice."<sup>97</sup> In the formal translation of this section into Hebrew,<sup>98</sup> the English term justice was translated into the Hebrew word *tsedek*, the common Hebrew term for substantive-justice. Moreover, in the proposed bill introduced in the Israeli Knesset in 1959, the term *tsedek* appeared as the professional principle guiding a lawyer's relationship with the court.<sup>99</sup> However, as a result of a

93. Ethical Rule 12, *supra* note 76, affords lawyers an unqualified privilege not to represent clients. Thus the rule can be used as a source to claim that lawyers' ethical principles allow them to terminate or refuse representation. The rules, however, are silent on this point, and seem to be aimed at preserving the liberty of the lawyer rather than obtaining an undesired outcome stemming from representation.

94. Ethical Rule 34, *supra* note 76.

95. On the price of abandoning a code of ethical principles for a code of rules see Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stan. L. Rev. 589, 647-48 (1985); see also Salzberger, *supra* note 74.

96. See IBA Act, chapters I (the establishment of the bar), II (the bar's institutions), III (exclusive jurisdiction), IV (training and education), V (membership in the bar), VI (professional ethics and disciplinary hearings, Sections 53-80, out of which only sections 53 and 54 direct lawyers in any substantive way about ethical principles), VII (attorneys' fees), VIIA (special circumstances when a lawyer is deceased), and VIII (miscellaneous).

97. Advocates Ordinance of 1922 § 14.

98. *Haitton Harrishmi* [Palestinian Gazette], July 5, 1922.

99. Section 50 of the Bar Association Bill, 395 Hataot Hok 370 (June 1, 1959), states: "A lawyer must act to the benefit of his client with devotion and loyalty and he

demand put forward by the lawyers, the term "*tsedek*" was aborted and was replaced by the term "*mishpat*," symbolically conferring a lesser commitment to the merited outcome of adjudication on account of its process.<sup>100</sup>

Through the IBA Act, the Israeli bar managed to formalize an extensive degree of independence from the state. Abel explains that the paradox of professional independence is that it can only be achieved through the authorization of the state.<sup>101</sup> Professionals must negotiate the level of their autonomy with state agents in order to subsequently be free of state control. The legislative process of the IBA Act, which ultimately was enacted in 1961, thirteen years after Israel gained its independence, illustrates this dilemma well.<sup>102</sup>

### B. *The Legislative Hearings*

It was not a simple and speedy task for the bar to establish in law its desired professional autonomy. In fact, despite continuous advocacy by lawyers during the 1950s, it took the Israeli Knesset thirteen years to enact a statute that recognized the status of the Israeli bar.<sup>103</sup> Throughout the parliamentary debate one can detect uneasiness with the central objective of the bill—to grant lawyers an autonomous status—during a period of tight state involvement and control. Numerous Knesset members were ambivalent about the emerging themes of the proposed law.<sup>104</sup> On the one hand, they felt that if Israel claimed to be a modern Western state, it would have to recognize the independence of certain professions. At the same time, it was difficult to reconcile such a laissez-faire approach with prevalent ideas of statism and collectivism.<sup>105</sup> These dilemmas reflect suspicion and discomfort not only with the ideals underlying lawyers' collective

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must assist the court to administer justice (*tsedek*)."

100. On the background and the meaning of this change, and how it conveys different approaches to the role of lawyers compared to judges, see Haim H. Cohen, *Fiat Iustitia*, Hapraklit [The Advocate] 37, at 47. Cohen, a former Supreme Court Justice, claims that the change was introduced based on an erroneous theory held by lawyers that lawyers do not owe a duty to help the court establish truths beyond their loyalty to their clients. *Id.*

101. Abel, *American Lawyers*, *supra* note 39, ch. 1.

102. Knesset Protocols from December 21, 1959, at 152-59; Knesset Protocols from December 22, 1959, at 160-74 [hereinafter First Reading Protocols]; Knesset protocols from January 11, 1960, at 288-304; Knesset Protocols from June 6, 1961, at 1927-54 [hereinafter Second Reading Protocols].

103. On the attempts to enact the law between 1948 and 1959, see Dr. Joshua Rotenshtreich, *The Establishment of the Bar Association*, Hapraklit [The Advocate] 1987, at 37.

104. Second Reading Protocols, *supra* note 102, at 1932, 1950.

105. Tension also arose because of the need to conciliate between the national interest to successfully absorb as many new immigrant lawyers as possible, and the interest of the bar to establish prerequisites and barriers to practice. See First Reading Protocols at 1934, 1938.

autonomy, but also with the principles of individual legal representation.<sup>106</sup>

Throughout the parliamentary discussions, the bar demanded extensive autonomy as a manifestation of trust and confidence that ought to be conferred upon it by the state and the public. Lawyers asserted that they were worthy of this privilege because of their qualities, status, maturity and prestige. Debates over independence and self-governance permeated the parliamentary hearings and formed the core deliberations over the bill.<sup>107</sup>

Minimal attention was paid to the role of lawyers in the preservation of justice. When then Minister of Justice P. Rosen presented the bill before the plenary, he nominally underscored both

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106. In various contexts the principles prescribed in the bill stood in contrast to the leading values of nation building. For example, the original version of the bill included a requirement that a lawyer must retain Israeli citizenship to become a member of the bar, but this requirement was dropped during the Law and Constitution Committee deliberations between the first and the second reading. However, this omission raised objections at the plenary based on Zionist ideals and "*aliya*" (immigration to Israel). Because "*aliya*" and pioneering were considered so central to Israeli society at the time, these values did not coincide with the prospect of a person becoming a lawyer without assuming citizenship, i.e., full and formal alliance with the state. It appeared against the grain of state and nation building that persons would come to Israel only "on condition" of their financial success; thus, some claimed that lawyers should not be allowed to obtain personal and financial gains without assuming the full risks of becoming Israeli citizens. A vivid objection was raised by Member of Knessett ("MK") Kushnir:

If a person comes from a country where he had lived in wealth, South Africa or something like that, where he could have servants and live in an apartment of ten rooms and in great comfort, and he has to come to this country, to the state of Israel, and here the conditions are still those of pioneering. . . . and we tell him: no rush, do not fear. Look, if you do well and you can live at a very high standard similar to where you came from—you can get your citizenship. But if you can't—pack your bags, sit on your suitcases for a few years, and return to the place you came from. Should we allow such a privilege?

Second Reading Protocols, *supra* note 102, at 1939. Subsequently this objection was refuted on the basis that lawyering did not require particular loyalty to the state (like civil service does), since it was a free vocation, and the requirement of citizenship was omitted.

107. See, for example, the debate over the role of governmental representatives in the governing bodies of the bar during the discussion towards second and third reading. Second Reading Protocols, *supra* note 102, at 1931 (justifying the demand to restrict the role of governmental representatives in order to protect lawyers' pride and autonomy). Similarly, the reason for the arrangement by which the head of the bar would be elected by the general committee was to ensure that the chair enjoyed "prestige and independence." Also see the debate over budget supervision of the bar and its authority to demand membership fees. *Id.* at 1950-51. During these deliberations, the chair of the Law & Constitution Committee stated, "Should we not trust them for this purpose? If we don't trust them like that, we shouldn't give them autonomy at all." *Id.* at 1952. The chair also stated, "If on the 14th year of the state we decided to grant the lawyers the bar association law, it is because the legislator believes that they have sufficiently matured in order to handle their affairs internally autonomously." *Id.*

the private and public duties of the legal profession. On the one hand, he stated, the legal profession was a free vocation, providing its members with freedom, honor and independence. At the same time the profession carried the duty to implement law and justice.<sup>108</sup> However, as the discussions over the bill continued, little was mentioned about any other substantive duties of lawyers, such as ensuring equal access to justice. Most of the debate centered on the level of independence the bar should receive and the fear of Knesset members that lawyers would abuse this autonomy for anti-competitive and closure policies.<sup>109</sup>

During the legislative debates, professional autonomy was not explicitly presented in exchange for the bar's obligation to further substantive justice or equal access to the legal system. Reference to these issues was minimal. For example, Member of Knessett ("MK") Zimmerman from the General Zionist Party expressed concern with the lack of attention to lawyers' power to abuse the law:

The debate conducted here leaves the impression that the purpose of this bill is to protect lawyers, the profession and its proficiency. I disagree with this opinion. I believe that the purpose of this bill and of the law when it is passed is to protect the public. . . . It is similar to giving someone a dangerous tool and not telling him how to use it positively and therefore he can use it in a negative way.<sup>110</sup>

MK Zadok of Mapai, who later became the Minister of Justice, also mentioned in his speech the public duties of the profession to provide services for the poor and to contribute to legal reform.<sup>111</sup> However, during the lengthy debate towards the second and third reading of the bill, there was only one reference to the bar's responsibility to provide legal representation to poor people.<sup>112</sup>

By and large, most of the parliamentary discussions rested upon an assumption that the bar does not carry strong commitments to the public good. Moreover, some provisions in the original bill that were designed to impose an elevated level of accountability on the profession were either deleted or changed. The original bill, for

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108. First Reading Protocols, *supra* note 102, at 152.

