“SLEEPING WITH THE ENEMY?”

ON GOVERNMENT LAWYERS AND THEIR ROLE IN PROMOTING SOCIAL CHANGE:

THE ISRAELI EXAMPLE

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Among cause lawyers, it is common to characterize government lawyers in negative tones. Both in the United States and in Israel they are often perceived as the servants of the regime, providing it with legal tools to protect its policies. Therefore, government lawyers are often marked as obstacles for the promotion of social change—agents of the status quo rather than agents of change. This Note suggests a different approach. By analyzing the current literature on the role of government lawyers, this Note stresses not only the complexity of this role, but also its relative flexibility, which emerges from its unique structure and its position between the courts, the government, and the public. This flexibility, as will be argued, provides government lawyers with greater capabilities to affect and influence policy. These characteristics may provide incentives for cause lawyers to find ways to cooperate with government lawyers. Through a case study of one department at the Israeli Ministry of Justice (the Israeli High Court of Justice department), the Note provides an example of how working with government lawyers can assist cause lawyers in overcoming some of the inherent obstacles in traditional cause lawyering strategies. By integrating innovative mechanisms of cooperation into these strategies, cause lawyers may increase their potential success in promoting social change. This case study functions as both an example and a challenge: an example of how cooperation between cause and government lawyers may better serve the public interest, and a challenge for cause and government lawyers in other jurisdictions around the globe aiming to achieve similar goals.

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INTRODUCTION: GOVERNMENT LAWYERS AND SOCIAL CHANGE – OPPOSITES ATTRACT?

"When I am in contact with the High Court of Justice Department\(^1\) members . . . I feel that I am talking to people that are similar to myself, more or less, in our basic conceptions as to what is law and to what we are striving to as the public interest . . . I have full confidence in them."\(^2\)

It would not surprise me if some eyebrows were raised while reading this quote, coming from an Israeli cause lawyer, who represented Palestinian petitioners in the Israeli High Court of Justice (HCJ) during the days of the first Intifada.\(^3\) How, one may ask, can a cause lawyer fighting for the human rights of Palestinians in the occupied territories consider government lawyers, representing the occupying regime, to be a reflection of his own conceptions of law and the public interest?

This puzzling question corresponds to a controlling narrative regarding government lawyers in the writing on law and social change. According to the prevailing scholarly conception, government lawyers are mainly perceived as "legal bureaucrats,"\(^4\) executing and fulfilling their clients'—the executive or presidential branch—social and political agendas. Therefore, it is not uncommon to characterize them as agents of the status quo rather than agents of change.\(^5\)

However, this depiction of government lawyers is not shared by all scholars, as emphasized in some studies analyzing the strengths and weaknesses of government lawyers' distinct position, standing at the intersection between the government, the courts, public interest lawyers, and the general public.\(^6\)

Although it is hard to draw a clear conclusion from the literature in the field, it seems that most scholars would agree that at least one characteristic controls the work of government lawyers: what I will define as a unique form of flexibility that stems from a unique form of complexity. This form of complexity has two dimensions: first, complexity in shaping the normative guidelines of their work; and second (and subsequently), complexity in forming coherent and

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\(^1\) This is the department at the Israeli Attorney General Office that is responsible for representing the Israeli government before the Supreme Court in constitutional and administrative law matters. I worked as an attorney in the High Court of Justice Department from 2005 to 2009.


\(^3\) The Intifada, which literary means in Arabic "shaking off" (although it is popularly referred to as the "up rise" or "resistance"), erupted in the Palestinian Territories in 1987. It represented one of the first resisting acts against the Israeli occupation.


standardized patterns of conducting their duties. As I will elaborate later, these complexities bear distinct shape and size in accordance with the specific role of government lawyers in the legal-political equation and their connections to the political leadership of a given legal system.

I wish to offer a way to look at these complexities and flexibilities as advantages—tools for strengthening the role of government lawyers in bringing about social change. Through a case study of the Israeli High Court of Justice Department (HCJD), which is part of the Israeli Attorney General’s Office, I will identify some advantages of the position held by the lawyers at the department, which may support, and even complement, some “classic” public interest advocacy strategies. Moreover, I would claim that the inherent characteristics of HCJD attorneys may assist cause lawyers in coping with some of the weaknesses of those advocacy strategies. Particularly, through the analysis of the Israeli case study, I will draw general conclusions regarding the limitations of government lawyers and the effect these limitations may have on their role as agents of change.

Two important remarks should preface the discussion. First, countries differ in the ways in which they have shaped and defined the role of government lawyers in their legal system. This Note will focus on the Israeli legal system because it shares conceptual similarities with the U.S. system regarding the definition and features of “government lawyers.” Obviously, there are still meaningful differences between the countries, but for purposes of this Note and its main argument, the shared similarities are sufficient for providing a basis for comparison. Second, government lawyers can be generally characterized in both countries as a group of legally-educated public servants who fulfill a continuum of roles, from prosecuting and bringing enforcement actions under statutes, to giving advice to administrators on the law, to representing government agencies in courts. This Note will focus on the last group and, more specifically, on the attorneys who take the leading role in representing the government before the Supreme Court (the Solicitor General’s Office in the United States and the Attorney General’s Office in Israel).

First, and as a general theoretical background, this Note will identify some leading narratives in the scholarship aiming to define the unique characteristics of government lawyers, mostly in the U.S. legal system, and particularly regarding the lawyers of the U.S. Solicitor General. Second, this Note will compare the characteristics of government lawyers in the United States and government lawyers in the Israeli legal system, particularly at the HCJD. Third, through examples and current data regarding the department’s work, this Note will discuss how the characteristics of the Israeli HCJD attorneys influence the department’s actual line of work, especially with regard to the settlement mechanism prevalent in their work. Fourth, this Note will use the example of the settlement mechanism to link the work of the HCJD attorneys to the field of public interest lawyering, while

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8 CLAYTON, supra note 4, at 1.
9 In Israel, the lawyers representing the State before the Supreme Court are nominated by the General Prosecutor and serve both under the State Prosecutor and the General Attorney. For the purposes of this Note, I will focus on the part of their role that is similar to the Solicitor General in the United States (i.e., representing the State before the Supreme Court).
analyzing how using this mechanism may contribute to two of the leading public interest lawyering strategies—impact litigation and legislative lawyering. In particular, this Note will portray the junctions in which the HCJD attorneys may support and promote the success of those strategies. This Note will further point to the complexities and obstacles for the social change movement, which may stem from the collaboration with the lawyers of the department. Lastly, this Note will draw some general conclusions regarding the role of Israel’s government lawyers in promoting social change, which have potential implications for other jurisdictions as well.

I. GOVERNMENT LAWYERS—DEFINING AND REFINING

As mentioned, Israel and the United States share certain characteristics regarding the role government lawyers in general and the Solicitor General attorneys in particular play in the legal arena. Therefore, we should start with identifying some leading themes in the U.S. literature regarding governmental lawyering, which may serve as a theoretical framework for the discussion of the Israeli legal system.

An attempt to recognize common characteristics in as huge and diverse a group as “government lawyers” is not a simple task to undertake. In the United States, government lawyers are spread around a few sections of the federal government, which in 1995 employed nearly forty thousand attorneys, by far the biggest law firm in the country. Around one-fifth of them worked in the Department of Justice, while the rest are scattered in various other offices, agencies, and departments of the government.

The importance of government lawyers does not stem only from their large numbers. In fact, their uniqueness lies mostly in the special positions that they hold, standing at the intersection between the administration, the courts, and the public—operating at the “nexus of this important policy-making relationship.” As mentioned earlier, this Note’s main focus is devoted to the group of government lawyers that represent the government in judicial proceedings. More accurately, the main attention is given to the department of the Solicitor General, which represents the government in the highest legal instance—the Supreme Court.

In the United States, and in Israel alike, the lawyers of the Solicitor General appear before the Supreme Court more than any other litigant. Their connection to the political decision makers and to the judges at the Supreme Court, as well as their ability to shape the legal and policy landscape, emphasizes their importance in the legal arena (inter alia, among the actors in the field of social change). Another important element emphasizing the strength and importance of the Solicitor General attorneys relates to their overwhelming success in the Supreme Court. In the United States, for example, the Court not only grants review to most of the cases that the Solicitor General requests, but the Court’s opinions also follow, more often than not, the position held by the Solicitor General. For

10 CLAYTON, supra note 4, at 1.
11 See id.
example, the Solicitor General's rate for certiorari petitions ranges from 75 to 90 percent. When it comes to the merits, the results are very similar—for example, the Solicitor General won around 68 percent of cases during the Burger Court era and 62 percent of cases during the Rehnquist era. The situation in Israel is quite similar: data relevant to the years 1990–94 reveals that out of all the cases in which the Israeli Supreme Court reached a final decision, around 90 percent were decided in favor of the State.

A. The Source of Solicitor General Attorneys' Strength

These overwhelming figures have led numerous scholars to try to identify the unique characteristics of the lawyers working at the Solicitor General as a way of supporting and explaining their unprecedented legal success. Through what are known as "theories of success," it is possible to identify some important characteristics that Solicitor General attorneys share. These same characteristics, mostly analyzed with regard to U.S. Solicitor General attorneys, will constitute the basic theoretical starting point for our discussion and will assist us later in identifying and analyzing the role HCJD attorneys in Israel may play in the process of social change.

1. The Solicitor General as a Repeat Player

One of the leading theories purporting to explain the success and importance of the Solicitor General attorneys at the Supreme Court is premised on the fact that they are commonly considered to be repeat players, which Galanter defines as a "unit which has had and anticipates repeated litigation, which has low stakes in the outcome of any one case, and which has the resources to pursue its long-run interests." The lawyers at the Solicitor General, both in Israel and in the United States, share this definition. Unfolding this general concept reveals a few elements that may explain the strength of repeat players. First, repeat players gain experience in appearing before the Court, and can thereby learn to construct written and oral arguments that will increase their likelihood of success. Moreover, the frequent appearance before the Supreme Court creates a close professional relationship, which, like most relationships, creates a special sense of trust between the judiciary and the Solicitor General lawyers. This circle of trust is supported by another feature in the "repeat player" definition—the repeat player as a source of truthful information. According to Black and Owens, the close relationship that emerges between the courts and the repeat players creates an incentive for the attorneys to provide credible information and to maintain their

13 Id.
15 Dotan, supra note 2, at 331–32.
17 BLACK & OWENS, supra note 12, at 35.
reputation as providers of that information. This incentive, in turn, supports once again the circle of trust and situates the Solicitor General attorneys in a strong position in affecting and influencing the Court. This takes us to the second key feature of government lawyers—their image as "agents of the court," or as more commonly known in Israel, "officers of the court."

2. The Solicitor General as an Agent of the Court

According to this theory, the Solicitor General succeeds in court because his attorneys are perceived as an unbiased and objective legal source, making balanced and principled arguments in the name of the "public interest." This vision of the Solicitor General attorneys underscores the relationship of trust between them and the Supreme Court. It should be mentioned that this notion of trust does not come out of thin air. Indeed, its origins can be found, *inter alia,* in the well-known willingness of government lawyers to second-guess the government's decisions, thereby proving their commitment to general conceptions of the "greater good." Wald supports this proposition of trust and provides an interesting insight for its roots, based on the judiciary's self-depiction, past experiences, and the institutional relations between the judiciary and the Solicitor General lawyers. For instance, the judiciary in general contains substantial representation of past government lawyers, who perceive themselves the way they expect the Solicitor General attorneys to be. Moreover, a relatively large portion of legal clerks goes to work as government lawyers, and thereby continues vital relationships between the institution and the judges. These relationships are maintained, *inter alia,* through the training process of government lawyers—a process in which judges take part. These connections, according to Wald, make the judges see themselves in something of a supervisory model role for government lawyers, resulting in expectations for higher standards of behavior. It seems, however, that the courts' expectations work both ways, granting the Solicitor General attorneys with some conscious and unconscious advantages over other legal players. This complexity of expecting higher standards, while granting extra strength, can be attributed partially to the role of the attorneys as agents of the courts. This role lends support to another accepted and important notion regarding the "client" of the Solicitor General attorneys—not only the individual agency whose case is being litigated, but also the United States as a whole, as will be discussed later. This almost "holier-than-thou" image of the Solicitor General's attorneys as "agents of the court" is a meaningful element in explaining their strength and importance in the legal arena.

However, this image brings into focus some of the complexities controlling the work of the Solicitor General attorneys. Are they really only representing the greater good? Are they truly indifferent to ideology and political interests? The
almost obvious answer is in the negative. A few theories offer a completely different view of government lawyers, emphasizing the ideological parameter controlling their work as government representatives and their role as political players assisting the court in maintaining its legitimacy. These theories paint the picture of government lawyering in completely different colors and thereby open the discussion to some of the complexities of this field of lawyering.

B. Complexities (OR) Schizophrenia as a Source of Growth

In the relevant literature, one can find “schizophrenia” as a term used to describe the complicated dilemma inherent in the work of government lawyers. On the one hand, they play the role of the “neutral expositor” of the law, a portrayal well-supported by the court. On the other hand, one cannot ignore the fact that they also play the inevitable role of being the advocates of the administration. This complex role gives rise to the classic question controlling the discourse on governmental lawyers—who is their client? Reality provides an extremely complicated answer. First, again, the Solicitor General serves as a kind of advisor to the Supreme Court. Second, it also serves as an advocate for the institutional power of the executive branch as a whole. Third, it acts as an advocate for the policy goals of the concrete administration it serves. Fourth, it is meant to serve the “public interest,” or if choosing a more dramatic phrase—society as a whole. This approach may support the notion that government lawyers actually serve two masters (which in theory are supposed to be one)—“the law” and the government, aiming endlessly at balancing these two in their charged position. The balance between these two raises numerous questions: first, regarding the complex set of hierarchy involved in their work; and second, concerning the leading principles and narratives controlling it. The different approaches taken by commentators and by bar ethics codes aiming at drawing those boundaries attest to the complexity of the matter.