109. Fear from closure measures such as restrictive exams and control over other entry requirements permeated the debate continuously, across political parties. They were mentioned by MK Mintz (Religious Torah Front Party), MK Ben Israel (Mapai Party), MK Verhaptig (National Religious Party), Azniya (Mapai Party), MK Bibi and Nir Refealex (Labor Union Party), to mention a few.

110. First Reading Protocols, *supra* note 102, at 295.

111. *Id.* at 164.

112. Second Reading Protocols, *supra* note 102, at 1930. Discussing whether this obligation should be mandatory or voluntary (the latter view was adopted), the chair of the law and constitution committee raised an expectation that the legal profession at some stage "will handle this issue in a satisfactory manner and ensure legal representation to the needy. In this case we could make this duty obligatory and relieve the state budget from providing it." *Id.*

example, stated that the bar was being established in order to unionize all lawyers, to protect their professional interests, to supervise their professional training, to further the betterment and pureness of the profession and to “advance law in general.”<sup>113</sup> This latter purpose was the only society-oriented function of the bar and it was eliminated before the second reading. I have already mentioned that in its original version the bill described the duty of lawyers to assist the court in administering justice, while in the final version the term “justice” was replaced with “law.” The bar, therefore, demanded broad autonomy but did not offer much in return. Its claim for independence rested upon the argument that the profession had sufficiently “matured” to gain self-control, but not that lawyers actually carry public obligations of any sort.<sup>114</sup>

The bar demanded and received extensive control over the “production” of lawyers and the regulation of their conduct. Various amendments intending to limit such control were defeated.<sup>115</sup> For example, the original bill required a five-year tenure for a lawyer to serve as a trainer for an apprentice. An amendment to shorten this period to three years, in order to encourage trainers and accelerate entry to the profession, was defeated.<sup>116</sup> A proposal to replace the requirement that an apprentice receive approval of the bar to change a place of internship, with the need to simply give notice, was rejected; an amendment to allow lawyers to practice as accountants was rejected; an amendment to abolish the bar’s authority to set maximum attorneys’ fees was rejected; an amendment to establish parliamentary supervision over bar membership fees was rejected, as was an amendment that the bar’s annual budget be approved by the Knesset.<sup>117</sup> A proposal to change a section, which deprived the civil

113. Bar Association Bill § 1, Hataot Hok 395 at 370 (June 1, 1959).

114. For example, MK Bar Hai (Mapai) stated: “The important question that is before us is, actually, one: has this profession matured to the stage that it deserves autonomy in two areas—entrance to the profession and internal discipline?” First Reading Protocols, *supra* note 102, at 167.

115. Some of the original provisions that granted lawyers excessive advantage over others were nonetheless defeated. A provision (section 81 of the bill) that would have allowed ex parte collection of attorney’s fees was removed from the original bill. The rationale for this provision was that it was not proper that lawyers would need to turn to the court to claim their fees. First Reading Protocols, *supra* note 102, at 155. Another provision (section 93 of the bill) that would have placed the burden of proving innocence on a person accused of providing services that were restricted to lawyers, was also removed between first and second readings.

116. The debate over the number of years needed to train an apprentice was the amendment of MK Schoffman who stated:

I wish heatedly to take this into account and not to impose artificial barriers. If we don’t want lawyers—let’s admit that. If we want to restrict lawyers—let’s say this explicitly. But don’t do it by borrowing measures from countries which we don’t want for us to set an example.

Second Reading Protocols, *supra* note 102, at 1936.

117. *Id.* at 1937, 1946, 1951, 1953.

court of jurisdiction over a fees claim by a non-lawyer who provided services that were exclusively restricted to lawyers (in addition to the act being criminalized), was defeated as well.<sup>118</sup>

In order to gain independence lawyers advocated the conception of the legal profession as a free vocation, assuming that market forces would determine the availability of legal services. Inasmuch as the bar restricted market forces in determining who could practice law, it accepted that legal services would be distributed according to these principles. The bar thus constructed itself as one of the state's liberal institutions without venturing into the terrain of substantive rights.

Indeed, the philosophical basis of these discussions presupposed a liberal adversarial system of justice: the bar was conceptualized as an organ that represented individual clients, its lawyers as agents who acted on their behalf. Lawyers were to protect the "rule of law," i.e., access of individual clients to court, by enabling the aggregate of many such 'private' representations. Accordingly, loyalty to the client was the fundamental commitment of a lawyer, constituting the basis of the profession's public duties.<sup>119</sup>

It is important to note that during that period Israel's legislative process did not involve participation of groups that represented the public's interest, in the broad sense of this term. The IBA Act was purely created by lawyers in the government and lawyers from within the bar. Besides the organized bar, records do not indicate that any non-governmental or citizens' groups appeared before The Law and Constitution Committee.<sup>120</sup> Israeli civil society at the time was undeveloped and there were hardly any organized citizens' groups that advocated for public or communal interests. Members of the Knesset who were sensitive to the lack of low cost legal services, to the inadequacy of the free market to distribute legal services fairly, and to the control of the bar over the professionalization of legal

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118. In this context, reference to the British Ordinance was used as a justification for restricting civil action for fee collection by a person who provided services contrary to the jurisdictional sections of the law:

In the Advocates Ordinance . . . there is such an instruction since 1938. It goes without saying, that if a person that is not a lawyer provides the service of a lawyer, he cannot claim his fee. He cannot give legal advice in that profession . . . he cannot do the things that the law exclusively designates for lawyers. And it is intolerable that when we decide to give autonomy to this profession this right be taken away from lawyers and that we cancel this section, after 40 years . . . [T]his has been a vested right of lawyers for forty years in this country.

MK Meridor, on behalf of the Law & Constitution Committee, Second Reading Protocols, *supra* note 102, at 1953-54.

119. For example, MK Zadok stated: "the democratic nature of the state is judged by the role fulfilled by lawyers in the judicial system. This role includes two elements: the freedom of the citizen to choose a lawyer as he sees fit, and the freedom of the lawyer to advocate fearlessly on behalf of his client." First Reading Protocols, *supra* note 102, at 163.

120. Rotenshtreich, *supra* note 103, at 40.

services, could not rise to challenge the power of the bar. At most, they impeded upon some excessive demands of the bar and blocked some marginal unjustified advantages, which lawyers moved to proclaim for themselves. However, there was not any significant opposition that demanded a higher standard of accountability to provide pro bono services by lawyers, or that conditioned the bar's monopoly over lawyers' entrance to the profession on the establishment of regulated low cost legal services. Indeed, as mentioned by MK Zimmerman, the favor of the law seemed to protect the profession rather than the public.

The IBA Act came into force in 1962 during a period in which law and legal institutions were in their formative stage in Israel. At that time, there was strong demand that law conform to the goal of state building, but there was also recognition of the need to set the foundation for a democratic infrastructure, in which legal institutions would not be subordinate to state interests. Against this backdrop, the bar claimed and received broad autonomy, partially because lawyers entered this process as a social group that was significantly removed from the national-collective project. To a large degree, lawyers had remained outsiders to the major national goals prevalent at the time. The legal profession stayed in the private sphere of Israeli society, albeit limited in its scope. Lawyers thus succeeded in overcoming the strong trends of collectivism, in part by depicting their private disposition as a means to attain the broader goal of state institution building. As a result, the bar was afforded an autonomous professional status with few demands upon lawyers to provide substantial remuneration in return. This disposition continued well into the 1990s, as the organized bar continued to present a rather unified front regarding the manner in which it discharged its public duties.