In my view, this complexity and the vagueness of the boundaries forming the work patterns of the Solicitor General’s attorneys should not be interpreted as a limiting force. On the contrary, this vagueness may allow government lawyers greater freedom in adopting their preferred line of work, attitudes, and personal

24 For support to this almost unquestionable notion, see Rebecca Mae Salokar, Politics, Law, and the Office of the Solicitor General, in CLAYTON, supra note 4, at 59.
26 BLACK & OWENS, supra note 12, at 42–43.
27 It should be noted, that the literature supports few other theories for explaining the success of the Solicitor General at courts. For an example of theories pointing at the professionalism of the Solicitor General lawyers, see id. at 39, or the smart way the Solicitor General chooses cases, see id. at 44–45.
28 CLAYTON, supra note 4, at 3.
moral compasses. Therefore, one might say that due to the multi-dimensional commitments and complicated hierarchical structure in which they function, government lawyers have no real master, serving in practice only themselves and their interests.\(^{32}\)

Accepting this notion may bring us to the conclusion that the complex challenges inherent in the work of government lawyers and the unique position they hold at the intersection between the law and the political actors may actually produce a much more independent and flexible kind of lawyering, thus resulting in a much more powerful entity. According to Perry, this notion is particularly relevant to those attorneys who lack political aspirations and who may therefore be less willing to bend their own ideological views in order to satisfy those above them in the official hierarchy.\(^{33}\)

This potential independence does not stem only from the undefined borders of the fidelity of the attorneys. The unique power structure in which these attorneys function puts them in a position through which both sides of the equation—the courts and the administration—are dependent on them. As mentioned earlier, the courts perceive the Solicitor General attorneys as partners in the process of protecting the unbiased “law” in the name of the public interest, trusting their judgments and opinions. The government, on the other side of the equation, is completely aware of the trust the attorneys receive from the court and accordingly respects their thoughts and opinions in presenting an argument or protecting a given policy. The knowledge acquired by the attorneys who litigate before the Supreme Court is priceless and is well used by the higher officials as a source of analyzing legal issues, sometimes at the early stages of the policy-making process. This position seems to gain importance in an era described by scholars as one in which “control over a growing number of policy areas... has been shifting out of the legislative arena and into the ambit of courts and the administrative state.”\(^{34}\)

C. Interim Summary – The Strength of the Solicitor General Attorneys

We have discussed in length the uniqueness of government attorneys in general and the Solicitor General attorneys in particular. It seems that the literature in the field supports two main notions, both important for the main argument of this Note: First, Solicitor General attorneys are strong and important legal players. They are located at an important junction between the judiciary and the administrative/legislative arenas, supported by them and simultaneously supporting and assisting them in promoting their agendas. They gain respect, trust, and appreciation from both the administration and the judiciary, and therefore can have a meaningful influential force on both. Second, though there is no question regarding their employer—the state—the Solicitor General attorneys enjoy/suffer from a complicated set of normative guidelines and principles. The question of whom they serve is a crucial question—do they serve the administration? Do they serve the courts? The law? Moreover, even inside their own home—the government—the question of hierarchy arises, due to the complex structure of the

\(^{32}\) Perry, *supra* note 30, at 130.

\(^{33}\) See *id.* at 143.

\(^{34}\) CLAYTON, *supra* note 4, at 1.
Solicitor General, the Ministry of Justice (in the United States—the Department of Justice) and the Attorney General. As mentioned, in my opinion, this complexity leads to a bigger degree of flexibility. It allows the Solicitor General attorneys more space in the complicated equation they try to fit in.

The combination of these elements—power and relative flexibility—points to the importance and relevance of the Solicitor General attorneys in the discourse of social change. These characteristics should be recognized and used as an engine for the promotion of social change. Through a case study of the Israeli legal system and the HCJ department in particular, this Note wishes to examine some possible ways of doing so.

II. THE SOLICITOR GENERAL ATTORNEYS – THE ISRAELI COUNTERPARTS

A. Relevant Background

The Israeli High Court of Justice (HCJ) is one of the arms of what is known as the Israeli Supreme Court. The other arms of the Supreme Court sit mostly as a third instance of cassation in criminal or civil cases. In some cases, the Supreme Court can sit as an appellate court for decisions of the lower district courts involving high value civil disputes or serious criminal offenses. This work will focus on the special arm of the HCJ, designated for judicial processes in the fields of constitutional and administrative law, in which a public agency exercises its legal power. In general, we can say that the HCJ deals with all of these cases as a first, last, and only instance. Therefore, in almost all cases reaching its gates, its decisions cannot be challenged. At the year 2000, a few legal amendments gave jurisdiction in some administrative matters to the district courts, but still a heavy load of cases in extremely sensitive and politically charged issues are being brought before the Supreme Court, mostly while sitting as the HCJ.

Unlike its U.S. counterpart, the Israeli Supreme Court is an extremely packed judicial institution. For example, the official semi-annual report of the Israeli Judiciary shows that only in the first half of the year 2013 (Jan. 1, 2013–June 30, 2013), 1,864 new main cases have been opened in the Israeli Supreme Court. These cases were added to the 2,111 cases already pending in the Supreme Court, totaling 3,975 cases pending at the Supreme Court at the end of that period. From those cases, 797 were submitted to the HCJ, totaling 1,268 HCJ cases pending at the end of that period. During the year 2012, 3,779 main cases have been opened in the Supreme Court, an increase in the number of cases that were opened

37 Id.
38 Id.
in 2011 (3,709). If we account for the complete amount of cases that were opened at the Supreme Court during 2011 (most of which are esoteric cases), the number may reach as high as 9,775 cases.

A few main reasons can explain the heavy use of the HCJ by Israeli and Palestinian plaintiffs: First, the formal procedures of the HCJ are relatively simple, followed by relatively low court fees (the current fee is 1,819 NIS which equals around $518). Moreover, the right of standing and the question of justiciability are interpreted in an extremely wide fashion. This allows almost everyone with a reason to believe his rights, or even someone else's rights, may be hurt or denied by an Israeli agency, and in almost all administrative or constitutional matters, to file a petition with the HCJ.

The procedure for handling a petition starts with a single judge viewing it, deciding whether it should be denied, go straight for a hearing, or demand a response from the respondent, usually a governmental entity. In rare cases, the judge can issue an order nisi, changing the burden of proof so that the respondent has to explain why he should or should not perform a specific action. If a petition goes for a hearing, usually three judges will hear the oral argument, based mainly on the parties' affidavits and some supplementary oral argument in cases where the judges find it necessary. Usually testimonies and examination of witnesses are not held at the HCJ. When the hearing is over, the judges can either decide the case right away, take additional time to write an opinion, ask one or both of the sides to supplement the argument on a specific point, or ask one or both of the sides to reach a compromise. I will refer to this post-hearing stage later on.

All of these elements have turned the HCJ into one of the most popular courts in the world, resulting in an enormous involvement and influence of this institution on the political, economical, and social spheres. It should be stated as well that there has been a dramatic increase in the usage of the HCJ by Israeli NGOs since the mid-1980s.

B. The HCJ Department at the Israeli Attorney General, The Ministry of Justice

An explanation of the HCJ Department at the Israeli Ministry of Justice is required in order to fully understand the picture of the unique legal procedures revolving around the HCJ. This department, which consists of only twenty-six attorneys, is basically the only department representing the Central Government of Israel—ministries, governmental departments, the army, the police, and other

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41 Id.
42 Courts Regulations (Fees), 2007, KT 5767, 492 (Isr.).
44 The HCJ Regulations, 1984, KT 5744, 2321 (Isr.), available at http://elyon1.court.gov.il/heb/laws/tak_seder.htm; see also Dotan supra note 2, at 323.
46 Yoav Dotan & Menachem Hofnung, Interest Groups in the High Court of Justice, Measuring Success in Litigation and in Out-of-Court Settlements, 23 LAW & POL’Y 1, 1–2 (2001).
public corporations—before the HCJ. The prevailing notion is that the department is generally free of political pressure. The members of the department are nominated by the State Attorney (General Prosecutor) and serve under the General Prosecutor and the Attorney General. The promotion of the attorneys at the department is detached from the governmental entities they represent. Moreover, the members of the department see themselves as "classic" civil servants, aimed at developing their careers in the boundaries of the public sphere, either the ministry of justice, other ministries, or a judicial position.48

All of these characteristics of the HCJD’s attorneys seem to fit well with the characteristics identified in the literature regarding the strength and unique position of the Solicitor General’s attorneys, as described in the previous Part. First, the important intersection in which they stand, acting as sort of mediators between the administrative and the judicial authorities; second, their advantages as repeat players; third, their role as "officers of the court" serving the rule of law above all other and the relative flexibility and independence that can be derived from this role; and fourth, the special relations of trust between the court and the attorneys which can be derived from these characteristics.

But not only do the members of the department reflect strengths that can be shared with their U.S. counterparts. They also carry some distinct characteristics that may result in even stronger powers than U.S. Solicitor General attorneys. First, while the U.S. Supreme Court chooses to hear around 100 cases a year, the Israeli Supreme Court, as mentioned earlier, gets a few thousand cases a year, among which an average of around 800 are HCJ cases. This huge portion of cases results in frequent encounters with the attorneys of the HCJD. Therefore, the "repeat players" element intensifies immensely. It is not rare for the attorneys to appear before the court on a weekly basis, sometimes even twice a week, in numerous cases. These frequent appearances give the element of "repeat players" a new meaning, bringing the tight relationship between the judges and the attorneys to a new level of intimacy and trust, putting more pressure on the attorneys while strengthening their image in the eye of the court.

The second unique characteristic, strongly related to the first, has to do with the procedures of the HCJ. As mentioned, the HCJ sits as a first instance in varied matters in a heavy load of cases. Therefore, the HCJ’s ability to effectively clarify the facts related to a specific case is limited, resulting in a heavy reliance on the information given by the administrative agency. The lack of testimonies or cross-examinations stresses the importance of the information provided by the HCJD attorneys. This leads to an actual sublimation of some of the court’s duties into the hands of the attorneys, which thereby strengthens their role in the process of the judicial decision-making. In fact, this sublimation, which stems from the heavy caseload and the relatively simple procedures, gives the HCJD attorneys an important role in framing and defining the limits of the legal debate. There is no doubt this is an extremely strong tool.

Third, due to the broad range of issues that can be brought before the HCJ, attributed mainly to its wide interpretation of the idea of justiciability, the attorneys

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47 Dotan, supra note 2, at 337; see also Uzi Vogelman, HCJD – A Lecture, 6 MISHPAT V’EMIMSHAL 174 (2001).
48 Vogelman, supra note 48, at 177.
at the department deal with overly sensitive issues related to the leading matters that control the discourse of the Israeli society; political, social, economical, and of course all issues related to defense and security measures. This variety and sensitivity of fields, combined with the unique position the attorneys hold as mediators between the court and the government, seem to strengthen even more their status and influence.

Fourth, due to the relatively wide accessibility of the HCJ to the public, it became a popular forum for Israelis and Palestinians alike. This wide exposure to diverse parts of society, as well as the intensity of that exposure, emphasizes the importance of the HCJD also in the eye of the public. The attorneys at the department have names, faces, and e-mail addresses, and they can be reached. Therefore, this small group of attorneys is often portrayed as the most reachable "governmental" entity. And so, the attorneys of the department play another important role since they stand not only at the intersection between the government and the court, but also at the intersection between society and two other branches of the state—the executive and the judiciary.

These peculiar characteristics of the HCJD attorneys, especially when combined with the rest of the Solicitor General's distinct features as elaborated earlier, are not merely of theoretical or of intellectual nature. In the Israeli legal system, they take an actual part in the work of the HCJD attorneys and consequently in the HCJ process of judicial decision-making. The following Parts will provide some examples of the leading ways in which these HCJD characteristics are translated into actions in real life. I will start by elaborating on the HCJD's unique approach towards the cases reaching its gateway and its formal and informal strategies of handling disputes. These strategies may emphasize the central position the HCJD attorneys hold in the legal process, as key players standing at the intersection between the HCJ, the government, and the public. Later on, I will discuss how these strategies may be integrated in the discourse of social change movements and how they can be used in order to advance their interests. But first things first.

III. THE HCJD IN REAL LIFE

A. Settlements as a Leading Narrative – Facts

In the limited scope of this Note, it is obviously difficult to cover all of the characteristics of the complex environment in which the HCJD attorneys function. Hence, the Note will focus on one element in their present work—the mechanism of out-of-court settlements. This has turned out to be one of the leading narratives in the work of the HCJD, and for a reason.⁴⁹ As will be further elaborated, this mechanism serves as more than just a tool for resolving cases. First, it points to the ways in which the HCJD's characteristics are transformed into actual legal work. Second, it crystallizes some of the leading features of the department and the role it plays in promoting social change.

For a better understanding of the place of settlements in the work of the HCJD, I asked the HCJD to provide me with data regarding the outcomes of petitions that were submitted to the HCJ and reached their judicial end between Jan. 1, 2011–Jan. 21, 2013. Two main charts are relevant:

(A) The outcome of the proceeding:

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage of total petitions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petition dismissed by the Court</td>
<td>425</td>
</tr>
<tr>
<td>Petition accepted by the Court—with state consent</td>
<td>11</td>
</tr>
<tr>
<td>Petition accepted by the Court—without state consent</td>
<td>3</td>
</tr>
<tr>
<td>Petitioner withdrew from petition from his own reasons</td>
<td>146</td>
</tr>
<tr>
<td>Petitioner withdrew from petition due to a compromise between the parties—fully or partially</td>
<td>235</td>
</tr>
<tr>
<td>Dismissal of petition due to HCJ’s offer for settlement</td>
<td>30</td>
</tr>
<tr>
<td>Petitioner withdrew from petition due to HCJ’s remarks</td>
<td>135</td>
</tr>
<tr>
<td>Other</td>
<td>73</td>
</tr>
<tr>
<td>Total number of petitions</td>
<td>1058</td>
</tr>
</tbody>
</table>

*The numbers do not add up to 100% because of rounding.