#### IV. THE LEGAL PROFESSION AS A CARRIER OF LIBERAL IDEALS

##### A. *The Claim for Professional Independence*

Professional independence, central in the earlier era of the bar's formation, continued to be a dominant theme during the second stage of democratic institution building in Israel, during the 1970s and 1980s.<sup>121</sup> Lawyers continued to "celebrate" their success in

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121. On the independence of the legal profession in Israel, see generally, Michael Keren, *Professionalism Against Populism: The Peres Government and Democracy* 64-68 (1996) [hereinafter Keren, *Professionalism Against Populism*]. Keren explains that one of the main reasons the bar managed to keep its independence was its distance from the Mapai party politics. *Id.* at 67. He explains further, though, that in crucial points of political and legal crisis, the legal profession failed to use its autonomy to confront basic violations of the rule of law, such as those described in his book which investigates the role of the legal profession in the Shabac (GSS) affair. In

establishing an independent bar. The 1972 issue of the bar's then central publication, "Hapraklit," was dedicated to its tenth anniversary.<sup>122</sup> The chair of the bar underscored that lawyers were celebrating "10 years since [the] association had received full independence" and continued to name the bar's central attainments: easing lawyers' employment problems which had been augmented due to the rise in the number of lawyers (a demand to distribute government legal work amidst a larger number of lawyers), establishment of a study forum for immigrant lawyers, establishment of an institute for "continuing legal education," establishment of a special body that would handle economic services for lawyers, etc.<sup>123</sup> The growing number of lawyers continued, as always, to be a worrisome issue. In 1973 attorney Hirshberg stated: "In the country there exist too many lawyers beyond the objective needs of the Israeli market and society." He suggested restricting entry to the bar by changing legal education requirements to an LL.M educational degree (instead of an LL.B).<sup>124</sup> The bar continued to struggle against lawyers' public image as profit seekers who reaped disproportionate income compared to their actual work.<sup>125</sup> Only rarely did the bar discuss its public obligations: the duty to provide legal aid to the poor,<sup>126</sup> the problem of imprisonment for civil debts,<sup>127</sup> or the bar's duty to address the crisis in the legal system due to the 1973 (Yom Kipur) war.<sup>128</sup>

The desire and quest for "independence" was thus presented both as a goal and as a means to strengthen the profession. It is important to underscore that, throughout the 1970s, these goals continued to be articulated with a strong correlation to state interests: lawyers' autonomy was necessary to strengthen the state and the emerging democratic regime.<sup>129</sup> Contrary to the discourse that emerged at a

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this case, members of the Israeli General Security Services had killed three Palestinian captives who were in their custody and then tried to cover up the offense.

122. See A. Polansky, Current Issues: Jubilee of the Jewish Lawyers' Association in the Land of Israel and 10 years to the Establishment of the Israeli bar, *Hapraklit* [The Advocate] 28 (1), 3; see generally *Hapraklit* [The Advocate] 28 (1) (dedicated in whole to this event).

123. Polansky, *supra* note 122.

124. A. Hirshberg, *A Proposal for Changing Legal Education*, *Hapraklit* [The Advocate] 29, 148 (1973).

125. A Public Notice of the Bar's Central Committee, June 7, 1972. The Notice referred to publications in the press, criticizing lawyers as living off huge profits, as the cause for the state's economic distortions, and as the source of "anti-social" and "immoral" behavior. *Hapraklit* [The Advocate] 29, at 506 (1972); see also A. Polansky, *The Status of the Lawyer*, *supra* note 56, at 168-75.

126. E. Slant, *Legal Aid to the Needy*, *Hapraklit* [The Advocate] 27, 364-71, E. Slant, *The Rich and the Poor in the Eyes of the Law*, *Hapraklit* [The Advocate] 17, at 313-19.

127. The lawyers' association held a symposium on this problem in 1958. See *Hapraklit* [The Advocate] 14, at 370-80 (1958).

128. A. Polansky, *The Bar in Emergency Times*, *Hapraklit* [The Advocate] 29, at 1-2 (1973).

129. Polansky, *The Status of the Lawyer*, *supra* note 56, at 169.

later stage, until the late 1970s, values such as personal autonomy and individual liberty did not constitute the basis of lawyers' demand for autonomy and independence.

It is not coincidental that the quest for professional independence conjoined with a process under which the Israeli Supreme Court was strengthening its own relative autonomy vis à vis Israeli political institutions.<sup>130</sup> The correlation between the independence of the bar and the judiciary in liberal states is recognized ubiquitously.

Terence Halliday and Lucien Kripak claim that despite political variances among nations "as a political reality, bar autonomy cannot be dealt with as a separate fact in any country: it belongs to the political constitution of society, and, more specifically, it is linked to the relative autonomy of judges and the courts."<sup>131</sup> This correlation was notable in Israel, too.

If in the early period of Israeli statehood the conceptions underlying legal professionalism were in dissent with those prevailing in the country, this was no longer the case starting from the 1980s. The rise of individualism and the decline of collectivism and social solidarity had been a steady phenomenon in Israel. Values of mutual responsibility had given way to personal fulfillment and individual attainment.<sup>132</sup> Patterns of consumption adopted Western styles and the standard of living has been on the rise, together with a transition into a market economy. Professionalism provided the scientific basis for these trends, and has gained recognition and social respectability.<sup>133</sup> Policies of economic liberalism were carried out through privatization and a lesser involvement of the state in the market. They were enhanced alongside a liberal-individual philosophy and a liberal-legal discourse, which positioned the individual as the central unit of both economic and legal scrutiny.

From the 1980s, the core conceptions of liberalism in legal professionalism—manifested strongly in notions of client loyalty—did not stand in discord with the prevailing values of modern Israel. If in the 1950s both the bench and the bar needed to play down their individualistic philosophy, this was no longer the case.

Thus, during the first period of Israel's existence, the formalism of the court and of the bar coincided. Over the years, however, it was

130. See Issachar Rosen-Zvi, *Constructing Professionalism: The Professional Project of the Israeli Judiciary*, 31 Seton Hall L. Rev. 760, 782-83 (2001).

131. Terence C. Halliday & Lucien Karpik, *Politics Matter: Comparative Theory of Lawyers in the Making of Political Liberalism*, in *Lawyers and the Rise of Western Political Liberalism* 15, 33 (1987).

132. Horowitz & Lissak, *Trouble in Utopia*, *supra* note 51, at 180; Mautner, *supra* note 67, at 125; Mautner, *Multiculturalism in a Democratic and Jewish State*, *supra* note 8, at 254-55.

133. See Keren, *Professionalism Against Populism*, *supra* note 121 (describing the rise of professional and knowledge elite groups in the 1980s and their role in countering populist forces in the country).

widely recognized that the Israeli Supreme Court strengthened its activist posture and became more involved in controversial social and political issues. The court continued to transform its professional authority into a moral-normative one.<sup>134</sup> Consequently, the judiciary became a relatively distinguished institution enjoying considerable public support for constraining government action.<sup>135</sup>

In contrast to the court, which assumed a value-oriented or substantive approach to law, the organized bar did not attempt to convert its professional knowledge and expertise into any kind of ideological or normative authority. It continued to promote the traditional neutral approach to legal representation on the individual level, together with a general organizational abstinence from issues that carried any public controversy. The bar's publications of this period, which largely reflect its agenda and business concerns, are dedicated almost entirely to questions of legal doctrine and the status of the bar itself. There is hardly any reference to problems of access to justice, social justice, human rights, poverty, discrimination, etc.

Despite its dominance over lawyers' professional sphere, the bar had to maintain its control over lawyers' practices and behavior. Abel states that "[s]ocial closure is an elusive goal, even for the most successful professions. It must be constantly defended against threats from consumers and potential competitors as well as the consequences of adventitious events."<sup>136</sup> In Israel too, the bar has effortlessly tried to prevent the derogation of its public image and reputation.

Two prongs were utilized for this purpose. First, the bar strove to uphold an image of a lawyer that displayed respectability and civility, to ensure that individual lawyers would behave in an honorable and distinguished manner. Second, the bar constituted the collective-public role of the profession as a protector of the core institutions of a liberal democracy, and in particular, the court.

These two strategies are connected. Because lawyers' status depends on the legitimacy of the justice system, the bar had a direct stake in refuting any challenge to the judiciary. It was therefore necessary to tackle instances in which lawyers behaved in a way that

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134. By implementing substantive values and ideals that constituted, in its view, the basis for a democratic society, the Israeli Supreme Court had become a leading institution in protecting individual rights. This had been the prevailing view in legal writings in Israel. Despite recent criticism of the Court's failure to apply the same standard of human rights protection to Palestinians in the Occupied Territories, current scholarship continues to portray the Israeli Supreme Court as the defender of individual rights, and as a judiciary which "has met this challenge admirably," despite Israel's security threats and economic hardships which pervade Israel's existence. See, e.g., Allen Zysblat, *Protecting Fundamental Rights in Israel Without a Written Constitution*, in *Public Law in Israel* 47 (Itzhak Zamir & Allen Zysblat eds., 1996).