(B) The operative result of the petition:

<table>
<thead>
<tr>
<th>Category</th>
<th>Percentage of total petitions</th>
</tr>
</thead>
<tbody>
<tr>
<td>Full success of petitioner</td>
<td>136</td>
</tr>
<tr>
<td>Partial success of petitioner</td>
<td>110</td>
</tr>
<tr>
<td>Petitioner given different remedy than asked in petition</td>
<td>57</td>
</tr>
<tr>
<td>Petition sent back to relevant administrative authority for new decision</td>
<td>16</td>
</tr>
<tr>
<td>The remedy asked was fully denied</td>
<td>636</td>
</tr>
<tr>
<td>Other</td>
<td>90</td>
</tr>
<tr>
<td>Total number of petitions</td>
<td>1045^</td>
</tr>
</tbody>
</table>

^ The total number of petitions is different between the tables. The provider of the information informed me it might stem from partial completeness of the data regarding finished petitions.
* The numbers do not add up to 100% because of rounding.

A few conclusions can be drawn from this data. First, from all the cases submitted to the HCJ, only 40.4% of the petitions ended with a judicial ruling. Moreover, from analyzing the data, it seems that most of the cases that reached a

50 For relevant data on HCJD petitions for previous periods, see Dotan, supra note 2 (regarding the years 1990–94), Dotan, supra note 43 (regarding the years 1990–99), and Vogelman, supra note 47 (regarding the year 1999).
final judicial ruling were denied (around 40%), leaving the petitioner on the losing side of the equation. In general, it seems that in around 60% of the cases the remedy was fully denied by the court. On the other hand, based on table B, in around 30% of the cases the petitioner received a remedy—fully or partially. It seems, therefore, that in most of the cases in which a petitioner received a remedy, it was reached through the mechanism of settlement. Based on table A, in 22% of the cases, receiving the remedy can be attributed to the mechanism of settlement without actual judicial intervention, while around 3% can be connected to the HCJ's offer for settlement. It should also be mentioned, it is likely that in a substantial part of the petitions that were eventually denied went at some point through the stage of an optional settlement that eventually did not ripe into a full agreement.

It seems, therefore, that when it comes to the HCJ, the petitioners' chances of promoting their interests and gaining from the judicial process they have filed increase if they are willing to reach a settlement with the HCJD. These conclusions do not come as a surprise. The mechanism of settlement is an important element in the work of the HCJD.\(^{51}\) Not surprisingly, a considerable amount of time and legal skills is devoted to solving matters through cooperation—the government entity on the one hand, and the petitioner on the other. Thus, it seems safe to say that the mechanism of settlement is a leading narrative in the work of the HCJD. Of particular interest in that process are the changes in institutional power that the petitions go through after being filed—from the judiciary as the main stage for debate they move to the parties' sphere, especially the attorneys of the HCJD. This underscores the importance of the HCJD in the process.

It should be mentioned that, due to the characteristics of the HCJ, in a substantial amount of cases the petitioners are NGOs and other cause lawyers who can also be considered repeat players. Therefore, and as clarified by Galanter, this dynamic of repeat players to minimize actual litigation while preferring out-of-court informal agreements may well explain the presence of the settlement mechanism in the work of the HCJD.\(^{52}\)

So what is the actual meaning of this mechanism? How does it work? Through some general explanations, supported by concrete examples, I will now turn to elaborate on the matter.

**B. Settlements as a Leading Narrative – Examples**

The process of reaching settlements between the state, represented by the HCJD, and the petitioners, can be roughly divided into *two categories*. Obviously, since it is an informal process, there is no *formal* division. I have chosen to draw this distinction because I believe it clarifies the different stages of the process and will later on assist me in incorporating these stages into the discourse of social change. In the first category, after a petition is filed, but before it reaches the stage

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51 See Mandel, *supra* note 49.

52 Galanter, *supra* note 16, at 110–11. Galanter might not agree with that comparison, since he considers the government to be a special kind of a repeat player, which may result in more litigation. The way I see it, the Israeli situation seems to fall somewhere in the middle between the basic RP non-governmental versus RP non-governmental situation, and the RP governmental versus RP non-governmental situation described in his article.
of a court hearing, the parties settle and bring the case to a successful resolution. The settlement can be the initiative of the HCJD, the petitioner, or both. I will refer to this category as a pre-trial settlement. In the second category, the petition has already reached the stage of a hearing, usually after the HCJD has presented its written response to the court. The court, after hearing both sides’ oral arguments, expresses its dissatisfaction with the government’s position. At this stage, the HCJ may ask the HCJD representative to reconsider its position while offering an alternative solution, or ask both sides to meet and find a solution. It is quite common for the HCJD to accept the court’s suggestion and delay the hearing for future occasion. More often than not, the HCJD attorneys go back to the relevant governmental entities and ask them to reconsider their position or to find a creative solution that may bring the case into settlement without the need for a judicial decision. Sometimes no accepted solution can be found, and the case goes back to court for a final decision. I will refer to this category as a post-trial settlement.

As mentioned earlier, and supported by tables A and B, both of these categories are common mechanisms in the work of the HCJD and seem to be a better way for petitioners to achieve their goals. These settlements can relate to almost any kind of matters, ranging from simple and focused cases involving particular individuals to complicated and principal cases affecting varied social groups. I will now present some examples of cases that reached settlements both in the pre-trial mechanism and the post trial-mechanism. These examples may assist in simplifying the principles of these mechanisms.

1. Pre-trial Settlements

Amending a religion-based discriminating statute – HCJ 404/12

In 2010, a new statute was passed by the Israeli parliament, providing synagogues, and synagogues only, with municipal tax exemptions. In the year 2012, a petition was filed with the HCJ, asking the court to repair the discriminatory element of the legislation, so that the tax exemption would apply to all religions, especially Christianity and Islam.

After the petition reached the desk of the HCJD attorney, and before a court hearing was held, it was decided, with the cooperation of the Israeli parliament (the Knesset) and its legal advisor, to amend the legislation. The decision was made after the issue was brought up before the ministerial committee for legislation in the Knesset. Therefore, the state asked the petitioners to allow it some time to handle the allegedly legally problematic legislation. After a few months, another amendment was enacted, changing the definition of “synagogue” to “house of prayer,” which thereby provided the tax exemption equally to all

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known religions. Because of the amendment, the petition was withdrawn without judicial intervention.\(^{55}\)

This case provides a good example of the pre-trial settlement mechanism, through which the HCJD attorney, with the cooperation of the parliament’s legal advisor, acknowledged the legal difficulty at issue and acted in order to solve it by amending the legislation before the case had reached a judicial hearing, and without any guidance or intervention from the court.

2. Post-trial Settlements

Widening a strict legislation and supporting the constitutional right for marriage and family - AA 8849/03\(^{56}\)

According to Israeli legislation, a foreigner who marries an Israeli resident may obtain legal status in Israel after a gradual process of seven years.\(^{57}\) At the first year of the process the foreigner receives a basic status (“the basic status”), which does not provide any health care rights or social benefits. After one year, the status can be upgraded, which provides the foreigner with social and health benefits. A new legislation was passed in 2003, limiting, from a certain day (“due date”), the ability of Israelis who want to marry Palestinians to bring them to Israel and include them in the process of obtaining official status.\(^{58}\) Moreover, it was decided that those who had entered the process before the legislation was enacted, but had already received the basic status, would not benefit from a status upgrade. That meant that a considerable number of people in Israel would have to live without health and social rights, and with hardly any ability to work.