135. See Martin Edelman, *The Judicial Elite of Israel*, 13 *International Political Science Review* (1992); see also Gad Barzilai et al., *The Israeli Supreme Court and the Israeli Public* 186, 211 (1994).

136. Abel, *American Lawyers*, *supra* note 39, at 24.

censured the justice system by enforcing their ethical duty not to degrade “the honor of the profession.”<sup>137</sup>

### *B. Protecting the Honor of the Profession*

Andrew Abbott explains that “[p]rofessional organizations often concentrated on making members aware of their personal effects on public perception. . . . [T]o this day it is violating the public image of the profession that draws the heaviest ethical censure.”<sup>138</sup> This can explain the bar’s sensitivity to lawyers who publicly criticized either the profession or the legal system.

A methodological caveat is in place. The cases described below do not reflect a typical disciplinary proceeding of the Israeli bar, since most disciplinary cases involve misconduct associated with the lawyer-client relationship.<sup>139</sup> However, precisely those “unusual” cases that do not involve an obvious breach of trust between lawyers and clients draw attention to the extent of sensitivity of the organized profession to its image and status.

In 1980, attorney Eli Zohar was interviewed by the Israeli newspaper *Ma’ariv* as part of a series of articles about the legal profession. During the interview, Zohar criticized the phenomenon in which lawyers over-legalize certain acts or transactions for their own interest, stating: “there are a million things for which one does not need a lawyer, but there are a lot of lawyers in the market who need work, and they give their client the feeling that it is not going to work without them.” For such criticism of the profession the Tel Aviv district bar committee initiated disciplinary proceedings against attorney Zohar.<sup>140</sup> He was charged, *inter alia*, with behavior that degrades the legal profession and does not befit a lawyer. The disciplinary court acquitted the attorney of these charges, stating that the lawyer’s expression touched upon an issue of public importance and interest.

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137. IBA Act § 61 (3) defines a disciplinary offense as “any action or inaction which does not befit the legal profession.”

138. Andrew Abbott, *The System of Professions: An Essay on the Division of Expert Labor* 61 (1988).

139. See Pinchas Stern, *Lawyers’ Ethical Professional Deviations and the Professional Regulation Over Them* (1991) (unpublished manuscript) (on file with author). According to Stern, most of the ethical violations for which lawyers were disciplined during 1969-1986 concerned harm done to clients. Out of 320 disciplinary decisions that were published by the bar (which represent a small amount of the actual cases handled by the disciplinary tribunals—320 out of 2,500 cases between the years 1969-1986), 64 cases were of the type of “victimless” offenses, *i.e.*, cases such as self-advertisement, improper expression, and the like. The rest (283 cases, with some overlap between those cases) involved behavior that harmed a particular party, out of which 157 cases involved injury done towards clients, and out of these over 90% involved direct economic damage to those clients.

140. BDM (Disciplinary Board Hearing) 107/81 Tel Aviv Dist. Bar Committee v. Att’y Eli Zohar.

In 1986, attorney A. Gal published an article in the local Jerusalem paper addressing the severe parking problems in the city. Gal, a private practitioner who had also been involved in public affairs, advised Jerusalemite drivers not to pay their parking fines but to challenge their parking tickets in court in order to create a blockage of the judicial system with these traffic violation trials: "The 'sting' and the rationale for this struggle is engagement in this process" he wrote. In response to the content of this article, the Jerusalem district bar committee initiated disciplinary proceedings against the lawyer, charging him with behavior that does not befit a member of the profession. Convicting the attorney, the disciplinary court stated that such an expression amounted to impeding the court's function, and as such "does not befit the status of a member of the bar as an officer of the court whose role is to assist the court to make law."<sup>141</sup> An appeal to the national disciplinary court was rejected on the same grounds, holding that a lawyer calling citizens to "abuse" the judicial system, as Gal did, crosses the line between legitimate expression and behavior that does not befit a lawyer.

In 1993 the bar initiated disciplinary proceedings against a lawyer who expressed his views following a particularly harsh decision of a magistrate judge against his client bitterly criticizing the decision, claiming it was rendered by "a judge in Israel, not in Sodom." The magistrate judge convicted an elderly Bedouin woman of illegally building (i.e., without a permit) a small fixed construction next to her tent, in which she had placed a dialysis machine.<sup>142</sup> The district disciplinary court convicted the lawyer for the offense of offending the judge who decided the case. The national disciplinary court affirmed the conviction, based on the need to maintain the integrity of the judicial system and the public's trust in it.<sup>143</sup> The Israeli Supreme Court reversed this decision and acquitted the lawyer, but on narrow, almost frivolous, grounds. The Supreme Court stated that the issue was "trivial," that the statement was made in bitterness, as part of a general criticism of government policy regarding demolition of Bedouin constructions. Nevertheless the court stated that it would

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141. BDM (Disciplinary Board Hearing) 8/86 The Jerusalem Bar's Central Committee v. Att'y Avraham Gal (decision rendered Apr. 11, 1988).

142. For a detailed description of this case, see Ronen Shamir & Sara Chinski, *Destruction of Houses and Construction of a Cause*, in *Cause Lawyering: Political Commitments and Professional Responsibilities* 227, 232-236 (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter Sarat & Scheingold].

143. BDA (National Disciplinary Board) 7/93, Doe v. The Israel Bar Ass'n, 1995 Padim, 34-43. It is noteworthy that even the dissenting member of the panel based her decision on a different 'balancing' between the interests of free speech and maintaining the integrity of the judiciary. The substantive matter at stake, and its obvious harshness, was not at all considered as a relevant factor in the analysis of this case.

have been better if the particular words used by the lawyer had not been voiced.<sup>144</sup>

In these cases neither the bar nor the courts considered the merits of these “unbefitting” expressions in terms of their accordance with substantive justice or the public’s interest.<sup>145</sup> These cases (and others)<sup>146</sup> judged professional behavior using neutral principles such as free speech, the integrity of judges or protection of collegial relations. These standards were applied impartially, notwithstanding the difference in the relative merit of the substantive interest concerned. A different analysis would, for example, distinguish between the *Gal* and the *Yovel* cases, and afford heightened protection to speech according to the issue at stake. Parking problems in Jerusalem are a disturbing matter indeed, but state deprivation of the basic right to health and housing based on ethnicity should provide the speaker—and especially a lawyer—broader protection of his expression on this topic.<sup>147</sup> Such differentiation is foreign to the analysis of the institutions mentioned above.

### *C. Sustaining the Legitimacy of the Justice System*

The bar and the judiciary in Israel bore an understanding about their respective roles in preserving the status of the justice system. Protecting lawyers’ professional status is necessary to maintain the symbolic status of law and of the rule of law, from which the court derives its own legitimacy. Lawyers trigger adjudication and, in an adversarial system as operated in Israel, the court relies on lawyers to influence the outcome of adjudication. Given their interdependent relationship, too great a loss in the legitimacy of the profession will inevitably result in some lessening of the legitimacy of the court. Courts therefore rely on lawyers as much as lawyers rely on courts, and act based on this mutual understanding.

Accordingly, lawyers were expected to display respect and honor towards the judicial system: criticism of the judiciary had its rules and limitations, both in content and style. In turn, the court embraced and reinforced the acclaimed doctrine forwarded by the bar regarding

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144. A.B.A (Bar Association Appeal) 2339/94, *Yovel v. The Israeli Bar Ass’n*, decision rendered on Dec. 31, 1995, 43 *Dinim Elion*, 427.

145. In the *Zohar* case the bar did not, but the disciplinary tribunal did.

146. See, e.g., A.B.A (Bar Association Appeal) 3558/93, *Doe v. Tel Aviv Dist. Bar Committee*, 36 *Dinim Elion*, 50 (upholding a conviction of an attorney who accused her colleague of meeting with an adverse witness and did so by notifying the court of her letter). It was this “public” notification which triggered the proceedings against the lawyer, of non-collegial behavior. A.B.A (Bar Association Appeal) 6839/93, *Se’adya v. Israel Bar Ass’n*, 49(5) P.D. 849 (upholding a conviction of a lawyer who accused a colleague of abusing his connections at the bar).

147. This is not to say of course that disciplinary hearings in the *Gal* case were justified, but rather to highlight the ignorance as to the substantive matter at stake.

lawyers' role in the justice system and about the nature of professionalism and legal representation.

First, the Israeli Supreme Court consistently reaffirmed various aspects of the dominant approach to lawyering.<sup>148</sup> Early rulings of the court, confirmed by later ones, accepted the centrality of the lawyer-client relationship as the essence of legal professionalism. The Court noted that duties towards the clients are the means by which all other tasks of a lawyer should be performed. In a 1955 case dealing with the improper conduct of a lawyer, the Supreme Court of Israel stated that: "This loyalty [to the client] is the life and soul of the profession, the basis upon which it is structured. Remove the trust a client savors towards his lawyer, and you eradicate the soul of the profession." The lawyer-client relationship, explained the court, serves to advance the prestige and image of the lawyer and the whole profession.<sup>149</sup> This understanding of the core of the legal profession and its relation to trust and professional honor has retained much of its force in later rulings.<sup>150</sup>

Second, the court sustained additional professional tenets embraced by the bar. It recognized the legitimate interest in guarding the honor and respectability of the profession,<sup>151</sup> and implied that this objective would be achieved not through a particular substantive legal disposition but, first and foremost, by sustaining loyalty and trust between lawyers and clients. In other cases the Supreme Court mentioned that it is preferable that only licensed lawyers appear before the magistrate court in misdemeanor cases (and not trained police prosecutors),<sup>152</sup> acknowledged the reasonableness of restrictions imposed on lawyers' self-advertising and other restrictions

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148. See Salzberger, *supra* note 74.

149. A.B.A. (Bar Association Appeal) 9/55, John Doe v. The Legal Council, 27(1) P.D. 20:

By authorizing a lawyer to act within the profession the authorities are announcing to the whole world that this authorized [person] is a decent person and deserves the trust of the public to act within the profession and within the law and everything else that derives and emerges from it.

*Id.*

150. A.B.A. 1/88, The Central Bar Committee v. Doe 42 (4) P.D. 472, 479 ("Full trust between a lawyer and a client is the heart and soul of the legal profession.").

151. A.B.A. (Bar Association Appeal) 4/75, Doe v. The Central Bar Committee, 30(2) P.D. 197 (confirming the conviction of a lawyer's misconduct and breach of the duty not to engage in commerce, finding that a lawyer's taking part in a car business was harmful to the profession's prestige); see also A.B.A. 3866/95, Doe v. The Dist. Bar Committee in Tel Aviv, 98(1) Takdin 622 (stating that a lawyer convicted of severe misconduct should be disbarred not only to protect the public against future misconduct but also because that lawyer harms the image and the honor of the profession, and consequently the trust of the public in the legal profession).

152. H.C. 2631, 3212/91, Zigel v. The Minister of Police 46(3) P.D. 546 ("[I]t would be preferable if all prosecutors who appear before a court will be licensed lawyers who have completed their studies in a law school, performed their apprenticeship and taken the exams that train them to act in the profession.").

on practice.<sup>153</sup> The court joined the bar in its concerns regarding lawyers' use of proper language as a means to retain professional honor and respect,<sup>154</sup> gave deference to the bar's decisions not to initiate disciplinary proceedings against a lawyer and confirmed professional behavioral standards set by the bar.<sup>155</sup> The court also conveyed the idea that even if the bar is a public and statutory body bound by certain administrative rules (such as the fairness doctrine and equality), it is mainly a professional union that deals with the internal matters of its members.<sup>156</sup>

Finally, it seems that the court and the bar share the philosophical foundation underlying the lawyer-client relationship, as well as the societal interests advanced through legal representation. *Ghanem v. The Israel Bar Association* is an illustrative case.<sup>157</sup>

*Ghanem* centered on the legality of the bar's Ethical Rule 27, which dealt with the transfer of cases between lawyers. According to this rule, a client who wished to switch his lawyer needed the consent of the former lawyer, which could be refused if the former lawyer had a pending fee dispute with the client. This being the situation, the client had to commit to the bar's arbitration and to deposit whatever amount the bar saw fit to guarantee payment to the lawyer pending the decision in the arbitration. This rule posed severe hardship on the client's right to legal representation or ability to switch lawyers. In a petition on behalf of several individuals and The Association for Civil Rights in Israel, the Supreme Court was asked to annul this rule. The

153. H.C. 5648/93, *Doe v. Tel Aviv Dist. Bar Committee* 48(3) P.D. 534. In this case the court acquitted the lawyer of the offense of unauthorized advertisement based on the lack of *mens rea* required for this offense. The court accepted, however, that the statutory restriction on advertisement should be regarded as a balance between two competing interests: the interest of free speech of lawyers, as well the public interest that lawyers express themselves on issues of public concern against the professional interests of honor and fair competition. *Id.* at 540. For an earlier case in which the court confirmed the rationale underlying restrictions on advertising, see A.B.A. (Bar Association Appeal) 4/75, *Doe v. The Dist. Committee of the Tel Aviv Bar Ass'n*, 30(2) P.D. 197.

154. See, e.g., A.B.A. (Bar Association Appeal) 6839/93, *Se'adya v. The Israeli Bar*, 49(5) P.D. 735, 737 (stating the public's interest in guarding the reputation of lawyers).

155. See H.C. 89/64, *Grinblat v. The Israel Bar Association* 18(3) P.D. 402 (dismissing a petition against the bar for rejecting a complaint against a lawyer despite the negligence in the way it was handled by the bar); H.C. 248/81, *Cohen v. The Dist. Committee of the Israeli Bar* 37(3) P.D. 533 (dismissing a petition challenging the bar's decision not to initiate disciplinary proceedings against a lawyer); A.B.A. (Bar Association Appeal) 3558/93, *Doe v. Tel Aviv Dist. Bar Committee* (declining to intervene in the standard of behavior set by the bar, in which a lawyer who sent a letter to the court accusing a colleague of meeting with an adversary's witness had committed a disciplinary offense and rejected her claim that it was done in the best interest of her client); Salzberger, *supra* note 74 at 79-84; see also H.C. 248/81, *Wallace v. The Dist. Committee of the IBA*, 37(3) P.D. 533.

156. H.C. 6218/93, *Shlomo Cohen v. The Israeli Bar Association*, 49(2) P.D. 529.

157. H.C. 4330/93, *Ghanem v. The Israel Bar Ass'n*, 50(4) P.D. 226.

bar defended the rule and argued that its purpose was not to guarantee collection of lawyers' fees but to regulate an orderly conveyance of cases from one lawyer to another and to ensure collegial behavior between lawyers.

The court abolished the rule but based its decision on narrow libertarian grounds. The majority of judges assumed that the purpose of the rule was indeed to encourage appropriate collegial conduct rather than to provide a means of fee collection.<sup>158</sup> However, the court stated the rule was overbroad and unjustly restricted two basic principles in Israeli law. The primary one was freedom of vocation of lawyers. The secondary one was the personal autonomy rights of the clients to freely choose (or switch) their lawyer.<sup>159</sup> Because the desired collegial arrangements could be achieved by imposing less burdensome restrictions on lawyers and clients, the rule was faulted for being disproportionately broad.

The reasoning of this decision was indicative of the interests the court values and protects. It reflects a clear libertarian approach to legal representation, anchored in the freedom of vocation, recognized in Israel as a basic individual right. Israel's law guarantees freedom of vocation and the opportunity to practice law as an extension of that basic individual right.<sup>160</sup> The lawyer-client relationship is constructed in terms of liberal autonomy, formulated between two free and independent individuals. The court did not base its decision on the right of equal access to justice or the duties of the legal profession to facilitate access to justice, nor did it challenge the market-based free enterprise ideology of legal representation.<sup>161</sup>

The *Ghanem* decision illustrates once more that despite the end result of this decision (abolishment of the ethical rule) judicial review has not put forth an alternative view of professional responsibility. It defined the duties of the profession in terms of structural-procedural, rather than substantive, justice. *Ghanem* exemplifies the correlation between the institutional jurisdictional interests of the bench and bar

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158. This was the position of Chief Justice Barak. Justice Strassberg-Cohen stated that the real purpose of this rule was financial and not ethical/collegial at all.

159. *Ghanem*, 50(4) P.D. at 234-35.

160. In 1992 the Israeli Parliament enacted two Basic Laws, which have a constitutional, or at least a semi-constitutional, status. The first one was Basic Law: Freedom of Occupation that guarantees the right of every Israeli national or resident to engage in any occupation, profession or trade (section 3). The second one was Basic Law: Human Dignity and Liberty.