The petition was filed with the Supreme Court in the name of a couple that had submitted their request for upgrading the status of the wife before the official “due date” of the legislation. According to the petitioners, the request was not handled due to a delay of the Ministry of Interior, which is responsible for handling those requests. The petition was first filed with the district court, which declined it. Later on, it reached the Supreme Court, which held a hearing on the matter. After both sides had made their oral arguments, the court was not pleased with the strict approach taken by the state, and asked the state to reconsider its interpretation of the statute. Based on that advice, the Ministry of Interior adopted a broader interpretation of the statute, which held that in cases in which the Israeli resident has filed the request for upgrading its status before the due date, but fails to obtain an upgrade due to a mistake or unjustified delay from the side of the state, the status may be upgraded. As a result of this decision, the petitioners were willing to

\(^{55}\) See also Aviel Magnezi, Because of the HCJ: Orthodox Parliament Members Took Care of Churches and Mosques, YNET (Aug. 6, 2012), http://www.ynet.co.il/articles/0,7340,L-4265325,00.html.

\(^{56}\) AA 8849/03 Doopash v. Ministry of Interior [2003] (Isr.) (unpublished decision) [hereinafter Doopash Case].


withdraw the petition after the court approved the interpretation offered by the state, but without an actual judicial ruling needed.

This interpretation has set the standard for all future cases, and therefore provides an example of a post-trial settlement that had a general influence on the public by remedying the infringement of both Palestinians and Israelis’ human rights, and providing them with greater access to social benefits.

These two cases explain both types of settlement mechanisms well. They both illustrate the important role the HCJD attorneys play in the process, the extent of their abilities to promote changes within the administration, and the unique interaction between the attorneys and the HCJ.

Although it may seem that most of the settlements reached by the HCJD attorneys and the petitioners fit well with these categories, the fact is that not all of them do. Some may reach the same outcome—a change in policy or legislation, with the cooperation of the HCJD attorneys and without an actual judicial decision—but the phases which they go through can take different directions.

Due to the obvious limitations of the Note’s scope, it focuses on a minimal number of examples of the settlement mechanism, hoping to explain through these examples its institutional and legal advantages. As explained, this mechanism is widely present in the relationship between the HCJD and petitioners to the HCJ. In principle, these settlements are not limited in their scope or the legal fields they may touch upon—from “minor”/personal issues to general/social ones; citizenship, medical treatment, education, religion, security, allocation of land, constitutional rights, and so on. The common usage of this mechanism, along with the wide scope of issues that may be covered by it, sets the stage for the next Part, which aims to explain how this mechanism can contribute to the field of social change, and conversely, how the field of social change can benefit from this mechanism.

IV. SETTLEMENTS AS A LEADING NARRATIVE – CONTRIBUTION TO THE FIELD OF SOCIAL CHANGE

As discussed, the mechanism of settlement, though an informal procedure, is a wide and accepted phenomenon in the work of the HCJD, characterized by two dominant forms: pre-trial settlements and post-trial settlements.

In effect, pre-trial settlement occurs before the case even reaches a court hearing. At that stage the court is hardly involved in the process, and the main players are the HCJD attorneys and the petitioners, intending to reach an agreement that will satisfy the needs of both sides. This agreement usually involves cooperation with the related government entity (i.e., the relevant ministry or other public agencies). Sometimes, the process involves actual legislation or policy-making decisions in which the petitioners may take an actual part. In fact, if analyzing this process through the lens of cause lawyering tactics, this mechanism may take the form of a tactic known in the social change field as “legislative cause lawyering”—practicing law in a “political, advocacy context” with the aim of

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59 For a detailed description regarding the contribution of this mechanism to the development of human rights in the occupied territory during the time of the Intifada, see Dotan, supra note 2.

changing legislation or policies. The tax exemption case can serve as an example of this process, in which the legislator amended the law after the petition was filed and before it even reached the court. In fact, the lawyers using this tactic as part of the HCJ petitions should be considered “legislative lawyers” with a twist—stepping through the gates of well-established litigating lawyering tactics as a path to act in the legislative-political arena. Although the process is classically defined under the “litigating cause lawyering” category because it started with filing a petition with the HCJ, I tend to see its merits in the field of legislative lawyering. Although the lawyers taking part in these processes may not be defined as “legislative lawyers” in the most complete sense, they still share major similarities with the kind of work done through this channel.

On the other hand, post-trial settlement seems to fit the more “classic” format of social change movements, known as “impact litigation lawyering” using the courts in order to promote the development of human rights and social change. The post-trial settlement mechanism should best fit the essence of impact litigation lawyering, since it usually involves an actual interaction with the court, i.e., hearing and oral arguments.

However, the categorization into these two sub-sections may not always be clear-cut, and some cases may involve both elements, for instance post-trial settlements that may demand more of legislative lawyering skills than litigating skills. Having said that, there is still a dominant difference between the two—the actual involvement of the HCJ in the post-trial mechanism, along with its litigating characteristics. Although one might say the specter of the HCJ hovers around both parts of the process—pre- and post-trial—the post-trial settlements can still be viewed as a direct result of the court’s interference in the case, after a hearing. The element of a hearing before the court demands the employment of classic litigation tactics, the oral argument being the most important one. Therefore, I would analyze the post-trial settlements through the eyes of the impact litigation tactic.

The categorization of pre-trial settlements as a form of legislative lawyering, and the post-trial settlements as a form of impact litigation lawyering sets the stage for a discussion about the world of social change. The next step will be as follows: through the analysis of the advantages and obstacles of these cause lawyering tactics, as acknowledged in the relevant literature, I will point to the ways in which using the mechanism of settlement—through cooperation with the HCJD—may assist cause lawyers in overcoming these obstacles. As will be further argued, the possibility of overcoming these obstacles should be attributed mostly to the unique characteristics of the HCJD attorneys as government lawyers.

This discussion should begin with some general definitions from the field of cause lawyering.

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62 As described by Feldblum, supra note 60, at 805.
63 See, e.g., Neta Ziv, Cause Lawyering for a Public Cause — Who is the Public? What is the Cause?: Ethical Dilemmas in Legal Representation of Minority Groups in Israel, 6 MIHAPT V’EMIMSHAL 129, 140 (2001).
A. Legislative Cause Lawyering – Advantages and Obstacles

One of the defining elements of the work of cause lawyers aiming to promote social change through legislative cause lawyering is the need to dive into the muddy waters of politics. This is one of the main strengths and weaknesses of the tactic. On the one hand, when lawyers succeed in influencing policy or legislation, their impact on the development of human rights in general, and of disadvantaged groups in particular, for example, may be considerably wider in its scope than in many other cause lawyering strategies. The legislative arena may profoundly affect the social discourse and its leading narratives. Moreover, legislative lawyering promotes general ideas of law and social change among law and policy makers, which may contribute not only to the issue at hand, but also to a much wider social construction and future debates. The assimilation of the human rights discourse among policy makers and the public bears an educational and significant importance, especially in the long run.6