161. The IBA requested reconsideration of this case, and this request was rejected by the court. Dangatz 7635/96, *The Israel Bar Ass'n v. Ghanem Takdin* 97(2), 1 (requesting reconsideration). The Court did state, however, in the rejection of this request that the former decision was based not only on the freedom of vocation of the lawyer but also on the right of every individual to have "free access to court." Thus access to court was mentioned as a protected interest, but with no direct implication of the collective responsibility of the profession to take part in fulfilling this objective.

on the one hand, and the presumptions regarding the “private” nature of legal representation on the other.

## V. CHALLENGES TO THE DOMINATING PROFESSIONAL IDEOLOGY

Until the late 1990s, the Israeli bar was not outspoken or active on issues of public concern that did not directly correlate with the legal system, lawyers’ interests or their work sphere. In an era pervaded by severe human rights violations and infringements on the rule of law, the bar maintained its “apolitical and independent” stance.<sup>162</sup> By contrast, in cases relating to the legal system or to legal representation, the organized bar regularly formed and expressed a substantive position, which almost always matched lawyers’ interests to discard any real or perceived threat to the market for their services.

For example, when a public defense system was established in Israel in 1995, the bar’s position was, at the least, ambiguous. On the one hand, it expressed concern over a grim reality in which the majority of suspects arrested and indicted undergo criminal proceedings without legal representation. On the other hand, the bar was anxious about the entry of state funded attorneys into a field that had been almost exclusively under the jurisdiction of the private bar.<sup>163</sup>

Similarly, despite the bar’s general abstinence from taking a public stand against human rights violations of Palestinians in the Israeli Occupied Territories, when access to the courts was at stake, the bar made an exception to its common attitude. In 1997, the government introduced a bill designed to bar Palestinians from suing the Israeli government in court for injuries caused by the military while suppressing the civilian uprising against the Israeli occupation.<sup>164</sup> The bar objected to the proposed bill and argued that it constituted an

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162. The bar’s refusal to speak out against human rights violations was condemned in the media as an inappropriate message that human rights protection lies in the interests of politicians only. See Moshe Negbi, *How Does Such a Caspi Sprout*, *Hadashot*, July 12, 1991 (“[T]he bar prides itself that it does not protest against infringements in the equal protection of the law, or human rights violations, justifying this stand by its so-called obligation to avoid political disputes. By this stand the [bar] reinforces the claim that the protection of the rule of law and of basic democratic values are the business of politicians only.”).

163. Interview with The Public Defender, Professor Kenneth Mann, in August, 1998. Following budgetary problems facing the Public Defender, the IBA president was approached in an attempt to enlist the bar to assist in obtaining necessary funding for the continuance of its operations during 1996. In reply to his appeal to the bar, stressing the bar’s professional responsibility to ensure that indigent persons receive legal representation, Professor Mann received a reply of the bar’s president that this institution has no responsibility for such representation. Letter from Hoter-Ishai, Chair of the Bar Association, to Professor Kenneth Mann, The Public Defender, dated Aug. 21, 1996 (on file with author); A.B.A. Commission on Professionalism, “In the Spirit of Public Service”: A Blueprint for Rekindling of Lawyer Professionalism (1986).

164. Draft Bill Handling Claims of Military Forces in Judea Samaria & Gaza Strip, 1997 (H.H. 2645 ).

unjustified restriction on the right of access to court. The bar justified its position by the need to maintain access to the courts, though clearly any limitation on the right to sue would have affected the interests of lawyers.

Likewise, when the Ministry of Justice proposed a bill to transfer handling of some personal injury cases (of less than 10% of bodily impairment) from the courts to the National Insurance Institute, the bar vehemently objected to this bill, launched a massive campaign to prevent its enactment and managed to halt the reform.<sup>165</sup> The explicit concern underlying the bar's objection to the bill was the restrictions imposed on the public's access to court. However, given that, in personal injury lawsuits, lawyers' fees are determined as a percentage of the damages awarded to the clients, other motives were in all likelihood at work.

Even when the bar initiated legal action as a "public interest petitioner," this move was confined to a cause that remained near at hand to the legal system, to law enforcement and to lawyers' conventional work. In December 1997, the Central Committee of the Israeli bar filed a petition to the Israeli Supreme Court demanding the closing of the police detention facility in Jerusalem, arguing that the detention conditions in this old Mandatory police station were inhumane. A similar petition was filed in December 1999 regarding the detention center near Haifa.<sup>166</sup> The petitions were dismissed following improvements of the detention facilities.

These claims do raise the question of whether bar associations ought to implicate themselves in issues that may well be of political controversy among their membership. There is no unequivocal answer to this question, and professional organizations have varied in their responses to this issue. In this context it is helpful to distinguish, even roughly, between two types of public interest concerns.<sup>167</sup> The

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165. Salzberger, *supra* note 74, at 68 n.115.

166. H.C. 7082/97, *The Israeli Bar Central Committee v. The Minister of Interior* (order nisi issued on December 4, 1997); H.C. 3910/99, *The Israel Bar Central Committee v. The Minister of Internal Security*. In a decision rendered in September 2000, the court complimented the bar for its activities on this issue.

167. In the United States, for example, the bar takes a clear stand on the issue of legal services, but has not been allowed to lobby on issues that are of controversy between its members. *See, e.g.*, ABA, Consortium on Legal Services and the Public, *Legal Needs and Civil Justice: Comprehensive Legal Needs Study* (1994). The A.B.A. Ethical Canons ("EC") state that: "[t]he rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer." Model Code of Prof'l Responsibility, EC 25 (1980). The newer A.B.A. Model Rules states that a lawyer "should aspire to render at least (50) hours of pro bono legal public services per year." Model Rules of Prof'l Conduct 8.6.1 (1993).

In Brazil, for another example, the bar has been active on almost every front of social and political issues, including defending minority rights to keep their land, leading a campaign to decommission arms as a strategy to reduce violence in the country, and participating in actions of the landless peasants against agrarian reform. *See* Eliane Botelho Junqueira, *The Brazilian Bar Association as a Collective Cause*

first involves inadequate access to justice and unequal distribution of legal services, to which one would expect lawyers to commit. A public body that incorporates all members of the legal profession cannot absolve itself from a collective responsibility to ensure equitable access to the legal system because, *de facto*, legal rights can hardly be realized without the assistance of lawyers. The secondary public causes are those that are not directly connected to the provision of legal services, among them human and civil rights abuses. These are often issues of deep controversy amongst the bar's members, and it is arguable that the professional bar must devote itself only to causes for which there is relatively broad consensus. Bar associations differ in their policies in this respect.<sup>168</sup> But even considering the differences between these two "types" of public interest concerns, it is evident that until the late 1990s the Israeli bar had consistently absolved itself of any actual responsibility to systematically address either of these causes.

For many years the Israeli bar did not face significant challenges to its dominant professional ideology or its methods of operation. As discussed above, the Supreme Court endorsed the bar's understanding of its profession's role. Other legal institutions such as the Ministry of Justice or the Attorney General did not constitute, oppose this view either.<sup>169</sup> Individual lawyers did not speak out against the dominance of the bar's tenets in a notable manner. From the public at large there was a limited expectation from professions in general, and the legal profession in particular, to resume a higher degree of public accountability.<sup>170</sup>

Against this background a change had been taking place from the mid 1990s. The organized bar has increasingly been confronted with dissenting voices from within its ranks. The professional dogmata forwarded by the bar have steadily been losing ground among lawyers in Israel. Claims of politicization, corruption, internal power struggles and selective enforcement of ethical standards have driven many Israeli lawyers away from the body that was founded to represent their interests. Changes in legal education and the opening of private law colleges caused a sharp rise in the number of lawyers entering the profession. This has led to stark internal competition between lawyers, accompanied by a demand to abandon anachronistic

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Lawyer, paper presented at the Law & Society Meeting in Aspen, Colorado, June 1998.

168. Halliday and Karpik explain that lawyers' commitments to liberal ideals are often restricted to procedural justice, and fail with regards to substantive rights: "the more lawyers' politics approach the issues that orient differences in party politics, the more difficult it is to mobilize and the less unquestionably legitimate are their positions." Halliday & Karpik, *supra* note 131, at 51.

169. See Salzberger, *supra* note 74, at 1, § 2.

170. On the weakness of professionals in the early years of Israeli statehood see Keren, *supra* note 46, at 113-15.

restrictions on lawyers' practices. The bar confronted challenges to its exclusivity from newly established commercial enterprises that offered para-legal and semi-legal services to the public.