On the other hand, one cannot ignore the difficulties and problems standing in the way of effecting social change through the legislative-political arena. First, as mentioned, the playground of this tactic is the political playground. Therefore it demands a thorough understanding of the political game; acquaintance with the principal players and identification of the political allies and political pitfalls that may be encountered along the way. Moreover, legislative cause lawyers may be used as pawns in a bigger political game, i.e., being supported by politicians whose interests are far from those shared by the lawyers, just as a mean of achieving other political goals.65

That may emphasize another drawback of the legislative lawyering tactic; when playing in the political arena, recognition as a political force is much clearer. This may harm lawyers aiming to promote general ideas of public interest while preferring to avoid political labeling. Unfortunately, the political labeling may not only coincide with the faith and ideology of the groups in whose names they are fighting for, but also harm the lawyers in future representations. This issue touches upon another fundamental “cause lawyering” dilemma; how to maintain the neutrality of the profession while being ideologically identified with the cause.66 All of these complicated issues are internal problems deriving from the legislative lawyering tactic. Another problem lawyers choosing this tactic may face is more of an external one. There may be complicated and sensitive issues in which standing alone as a lawyer against conflicting political interest groups may be useless. In Israel, for example, breaking from the status quo in issues of security or religion seems almost impossible.67

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65 For more about the map of interests in the legislative arena, see Ziv, supra note 63, at 213.
67 Guild & Sha'hab, supra note 64, at 76.
B. Coping with the Obstacles – How Can the HCJD Attorneys and the Pre-trial Settlements Mechanism Assist in Executing the Legislative Lawyering Tactic

In my view, the role HCJD attorneys play in the Israeli legal system indicates that working with them through the pre-trial settlement mechanism may assist the legislative lawyers in promoting their purposes and mitigating some of the problems inherent in this tactic. First, as opposed to cause lawyers, the HCJD attorneys are part of the administrative branch. They work with the policy makers on a regular basis and are much more familiar with the key players of the political arena. Although they are far from being political players themselves, they may act as mediators between cause lawyers and policy makers while assisting in the promotion of the former’s ideas. When it comes to NGO cause lawyers who are the main players in the legislative lawyering arena, things may become much easier, due to the fact that they maintain strong relationships with the HCJD attorneys, both repeat players in the litigating arena.

Second, the HCJD attorneys gain a lot of respect from the administration, their formal “clients.” With the HCJD on their side, the cause lawyers may find themselves in a better starting point for achieving their policy goals.

Third, the HCJD attorneys are not considered political actors, but rather protectors of the general “public interest.” That affects both sides of the equation—the cause lawyers on one side and the policy makers on the other. On the side of cause lawyers, working with the HCJD attorneys rather than directly with politicians may minimize the political labeling that may otherwise limit their movements in the future. It may also assist them in handling the professional ethical dilemma regarding the objectivity of the lawyer. As for the politicians, working with the HCJD may be considered a subtler and less politically charged move than working with cause lawyers. This is mainly due to the fact that some cause lawyers may not share with the politicians the same political agenda, and the latter may be criticized by their voters for cooperating with the former. Moreover, the relative flexibility of the HCJD comes in handy in the process of practicing legislative cause lawyering through the settlement mechanism, which allows the HCJD attorneys to consider the case with a relative ease of political pressure.

We can therefore see that the distinct role the HCJD attorneys play in the Israeli legal system may support and strengthen the mechanism of pre-trial settlements as an efficient tool in promoting social change through the legislative arena.

Needless to say, the employment of the mechanism of settlement has its limitations. Still, one can hardly ignore the advantages of using the pre-trial settlement mechanism as part of a legislative cause lawyering strategy, and the important role the HCJD attorneys play in promoting social change through that arena, with all its flaws and limitations. The same applies to the usage of the post-trial settlement mechanism, as part of impact litigation lawyering.

C. Impact Litigation Lawyering – Advantages and Obstacles

As opposed to the legislative lawyering tactic, litigation, known in the field of social change as “impact litigation,” has always seemed to be the most natural
and conservative form of cause lawyering. Despite its weaknesses and difficulties, using the courts as the strongest engine for igniting social change and promoting social rights has not lost its importance. In fact, the interaction between petitioners and the HCJD attorneys is closely related to the formal shape of "impact litigation," though as discussed earlier, it seems to be a more complicated process, which may bear similarities to other forms of cause lawyering as well. Here again, I will point out the ways in which the unique characteristics of the HCJD attorneys may assist in overcoming some of the obstacles and criticism expressed in the literature regarding the ability of courts to promote social change.

The literature regarding the limitation of courts in promoting social change, especially in general policy issues regarding underprivileged minority groups, is abundant. A comprehensive view of the courts' constraints in promoting significant social reforms may be found in Rosenberg's important piece, "The Hollow Hope." According to Rosenberg, three leading reasons may explain these constraints: (a) the limited nature of constitutional rights; (b) the lack of judicial independence ("the institutional factor"); and, (c) the judiciary's inability to develop appropriate policies and its lack of powers of implementation.

At the heart of the constraints related to judicial independence lies the political context in which courts function. The courts, though allegedly constituents of an independent branch of government, are not as independent as they seem to be, and their abilities to resist governmental policies are limited. First, judges in Israel are not elected, as opposed to members of parliament, a number of which usually constitute the government. Therefore, taking a stand against governmental policies may harm the legitimacy of the judiciary in the eyes of the public. Second, the legal constitutional framework (both in the United States and in Israel) and the democratic checks-and-balances system force the courts to be restrained in their decisions to oppose governmental policies, especially in sensitive and complicated social, political, and military issues. Therefore, it is not surprising to discover that historically, the courts have not strayed much from what was politically accepted, both in the United States and in Israel.

D. Coping with the Obstacles – How Can the HCJD Attorneys and the Post-trial Settlements Mechanism Assist in Executing the Impact Litigation Lawyering Tactic

The post-trial settlement mechanism and the cooperation with the HCJD attorneys may assist the courts in overcoming some of the obstacles mentioned above. For instance, it is not rare to see a judge addressing an HCJD attorney during a hearing, asking her to go back to her clients in order to convince them to
soften their position, or to think over whether amendments in a given policy should be adopted. At the same time, the HCJ addresses the attorney of the other side, suggesting that she find a way of reaching an agreement with the government. Due to the relationship between the HCJD attorneys and the court, and the mutual importance placed in preserving it, the HCJD attorneys tend to accept the offer, go back to the relevant governmental entities, and reconsider solutions. In many cases, this may lead to new regulations or changes in given policies, as occurred in the Doopash Case mentioned above. In that way, the petitioner can achieve his goals—wholly or partly—the government voluntarily changes its position, and the court need not enforce its point of view through a verdict. As a result, the fear of social or political resistance to the court decreases, while still some changes can be promoted.74

The same goes for the court’s limitations regarding the creation of policies and implementing its decision. There is almost no doubt that the court is limited in its abilities and resources to develop thorough policies, consider all the relevant variables, and support their implementation. That is the work of the government. The court is also limited in the tools given to it to implement its own decisions. But these limitations may become minor when the mechanism of post-trial settlement comes into play. If the government is the one making the decision of adopting a given policy or amending one, then all the relevant decision makers may be involved in the process, so (hopefully) the decision will be reached after a full consideration is given to all the relevant variables. Moreover, when the executive branch is the one shaping the policy, the issue of implementation is no longer a difficulty in most cases.75

Therefore, it seems that the mechanism of post-trial settlements can overcome some of the inherent obstacles that stand in the way of impact litigation lawyers in promoting social change. Moreover, it seems that the effectiveness of this mechanism should be attributed to the distinct role that the HCJD attorneys play and the trust they gain both from the court and from the governmental entities they represent. As for the court, it appreciates the assistance given by the attorneys in preserving the court’s ideology. The court counts on the HCJD attorneys to understand its limitations while taking the court’s suggestions into serious account. In turn, the HCJD attorneys and the government represented by them know the court’s trust and respect should be preserved, as a useful resource for future legal debates. This semi-acrobatic role can be performed only due to the aforesaid unique characteristics of the HCJD attorneys and their flexibility. The lawyer intending to bring about social change may as well benefit from this situation, and may therefore find the mechanism of settlement to be useful for promoting his or her interests.

E. Some Caveats

Obviously, attempting to achieve social change through the mechanism of pre-trial and post-trial settlements should not be painted only in rosy colors, since

74 For similar analysis of the HCJ’s decisions during the Intifada and the importance of settlements in that sensitive time, see Dotan, supra note 2, at 344-47.
75 ROSENBERG, supra note 5, at 15–16.
both of these mechanisms have their limitations as well. First, we should remember that the intensive usage of the settlement mechanism is a product of compromise (i.e., the petitioners' bitter experience, knowing that their chances in winning cases in the HCJ are quite low, and that settlements may better promote their interests).

Second, using these mechanisms may suffer from formal limitations. For instance, cause lawyers cannot use the petition as the first attempt to promote the changes they aspire to. According to the principles of the Israeli administrative law, a petition can be filed only after the petitioner has attempted to achieve its goals before the relevant authority. Therefore, there may be cases in which failure to challenge the policy or legislation was tried and failed. Hence, the pre-trial procedure will not affect these cases. However, previous cases have proven that even a first failed attempt may not shut the door for changes to occur through the settlement mechanism, pre- or post-trial.

That brings us to the third weakness of the mechanism: its limited scope. In some matters, especially sensitive and complicated ones, this tactic may not be used in practice. The more central and principal the matter is, the less power the HCJD attorneys may have in changing the government’s position. That of course does not mean there have not been any cases in which radical changes have occurred through the usage of those mechanisms, but one should bear in mind that there are cases in which these tactics will not achieve their goals.

The fourth problem of using the mechanism is inherent—it is still a mechanism of settlement. Thus, in some occasions, cause lawyers may not fully achieve the goals of their clients. Settlements are limited, especially when aiming to promote significant social change. It is relatively common that the compromise may solve the individual issue of the petitioner, but will not promote a deeper change to all of his interest group. That may not only raise ethical dilemmas for cause lawyers, but may limit the change promoted by the petition. These dilemmas are well present in the professional life of cause lawyers: Whose interests are to be protected—the single client or the whole group to which he belongs? Moreover, settlements may be a preferred solution for the government, since they do not usually form a general precedent but rather a specific solution to a specific case. That of course limits the impact of the petition, and the impact of the change respectively. On the other hand, history has shown that some settlements have touched upon matters of fundamental importance and promoted deep changes in policies in a wide range of issues. Moreover, as suggested in Dotan's article, a large number of settlements in small cases may create an accumulated critical mass that may lead to an actual change.

Fifth, one must remember that though the HCJD attorneys may have unique strengths that can assist cause lawyers in promoting social change, these powers are not unlimited. In some issues, usually in the more complicated and sensitive ones, the government may not support the mechanism of settlement. Moreover, in some cases the HCJD attorney will not see the issues “eye to eye”

77 Ziv, supra note 63, at 159.
78 The Doopash Case may serve as an example. Sometimes, even if the solution seems to be in a particular case, it might influence future cases, providing cause lawyers with tools to approach similar matters in the future.
79 Dotan, supra note 2.
with his counterpart cause lawyer. In these cases, the petitioners will have to continue their battle in the old-fashioned way, through actual litigation before the court, and hope for the best. Luckily, in the Israeli legal system there are times in which that might work as well.\textsuperscript{80}

V. FINAL THOUGHTS

This Note has attempted to shed some light on the meaningful phenomenon of settlements among petitioners and HCJD attorneys, through the framework of cause lawyering. In particular, the Note has pointed at the connections between the settlement mechanism—which is an inherent part of the HCJD—and cause lawyering strategies, aiming to promote social change. Through analyzing the unique characteristics of government lawyers in general and the Israeli HCJD attorneys in particular, the Note demonstrated the role Solicitor General’s attorneys can have in overcoming some of the drawbacks these strategies suffer from, as identified in the literature on law and social change.

As always in this complicated and politically charged field of social change, solutions are never easy or complete, and in this Note we have touched upon some of the limitations and the obstacles standing in the way of cause lawyers in promoting social changes through the settlement mechanism. The conclusion therefore is not a clear one. On the one hand, in the unique Israeli legal setting one should not overlook the important role HCJD attorneys play in promoting social change through their collaboration with cause lawyers. The abilities of the HCJD attorneys in doing so stem mainly from their particular position as government lawyers in general and in the Israeli setting in particular. On the other hand, employing the mechanism of settlement has its flaws, and may not always support the preferred outcomes in terms of social change.

Obviously, the decision of whether to support it in a particular case or fight all the way till the final verdict will be a product of particular circumstances. Whatever the decision may be, my modest hope is that both sides will not forget the importance of maintaining this tool—neither the cause lawyers, nor the HCJD attorneys. Surely, that demands some compromise from the former, but it cannot be taken for granted by the latter. On the shoulders of HCJD attorneys lies a heavy burden in maintaining this tool, keeping it alive and meaningful. For that they will have to use more than just their charm.

This Note is obviously well rooted in the Israeli legal system, its conceptions and its legal culture. The Israeli structure of the HCJ—its procedures, the legal principles controlling the issues reaching its gates, and the way these issues are treated—is of a singular nature. Therefore, it may be hard to draw conclusions from my argument with regard to other jurisdictions. Still, some basic conceptions may be derived, especially with regard to the important role

\textsuperscript{80} Though the majority of the petitions are still denied, the Israeli Supreme Court has gained some reputation for relative activism in granting petitions against the Israeli parliament and the government. To name a few from recent years: HCJ 3282/05 Itach – Ma’aki v. National Insurance Institute of Israel [2012] (unpublished decision) (declaring a social security legislation void based on infringement of the social right for minimum dignified existence); HCJ 6298/07 Relser v. The Knesset [2012] (unpublished decision) (declaring a statute releasing Jewish Orthodox from serving in the IDF unconstitutional on the basis of discrimination).
government lawyers may play in promoting social change. As discussed, both the U.S. and the Israeli government lawyers share some common characteristics, which emphasize both the complexity of their work and the relative flexibility it allows. I would not be surprised if these characteristics can be found in other jurisdictions as well. This flexibility, when combined with the influence government lawyers may have on both the administration and the courts, is of great importance to the world of social change. The Israeli case is just one example of how these characteristics may contribute to the promotion of social change. Finding the right paths for achieving it in other jurisdictions may therefore be the next mission.