In the mid 1990s, a group of lawyers formed a list that challenged the hierarchy of the "old generation" of the bar. The list, *Lishka Acheret*—"A Different Bar"—participated in the elections to the central committee of the bar. Since its inception, the list has voiced the idea that the legal profession carries a collective responsibility to promote substantive justice. It challenged the bar to denounce administrative detention used by the Israeli security forces and to speak out against the miscarriage of justice in the military courts in the Israeli occupied territories. The group demanded abolition of Ethical Rule 27, which restricted clients' ability to switch lawyers, as well as the ethical rule that set minimal attorneys' fees. Lawyers within the list presented an alternative view of the organized bar's role, one that reached beyond—although not substituting the task of—serving the interests of its members.<sup>171</sup> The existing leadership of the bar labeled this initiative as an attempt to politicize the profession. In 1993, for example, the central committee of the bar refused to publish in its newsletter an article by the head of the list that criticized the bar, a decision that was challenged in court.<sup>172</sup>

At the same time, individual lawyers have started approaching the Israeli Supreme Court to challenge breaches of substantive norms of the rule of law by the state. Contrary to the traditional litigation strategy of the bar, these matters did not necessarily bear close relationship to the legal system or to legal institutions. In H.C. 1607/94, three lawyers and *Lishka Acheret* challenged the appointment of the Consul General in Germany by the minister of Foreign Affairs by arguing that the appointee was a personal friend of the Minister.<sup>173</sup> In 1993, a group of eleven lawyers joined a petition against the Attorney General, requesting that he dismiss the Chief of the Israeli police following media exposure of his improper receipt of

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171. Interview with Dr. Shlomo Cohen, Head of the *Lishka Acheret* List (Currently, Chair, Israel Bar Association), in August 1998.

172. The bar's decision was challenged in the Israeli Supreme Court. This petition was rejected, and writing for the majority, Justice Bach confirmed the bar's decision to limit publications in this paper to "informative" materials only (i.e., doctrinal or legal material), and to restrict publications that may transform the paper into a political platform. Dissenting, Chief Justice Shamgar stated that he would accept the petition, holding that the bar is constrained by administrative and semi-constitutional norms of free speech, its newsletter having the status of a "public forum." Both decisions clearly presume, however, that the bar's main duty is to handle the affairs of its own members. Both the majority and dissent merited their decisions by resorting to an in depth analysis of free speech doctrine. Again, the judiciary has been reactive in considering the private-public dimensions of professionalism; H.C. 6218/93, Dr. Shlomo Cohen v. The Israel Bar Ass'n, 49(2) P.D. 529.

173. The petition was rejected, and so was a request to reconsider the case. See Dangatz 2751/94, *Lishka Acheret* v. The Minister of Foreign Affairs, 48(5) P.D. 543.

discounted rates in hotels and other benefits.<sup>174</sup> In these cases the lawyers-petitioners presented themselves as members of the profession, i.e., public figures that have a stake in guarding the rule of law.<sup>175</sup>

Lawyers also began opposing the restrictive measures of the bar through legal and non-legal measures.<sup>176</sup> On the adjudicative front, a lawyer challenged the bar's decision not to allow him to announce on his letterhead that he is a qualified accountant in addition to being a lawyer, and, in 1997, a lawyer directly challenged the constitutionality of this restrictive rule.<sup>177</sup> Such challenges have resulted in reforms of the ethical rules in two areas: advertising and prohibited vocations. In 2001, the total ban on advertising was replaced with a regulatory scheme, which allows lawyers to advertise their services under certain conditions.<sup>178</sup> In July 2002, the prohibition on vocational activities was abolished and replaced with a rule that defines the restrictions in terms of conflict of interest.<sup>179</sup> The bar was not able to oppose these demands, nor to refute the pressure of competition from within its ranks.

The previous rather unified front between the judiciary and the bar has also been undergoing changes, as the Supreme Court's endorsement of the bar has gradually been eroding.<sup>180</sup> In particular, in 1996 the relationship between the bar and the Israeli Supreme Court became tense following an overt clash between then chairman of the

174. H.C. 7105/93. This petition was heard together with a series of other petitions against the Attorney General dealing with the same event. See H.C. 7074/93, 7165/93, 57/93. The court remanded the case to the Attorney General for further investigation; in the meantime, however, the Chief of the Police had resigned.

175. The question of standing did not rise in these cases as Israel's Supreme Court has largely relaxed the requirements of standing on issues of public concern.

176. Shmuel Mintzer, *Rules of a Fossilized Guild*, Haaretz, Mar. 16, 1993. In this article Mintzer criticized the rules that restrict lawyers from engaging in certain vocations. He disputed the notion that lawyering was an "honorable profession" rather than a business.

177. H.C. 4000/93, Alroi Kanbal v. The Israeli Bar Ass'n, 52 Dinim Elion 504. The court reached quite an innovative result in this case, holding that a lawyer may state on his letterhead that he holds the degree and title of an accountant but must take steps to ensure that it is understood that he is not practicing as an accountant. In H.C. 6657/97, Gil Perminger v. The Israeli Bar and The Minister of Justice, the challenge to the rule prohibiting lawyers from practicing as land evaluators was dismissed following a settlement that applied to the petitioner only. Since 1992, when the Basic Law: Freedom of Vocation came in force, this semi-constitutional source has served as a major venue to bring under judicial review professional and ethical norms that restrict lawyers' practices. On the evolution of judicial review of statutes based on the 1992 enactment of the two Basic Laws, see Daphne Barak-Erez, *From an Unwritten to a Written Constitution: The Israeli Challenge in American Perspective*, 26 Colum. Hum. Rts. L. Rev. 309 (1995).

178. Israel Bar Association Rules (Advertising) 2001.

179. Israel Bar Association Rules (Additional Practices) 2002, promulgated under the amendment to section 60 of the IBA Act. The rules are still subject to the approval of the Minister of Justice.

180. Salzberger, *supra* note 74.

Israeli bar, attorney Dror Hoter-Ishai, and the Chief Justice of the Israeli Supreme Court, Aharon Barak. Hoter-Ishai spoke out against the over-activism of the Supreme Court that, in his words, was "managing the state" instead of confining itself to the judiciary's genuine role of dispute resolution.<sup>181</sup> In a brusque interview in the ultra-orthodox newspaper "Yated Neeman" in 1996, the head of the bar attacked the Supreme Court and the judges directly. He accused the judges of attending to their own careers by publishing books and teaching in private law schools instead of serving litigants who await court decisions for years, and claimed that justice cannot be found within the judiciary.<sup>182</sup> The harsh attack led to a temporary cease of professional cooperation between the court system and the bar for several months.<sup>183</sup> From within the bar, the criticism voiced by the chair was met with objection and extensive dissent by the bar's district chairs as well as by individual lawyers.<sup>184</sup> These attorneys expressed their support for the court and denounced both the content and style of the critique.<sup>185</sup>

In the 1999 elections the oppositional list *Lishka Acheret* won the elections and its chair was elected to head the Israeli Bar. Since that time, the bar's maneuvers to assert its proclaimed public duties and maintain lawyers' self interests have been more complex and challenging.

Though more civilized and polite in its manner, the bar continues to affirm its role as an independent legal institution guarding the integrity of the legal system. In an unprecedented move, and against

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181. Rosen-Zvi offers a somewhat different explanation for the weakened solidarity between the bar and the judiciary. See Rosen-Zvi, *supra* note 130. He claims that the judiciary is undergoing its own sub-professionalization process that distinguishes it from that of the bar, and the bar is reacting to this process. Under this theory, the judges have been creating mechanisms that disassociate them from the lawyers in various areas of professional life. Another way to understand this trend is that the organized bar is itself becoming more distant and alienated from its members and does not manifest the divergent conceptions about professionalism. Either way it is evident that the bar is no longer the exclusive representative of professional ideology amongst Israeli lawyers, both on the collective and the individual level. This is the central argument of Rosen-Zvi. *Id.* at 825-26.

182. Shahr Ilan and Ben Tsion Tzitrin, *The Chairman of the Bar Association: "What is Happening in the High Court of Justice is Outrageous; No Justice and No Law Can Be Found There;"* Haaret'z, Nov. 27, 1996.

183. Judges were instructed not to take part in fora organized by the bar. Relationships resumed after the chairs of the district committees denounced these attacks. See Ben-Zion Tzitrin, *Rift in the Bar Association: The Heads of the Districts Denounce Hoter Ishai's Attacks on Barak*, Haaret'z, Mar. 5, 1997.

184. The media, too, condemned Hoter Ishai for his comment against the courts and raised doubts about the status of the bar and its competence to serve as a representative body of the profession. See Editorial, *An Unbridled Assault*, Haaret'z, Nov. 28, 1996.

185. *Id.* (describing the public statement in which the four chairs of the bar's district committees disapproved Hoter-Ishai's statements against the judiciary and the judges); see also *We Are Proud of Our Legal System*, Haaret'z, Dec. 3, 1996.

the vehement objection of Chief Justice Aharon Barak, the bar conducted a comprehensive survey of judges' performance among lawyers. The bar insisted on its autonomous position within the justice system—separating itself from the courts—and managed to resist the strong pressure from the judiciary to refrain from conducting this survey.<sup>186</sup>

The bar has also been deeply engaged in efforts to curb encroachment on its exclusive jurisdiction from private commercial companies that started offering semi-legal services to the public in the late 1990s, mainly in the area of personal injury and monetary benefits. In 1998, the bar amended its ethical rules, barring lawyers from accepting referrals from commercial entities that advertise their legal services, and prohibiting them from offering legal services to outside clients while employed by such entities.<sup>187</sup> In 2002, the bar launched a lawsuit against one of these companies, asking for a temporary and permanent injunction against the provision of legal services by private non-legal entities.<sup>188</sup> Litigation was accompanied by a media campaign cautioning the public not to obtain non-professional aid and encouraging them to approach “real” lawyers only.<sup>189</sup>

As for its explicit public obligations, the most pronounced has been the initiation of a pro bono project of the bar.<sup>190</sup> In 1999, a special taskforce was appointed by the bar's chair to prepare the platform for the project. Implementation of the plan, however, was met with fervent objection from the bar's Central Committee, still under the control of the old leadership. The dissenters argued that pro bono work might impinge upon the interests of new and young lawyers and would constitute unfair competition.<sup>191</sup> Despite objections from within, in May 2002 the pro bono project was launched and within three months over 700 lawyers applied to take part in it. On September 1, 2002, the first pro bono stations were opened.<sup>192</sup>

Alongside the changes that have been taking place within the private bar, though slow and restrained, public interest law in Israel

186. Orech Hadin (The Attorney) 31, July 2002, 32-43.

187. Ethical Rule 11B, *supra* note 76.

188. Civ. Req. 452/02, The Israeli Bar Ass'n v. Pitsuy Nimratz, Ltd. (Jerusalem District Court, decision rendered Apr. 10, 2002), Civ. App. Req. 4196/02, Pitsuy Nimratz, Ltd. v. The Israeli Bar Ass'n, decision rendered July 7, 2002.

189. Orech Hadin, The Attorney 33, Oct. 2002.

190. See, e.g., Memorandum, Position Paper on the Establishment of a Pro Bono and Legal Aid Project, from Schachar Velnar, Chair of the Israel Bar Association Legal Aid Committee, to Shlomo Cohen, the Chair of the Israel Bar Association (Dec. 27, 1999) (on file with author).

191. Cf. Deborah L. Rhode, *Cultures of Commitment: Pro Bono for Lawyers and Law Students*, 67 Fordham L. Rev. 2415 (1999).

192. The project received the endorsement of Yigal Arnon, one of Israel's most prominent attorneys, bestowing upon the initiative credibility and respect. Orech Hadin, Hapraklit [The Advocate] 11 (July 2002).

has been growing steadily and gaining acceptance during the 1990s.<sup>193</sup> The number of public interest organizations that employ lawyers or are assisted by legal counsel has risen significantly in the last decade.<sup>194</sup> Law school clinics have been established,<sup>195</sup> private lawyers assist Non-Government Organizations through the provision of free legal advice,<sup>196</sup> and cause lawyering is becoming an accepted form of practice. The legal profession in general is receiving more attention in the academy as a subject of research.<sup>197</sup> Together, these trends signify the beginning of a new period in the evolution of the legal profession in Israel.

### CONCLUSION

The Israeli legal profession has undergone significant changes in the last decade. The driving forces behind these new initiatives are numerous. Some lawyers found flaws with the bar's long-standing

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193. On public interest law in Israel generally, see Stephen Ellmann, *Cause Lawyering in the Third World*, in Sarat & Scheingold, *supra* note 142, at 349.

194. The following are the leading public interest organizations that use legal action as a central strategy for their action, either through hired staff or pro bono work of private attorneys: The Association for Civil Rights in Israel, The Israel Women's Network, Adalah—The National Council for the Child, Israel Religious Action Center ("IRAC"), Naamat (Israel's Working Women's Organization), Hotline for Victims of Violence, The Movement for Quality Government, The Tel Aviv Law Faculty Clinical Education Program, The Israel Human Rights Center for Persons with Disabilities ("*Bizchut*"), Workers' Rights ("*Kav Laoved*"). For a more general review of public interest organizations supported by the New Israel fund, a leading organization that funds public interest organizations in Israel, see NIF 2001 Annual Report available at [www.nif.org](http://www.nif.org) (last visited Jan. 27, 2003).

195. The following institutions have set up programs for community involvement of their law students: Haifa University Law School (two clinical programs and one research program); Bar Ilan Law School (three clinical seminars in which students provide legal assistance under the supervision of a lawyer); Hebrew University in Jerusalem (support of a student pro bono program and an externship clinic); Tel Aviv Law Faculty (six full time accredited clinics); Ramat Ran Law College (four accredited courses, a Human Rights Study Unit, support of a full time attorney); The College for Managerial Studies (Law Faculty) (a women's rights clinic and an accredited course for community legal advice); Manchester and Netanya College (criminal justice clinic); The Inter Disciplinary Center, Hertzeliya (one "social rights" clinic).

196. The most prominent are The Movement against Poverty ("*Halev*"), that engages over 100 lawyers as volunteers in community centers, and "Adam" law office, a private law firm that established a pro bono department in 2001.

197. See, e.g., Yoav Dotan, *Cause Lawyers Crossing the Lines: Patterns of Fragmentation and Cooperation Between State and Civil Rights Lawyers in Israel*, 5 (2/3) Int'l J. of the Legal Prof. 193, 197-98 (1998); Lisa Hajjar, *Cause Lawyering in Transnational Perspective: National Conflict and Human Rights in Israel/Palestine*, 31 Law & Soc'y Rev. 473 (1997); Rosen-Zvi, *supra* note 130; Salzberger, *supra* note 74; Ron A. Shapira, *Law Professors as Sub-Profession*, 17(1) Bar Ilan Law Studies 263 (2001); Neta Ziv, *Public Interest Lawyering: Who is the Public? What is the Interest? Ethical Dilemmas in the Representation of Minority groups in Israel*, 6(1) Mishpat Umimshal [Law & Government in Israel] 129 (2001); See also 25(2) Iyunei Mishpat [Tel Aviv Law Review] (2001), devoted to legal education.

apolitical position, and its abstention from taking a stand on violations of human rights and the rule of law. Other lawyers wanted to get free of the bar's extensive grip over their professional conduct and to get rid of the various archaic restrictions imposed on their practice. Still, many lawyers were driven by a commitment to public service, reflecting a new, alternative perception of their professional obligations.

Whether these new trends are driven by pure self-interest or they represent an expectation for higher professional accountability, their cumulative significance cannot be ignored. They problematize the standard notions of professionalism that have dominated the discourse on the meaning of legal professionalism in Israel for many decades.

Robert Nelson and David Trubek underscore the importance of these mixed voices and consider them an important part of the "professional ideology" in a given society. Professional ideology, according to these authors, is "the body of thought and practices through which a profession (or its constituent groups) develops and promulgates ideas about the nature of its work and the identities of its practitioners."<sup>198</sup> In this sense the legal profession in Israel has been undergoing a process of giving new meaning to its public role, the legitimizing basis for its claim to professionalism. It no longer situates itself completely within the sphere of state, as in the early era of Israeli statehood, nor in the private sphere alone, as in the second stage of its development. The legal profession in Israel is constructing itself as part of Israel's evolving and expanding civil society, while engaging in an ongoing debate about the ways to reconcile its private commitments and public responsibilities.

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198. Robert L. Nelson and David M. Trubek, *New Problems and New Paradigms in Studies of the Legal Profession*, in *Lawyers' Ideals/Lawyers' Practices* 15 (Robert L. Nelson et al. eds. 1992).

## *Notes & Observations*